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THE
Justice of the Peace,

AND
PARISH OFFICER.

BY RICHARD BURN, LL.D.

FORMERLY CHANCELLOR OF THE DIOCESE OF CARLISLE.

A NEW EDITION:

WITH CORRECTIONS AND ADDITIONS TO THE LATEST PERIOD.

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BY THOMAS D'OYLY,
SERJEANT AT LAW.

THE BEST OF THE WORK

BY EDWARD VAUGHAN WILLIAMS,
BARRISTER AT LAW.

Dr. Burn has great merit: He has done great service, and deserves great commendation. — Per Lord MANSFIELD C.J. Burr. S. C. 548.

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CRIMINAL LAW.

Abduction. See **Child-stealing**, and **Women**.

Abortion. See **Homicide**.

Accessory.

I. *Of Accessories in general.*

[27 Eliz. c. 2.]

II. *Of Accessories before the Fact.*

[57 G. 3. c. 127.]

III. *Of Accessories after the Fact.*

IV. *How Accessories to be proceeded against.*

[7 G. 4. c. 64. — 7 & 8 G. 4. c. 29. c. 30. — 9 G. 4. c. 31.]

V. *Receivers of Stolen Goods.*

[7 & 8 G. 4. c. 29.]

I. Of Accessories in general.

AN accessory (*quasi accedens ad culpam*) is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either *before* or *after* the fact committed. 4 *Blac. Com.* 35. Accessory, what.

In the highest capital offence, namely, high treason, there are no accessories, neither *before* nor *after*; for all consenters, aiders, abettors, and knowing receivers and comforters of traitors are principals. 1 *Hale*, 618. In treason, no accessories.

But yet as to the course of proceeding, it hath been and indeed ought to be the course, that those who did actually commit the very fact of treason should be first tried, before those that are principals in the second degree; because otherwise this inconvenience might follow, that the principals in the second degree might be convicted, and yet the principals in the first degree may be acquitted, which would be absurd. 1 *Hale*, 613.

In the lowest offences, no accessories.

So in cases that are criminal, but under the degree of felony, there are no accessories; for all the accessories *before* are in the same degree as principals; and accessories *after*, by receiving the offenders, cannot be in law under any penalties, as accessories, unless the acts of parliament, that induce those penalties, do expressly extend to receivers or comforters, as some do. 1 *Hale*, 613. 4 *Blac. Com.* 36. (See also *post*, p. 9.)

Accessories only in felonies.

Therefore the business of this title of accessory refers only to felonies, whether by the common law, or by act of parliament.

Accessories implied in felony.

Concerning which, *Ld. Coke* observes, generally, that when an offence is felony, either by the common law, or by statute, all accessories both before, and after, are incidentally included. 3 *Inst.* 59.

Accessories in felonies by statute.

But as to felonies by act of parliament, *Ld. Hale* distinguishes thereupon as follows; regularly (he says) if an act of parliament enacts an offence to be felony, though it mention nothing of accessories *before* or *after*, yet virtually and consequently those that counsel or command the offence, are accessories *before*; and those that knowingly receive the offender, are accessories *after*. 1 *Hale*, 613.

Construction.

But if the act of parliament, that makes the felony, in express terms comprehend accessories *before*, and make no mention of accessories *after*, namely, receivers or comforters, there it seems there can be no accessories *after*; for the expression of procurers, counsellors, abettors, all which import accessories before, makes it evident, that the law-makers did not intend to include accessories *after*, which is an offence of a lower degree than accessories *before*. 1 *Hale*, 614.

Yet, says Mr. Hawkins, I take it to be settled at this day, that, in these and all other cases, where a statute makes any offence treason or felony, it involves the receiver of the offender in the same guilt with himself, in the same manner as in treason or felony at common law, unless there be an express provision to the contrary. 2 *Haw. c.* 29. § 14.

And although it be generally true, that an act of parliament, creating a felony, renders, consequentially, accessories *before* and *after* within the same penalty, yet the special penning of the act sometimes varies the case. 1 *Hale*, 614.

Thus the statute of 27 *Eliz. c.* 2. makes the coming in of a Jesuit treason, the receiving or relieving of him felony, the contributing of money to his relief a *præmunire*. So that acts of parliament may diversify the offences of accessory or principal, according to the various penning thereof, and so have done in many cases. 1 *Hale*, 615.

Lord Coke and Mr. J. Foster considered the word *command* as comprehending all those who incite, procure, set on, or stir up, any other to do the fact. 2 *East's P. C.* 641.

How far accessories by statute shall have their equity.

Also a statute, excluding the principals from the benefit of clergy, doth not thereby exclude the accessories before or after; neither doth a statute, excluding the accessories, thereby exclude the principals. 2 *Haw. c.* 33. § 26.

Although benefit of clergy is now abolished, this passage has been nevertheless retained, to point out that a criminal statute may apply to a principal, or to an accessory, exclusively. (See next page, and also p. 9.)

II. Of Accessaries before the Fact.

An accessary before the fact committed, is he that, being absent at the time of the felony committed, doth yet procure, counsel, command, or abet, another to commit a felony.

Accessary before.

Being absent at the time of the felony committed.] For if he be present, he is not an accessary, but a principal.

Principal in 2d degree.

So, if divers come to commit an unlawful act, and be present at the time of the felony committed, though one of them only doth it, they are *all* principals. *Hale's Sum.* 215.

Provided it be committed in the prosecution of the unlawful purpose, for the effecting whereof the parties were combined. *1 Russ.* 24.

So, if homicide be committed, where it appears from all the circumstances of the case, that the parties were acting with a general resolution against all opposers. *1 Russ.* 25.

But *aliter*, if the original intention be lawful; for in such case none will be guilty but the person who did the act, and his aiders and abettors. *Ib.*

So, if one present move the other to strike; or if one present did nothing, but yet came to assist the party if needful; or if one hold the party while the felon strikes him; or if one present deliver his weapon to the other that strikes: for they are *present*, aiding, abetting, or comforting. *Hale's Sum.* 216.

Aiders and abettors.

So, if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each taketh the part assigned him, some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favour, if need be, the escape of those who are more immediately engaged; they are all, provided the fact be committed, in the eye of the law *present* at it: for it was made a common cause with them; each man operated in his station at one and the same instant towards the same common end; and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprise. *Fost.* 350.

A distinction has however been made, where the statutes, which took away the benefit of clergy from the offender, seemed to apply merely to the person committing the offence under certain circumstances; thus, in cases under *1 Jac. 1. c. 8.* against stabbing, in those under *39 Eliz. c. 15.* against stealing in dwelling-houses, &c., and in those under *8 Eliz. c. 4.* against privately stealing from the person; it has been held, that the person only who individually committed the crime, was ousted of clergy, and not those who were present, aiding, and abetting: *1 Russ.* 26, 27. It is to be observed, however, that these statutes are now repealed.

Where statute applies only to person actually committing the offence.

But in two cases under *9 G. 1. c. 22.* (also repealed), one for maiming cattle, and the other for malicious shooting, it was held that the aiders and abettors were ousted of clergy, as well as the principals in the first degree. *Ibid.* 28.

Where *10 & 11 W. & M. c. 23.* took away clergy from all who privately stole in a shop, &c., and from all who assisted, hired, and commanded them, the judges were clear, that this took away clergy

from a person present, aiding, and assisting. *H. T.* 1818. *R. v. Gogerly, MS. Bayley B. S. C. C. R.* 343.

If a statute makes it felony without clergy if any person or persons do a certain act, all who are present aiding and abetting will be principals. *R. E. T.* 1818. And this, though the same clause, in making persons doing other acts felons, mentions aiders and abettors. *R. ib.*

By 57 G. 3. c. 127. § 4. if any person or persons personate a seaman, &c., or cause or procure any other person to personate one, he or they shall be felons without clergy. The same clause makes it felony without clergy to personate powers, to utter them, to take a false oath, or to demand, or to receive wages. The forgery part mentions persons acting or assisting therein; and the uttering part, persons aiding and abetting: and, on case, the question was, whether a person present, aiding and abetting another, whilst personating, was within the act, and, on consideration, the judges were unanimous that he was. *R. v. Potts, E. T.* 1818. *MS. Bayley B. C. C. R.* 353.

Principal
though absent.

Also in some cases, even a person *absent* may be principal; as he that puts poison into any thing to poison another, and leaves it, though not present when it is taken: And so it seems all that are present when the poison is so infused, and consenting thereto. *Hale's Sum.* 216.

Present, but
not aiding.

But if one came casually, not of the confederacy, though he hindered not the felony, he is neither principal nor accessory, although he apprehend not the felon; but for his negligence he is punishable by fine and imprisonment. *Hale's Sum.* 216. *2 Haw. c. 29. § 10.*

Not sufficiently
near to assist.

Persons not present, nor sufficiently near to give assistance, are not principals.

Brighton uttered a forged note at *Portsmouth*; the plan was concerted between him and two others, to whom he was to return when he had passed the note, and divide the produce. The three had before been concerned in uttering another forged note; but at the time this note was uttering in *Portsmouth*, the other two stayed at *Gosport*. The jury found all three guilty: but on case, the judges were clear, that as the other two were not present, nor sufficiently near to assist, they could not be deemed principals, and therefore they were recommended for a pardon. *Rex v. Soares, Atkinson, and Brighton. 2 East's P. C.* 974. *S. C. C. R.* 25.

Going towards the place where a felony is to be committed in order to assist in carrying off the property, and assisting accordingly, will not make a man a principal, if he were at such a distance at the time of the felonious taking as not to be able to assist in it.

The prisoner and *J. S.* went to steal two horses. *J. S.* left the prisoner half a mile from where the horses were, and brought the horses to him; and both rode away with them. On case reserved, the judges thought the prisoner an accessory only, not a principal, because he was not present at the original taking. *R. v. Kelly, M.* 1820. *C. C. R.* 421.

Procure, counsel, command, or abet.] But here note some diversities: As,

Accessories
before, who are.

(1) *When the principal doth not accomplish the fact altogether in the same sort, as it was beforehand agreed between him and the accessory; And therefore if one command another to lay hold*

upon a third person, and he lays hold upon him and robs him, the person commanding is not accessary to the robbery, for his command might have been performed without any robbery. *Dalt. c. 161. p. 369.*

But if the command had been to beat him, and the party commanded doth kill him, or beat him so that he dieth thereof; the person commanding shall be accessary to the murder; for it is a hazard in beating a man, that he may die thereof. *Id.* Distinctions.

(2) *He that commandeth or counselleth any evil or unlawful act to be done (a), shall be adjudged accessary to all that shall ensue upon the same evil act, but not to any other distinct thing.* As, if one command another to steal a horse, and he stealeth an ox; or to rob a man by the highway of his money, and he robs him in his house of his plate; or to burn such a one's house, and he burneth the house of another: these are other acts and felonies than he commanded to be done, and therefore he shall not be adjudged accessary to them. *Id.*

(3) *But if a person commit the same felony, which another did command or counsel to be done, though he doth it at another time, or in another place, or in another sort than was commanded or counselled, yet here such person commanding or counselling shall be accessary.* As, if he doth counsel to kill a man by poison, and he kills him with a dagger; or to kill him by the highway, and he kills him in his house; or to kill him one day, and he kills him on another day: in these and the like cases he shall be accessary to the murder. *Id.*

(4) *Those offences, which in the construction of law are sudden and unpremeditated, cannot have any accessaries before.* As, killing a man by misadventure in his own defence, or manslaughter; for in such case there can be no procuring, counselling, commanding, or abetting. 1 *Hale*, 616.

(5) It seems to be generally agreed, that *he who barely conceals a felony which he knows to be intended, is guilty only of a misprison of felony, and shall not be adjudged an accessary*; for this is not procuring, counselling, or abetting. 2 *Haw. c. 29. § 23.*

Nor will words that amount to a bare permission make an accessary. *Ib. c. 29. § 16.*

(6) Also, if a man counsel or command another to kill a person, and before he hath killed him, he who counselled or commanded it repents and *countermands* it, charging him not to kill him, and yet after he doth kill him; here such person countermanding shall not be adjudged accessary to the murder: for, generally, the law adjudgeth no man accessary to a felony before the fact, but such as continue in that mind at the time that the felony is done and executed. *Dalt. c. 161. p. 369.*

(7) But if a person advise a woman to kill her child as soon as it shall be born, and she kill it in pursuance of such advice, he is an accessary to the murder, though at the time of the advice, the child not being born, no murder could be committed of it; for the influence of the felonious advice continuing till the child was born, makes the adviser as much a felon, as if he had given his advice after the birth. 2 *Haw. c. 29. § 18.*

(a) To incite and solicit another to commit a crime, is a misdemeanor at common law, although no act be done in consequence of such incitement and solicitation. *Reg. v. Higgins, 2 East, 5.*

III. Of Accessories after the Fact.

- Accessory after.** *Accessory after the fact is, where a person, knowing the felony to be committed by another, relieves, comforts, or assists the felon.*
- The receiver must have notice.** *Knowing the felony to be committed.]* There can be no doubt, but that it is necessary that the receiver have notice of the felony, either express or implied; and it must be laid in the indictment, that the receiver *knew* that the person received by him had committed the principal felony. 2 Haw. c. 29. § 32.
- In felonies only.** *The felony.]* This, as hath been said, holds place only in felonies. 1 Hale, 618.
- Aliter, in misdemeanors.** And it seems, if a person do barely receive, comfort, and conceal an offender guilty of *any common trespass, or inferior crime of the like nature*, though he knew him to have been guilty, and that there is a warrant out against him, (which by reason of such concealment cannot be executed,) yet he is not an accessory to the offence; but perhaps in such case he may be indictable for a contempt of the law, in hindering the due course of justice. 2 Haw. c. 29. § 4.
- What constitutes an accessory after.** *Relieves, comforts, or assists the felon.]* In the explication of these words several things are considerable:
- Help given.** (1) Generally, any assistance whatsoever given to one known to be a felon, in order to hinder his being apprehended, or tried, or suffering the punishment to which he is condemned, is sufficient to bring a man within this description, and make him accessory to the felony; as, where one assists him with a horse to ride away with, or with money or victuals to support him in his escape. 2 Haw. c. 29. § 26.
- Felony must be complete.** The felony must be complete at the time of the assistance given, or else the assistant will not be an accessory; as, if, after a mortal wound given, a person assists or receives the delinquent before death ensues, it will not make him an accessory, for, till death, no felony is committed. 2 Hawk. c. 29. § 35. 2 Russ. 96.
- Distinctions.** (2) But if a man know that a person hath committed a felony, but doth not discover it, this doth not make him an accessory, but it is a misprision of felony, for which he may be indicted, and upon his conviction fined and imprisoned. 1 Hale, 618.
- Neglect to apprehend.** (3) Also, if a man see another commit a felony, but consents not, nor yet takes care to apprehend him, or to levy hue and cry after him, or upon hue and cry levied doth not pursue him; this is a neglect punishable by fine and imprisonment, but it doth not make him an accessory. 1 Hale, 618.
- Suffering felon to escape.** (4) In like manner, if one commit a felony, and come to a person's house before he be arrested, and such person suffer him to escape without arrest, knowing him to have committed a felony, this doth not make him accessory; but if he take money of the felon to suffer him to escape, this makes him accessory: And so it is if he shut the fore-door of his house, whereby the pursuers are deceived, and the felon hath opportunity to escape, this makes him an accessory; for here is not a bare omission, but an act done by him to accommodate the felon's escape. 1 Hale, 619.
- Rescue.** (5) Also, it seems to be settled at this day, that whosoever rescues a felon from an arrest for the felony, or voluntarily suffers him to escape, is an accessory to the felony. 2 Haw. c. 29. § 27.

(6) But if a felon be in prison, he that relieves him with necessary meat, drink, or clothes, for the sustentation of life, is not accessory. 1 *Hale*, 620. Relief in prison;

(7) So if he be bailed out, it is lawful to relieve and maintain him, for he is *quodammodo* in custody, and is under a certainty of coming to his trial. 1 *Hale*, 620. or on bail.

(8) But if a felon be in gaol, for a man to convey instruments to him to break prison to make an escape, or to bribe the gaoler to let him escape, makes the party an accessory: for though common humanity allows every man to afford such persons necessary relief, yet common justice prohibits all unlawful attempts to cause their escapes. 1 *Hale*, 621. Helping escape.

(9) The sending a letter in favour of a felon, or advising to labour witnesses not to appear, makes no accessory; but it is a high contempt. *Hale's Sum.* 219. Favour shown.

(10) A man may be accessory to an accessory, by the receiving of him, knowing him to be an accessory to felony. 1 *Hale*, 622. Accessory to an accessory.

(11) If a man have goods stolen, and he receive his goods again, simply, without any contract to favour the felon in his prosecution, this is lawful; but if he receive them upon agreement not to prosecute, or to prosecute faintly, this is theftbote, punishable by imprisonment and ransom, but yet it makes him not an accessory; but if he takes money of him to favour him, whereby he escapes, this makes him accessory. 1 *Hale*, 619. Receiving back stolen goods.

(12) And if any person shall receive or buy stolen goods, by 7 & 8 G. 4. c. 29. § 54., knowing them to be stolen (a), or shall receive, harbour, or conceal the thieves, he shall, where the original offences admitted of accessories, be deemed an accessory. 7 & 8 G. 4. c. 29. s. 54. Receivers.

And buying the goods at an under-value, is a presumptive evidence that the buyer knew they were stolen. 1 *Hale*, 619.

(13) It seems agreed, that the law hath such a regard to that duty, love, and tenderness, which a wife owes to her husband, as not to make her an accessory to felony by any receipt given to her husband. Yet if she be any way guilty of procuring her husband to commit it, it seems to make her an accessory before the fact, in the same manner as if she had been sole. Also, it seems agreed, that no other relation besides that of a wife to her husband will exempt the receiver of a felon from being an accessory to the felony; from whence it follows, that if a master receive a servant, or a servant a master, or a brother a brother, or even a husband a wife, they are accessories in the same manner as if they had been mere strangers to one another. 2 *Haw.* c. 29. § 34. Husband and wife.

(14) But if the wife alone, the husband being ignorant of it, do receive any other person, being a felon, the wife is accessory, and not the husband. 1 *Hale*, 621.

(15) But if the husband and wife both receive a felon knowingly, it shall be adjudged only the act of the husband, and the wife shall be acquitted. *Id.*

IV. *How Accessories to be proceeded against.*

By 7 G. 4. c. 64. § 11., in order that all accessories may be convicted and punished in cases where the principal felon is not

Accessory, either before or after the fact,

(a) See post, p. 14.

may be prosecuted after conviction of principal, though principal be not attainted, &c.

attainted, it is enacted, that if any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if the principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be admitted to the benefit of clergy, or pardoned, or otherwise delivered before attainder; and every such accessory shall suffer the same punishment, if he or she be in anywise convicted, as he or she should have suffered if the principal had been attainted.

Accessory before the fact may be tried as such, or as a substantive felon, by any court having jurisdiction to try principal felon, though the offence be committed on the seas or abroad.

By § 9. if any person shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute or statutes made or to be made, the person so counselling, procuring, or commanding, shall be deemed guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not be amenable to justice (a), and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished; and the offence of the person so counselling, procuring, or commanding, howsoever indicted, may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed either on the high seas or at any place on land, whether within his Majesty's dominions or without; and that in case the principal felony shall have been committed within the body of any county, and the offence of counselling, procuring, or commanding shall have been committed within the body of any other county, the last-mentioned offence may be inquired of, tried, determined, and punished in either of such counties: provided always, that no person who shall be once duly tried for any such offence, whether as an accessory before the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence.

If offences be committed in different counties, accessory may be tried in either.

No accessory to be tried twice for same offence.

Accessory after fact may be tried by any court having jurisdiction to try principal felon.

If offences in different counties, accessory may be tried in either.

No accessory to be tried twice

By § 10. if any person shall become an accessory after the fact to any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, the offence of such person may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon, in the same manner as if the act, by reason whereof such person shall have become an accessory, had been committed at the same place as the principal felony, although such act may have been committed either on the high seas or at any place on land, whether within his Majesty's dominions or without; and that in case the principal felony shall have been committed within the body of any county, and the act, by reason whereof any person shall have become accessory, shall have been committed within the body of any other county, the offence of such accessory may be inquired of, tried, determined, and punished in either of such

(a) It has been ruled, that an accessory cannot be brought to trial under this act, who previous to the passing of it was not liable to be tried at all. See *R. v. Russell*, 1 M. 356. See *post*, tit. *Domestic*, Sect. VI.

counties: provided always, that no person who shall be once duly tried for any offence of being an accessory shall be liable to be again indicted or tried for the same offence.

for same offence.

By 7 & 8 G. 4. c. 29. § 61. in the case of every felony punishable under this act (a), every principal in the second degree and every accessory before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under said act (except only a receiver of stolen property) shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under said act, shall be liable to be indicted and punished as a principal offender.

7 & 8 G. 4. c. 29. Principals in 2d degree and accessories before and after to offences within the act; punishment.

Abettors in misdemeanors.

By § 62. if any person shall aid, abet, counsel, or procure the commission of any offence which is by this act punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, every such person shall, on conviction before a justice of the peace, be liable for every first, second, or subsequent offence of aiding, abetting, counselling, or procuring, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence, as a principal offender, is by said act made liable.

Abettors and accessories before in misdemeanors punishable on summary conviction within the act.

By 7 & 8 G. 4. c. 30. § 26. in the case of every felony punishable under this act (b), every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree is by said act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act shall be liable to be indicted or punished as a principal offender.

7 & 8 G. 4. c. 30. Principals in 2d degree, and accessories before and after to offences within the act; punishment. Abettors in misdemeanors.

By 9 G. 4. c. 31. § 31. every accessory before the fact to any felony punishable under this act (c), for whom no punishment has been hereinbefore provided, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding three years; and every accessory after the fact to any felony punishable under this act (except murder) shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and every person who shall counsel, aid, or abet the commission of any misdemeanor punishable under this act, shall be liable to be proceeded against and punished as a principal offender.

9 G. 4. c. 31. Provision for accessories before, and after, to offences within the act.

By § 3. every person convicted of murder, or of being an accessory before the fact to murder, shall suffer death as a felon; and every accessory after the fact to murder, shall be liable, at

Principals, and accessories before, and after, in murder.

(a) For consolidating and amending the laws relative to larceny, &c.

(b) For consolidating and amending the laws relative to malicious injuries to property.

(c) For consolidating and amending the statutes relative to offences against the person.

the discretion of the court, to be transported beyond the seas for life, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years.

Of Indictment and Trial.

Subject to the provisions contained in the enactments above recited, the following are the leading principles relating to the indictment and trial of accessaries.

Accessory and principal in the same indictment.

The accessory may be indicted in the same indictment with the principal, and that is the best and most usual way: but he may be indicted in another indictment: but then such indictment must contain the certainty and kind of the principal felony. 1 *Hale*, 623.

Principal to be first convicted.

It seemeth that the accessory may be put to answer before the principal hath appeared: but his plea cannot be tried before such appearance, unless he desire it himself; but if he will put himself upon the trial before the principal be tried, he may; and his acquittal or conviction, upon such trial, is good. 2 *Haw. c.* 29. § 45. 1 *Hale*, 623.

But it seemeth necessary in such case to respite judgment till the principal be convicted and attaint; for if the principal be after acquitted, that conviction of the accessory is annulled, and no judgment ought to be given against him: but if he be acquitted of the accessory, that acquittal is good, and he shall be discharged. 1 *Hale*, 623, 624.

Both tried by one inquest.

It seems to be settled, that if the principal and accessory appear together, and the principal plead the general issue, the accessory shall be put to plead also; and that if he likewise plead the general issue, both may be tried by one inquest; but that the principal must be first convicted, and that the jury shall be charged, that if they find the principal not guilty, they shall find the accessory not guilty. But it seems agreed, that if the principal plead a plea in bar or abatement, or a former acquittal, the accessory shall not be forced to answer, till that plea be determined; for if it be found for the principal, the accessory is discharged; if against the principal, yet he shall after plead over to the felony, and may be acquitted. 2 *Haw. c.* 29. § 47. 1 *Hale*, 624.

Accessory may be tried, though the principal be not attainted.

Anciently, the accessory could not be tried unless the principal were attainted (3 *Ed.* 1. c. 14.): but by the 1 *Ann. stat.* 2. c. 9. § 1., (a) if the principal be convicted, or if he peremptorily challenge above twenty of the jury, the accessory may be tried and punished as if the principal had been attainted, and this although the principal be admitted to his clergy, pardoned, or otherwise delivered before attainer. See 7 *G. 4. c.* 64. § 11. *ante*, p. 7., to the same effect as 1 *Ann. st.* 2. c. 9.

Case where a person is charged as accessory to more than one.

Formerly, if a man had been indicted as accessory in the same felony to several persons, he could not have been arraigned till all the principals were convicted and attainted: but, as the law now stands, if a man be indicted as accessory to two or more, and the jury find him accessory to one, it is a good verdict,

(a) Now repealed.

and judgment may pass upon him. 9 Rep. 119. *Fost.* 361. 1 Russ. 37.

And therefore the court in their discretion may arraign him as accessary to such of the principals who are convicted; and if he be found guilty as accessary to them or any of them, judgment shall pass upon him: but on the other hand, if he be acquitted, that acquittal will not discharge him as accessary to the others; but by *stat.* 43 G. 3. c. 113. § 5, (a) it is provided that no person shall be tried more than once for the same offence of being accessary before the fact. See 7 G. 4. c. 64. §§ 9 & 10. *ante*, pp. 8. and 9., to the same effect.

If the principal be erroneously attainted, yet the accessary shall be put to answer, and shall not take advantage of the error in that attainder; but the principal reversing the attainder reverseth the attainder of the accessary. 1 *Hale*, 625.

Case where the principal is erroneously attainted.

Where an indictment for receiving stolen goods averred that the principal felon had been *duly convicted*, upon an objection that the record which was produced was not sufficiently formal and correct to support the averment, it was held that the *judgment* was not necessary, and might be rejected; that the *conviction* was sufficient; that in the common case where the receiver is tried with the thief, there is no judgment on the thief before the verdict against the receiver; and that although the record produced was full of errors, yet an erroneous attainder of the principal is sufficient, as against the accessary, until it is reversed. *Baldwin's case*, *Monmouth Sum. Ass.* 1812, *cor. Thomson B.* 3 *Campb.* 265.

Erroneous attainder.

The judgment upon an indictment must be taken to be good until it is reversed by a writ of error; as in the case of proceedings against the accessary. So, if there be a judgment against the husband for treason, not reversed by error, it is sufficient to deprive the wife of her dower. *Per Lawrence J.* *Holmes v. Walsh*, 7 *T. R.* 465.

If the principal and accessary are joined in one indictment and tried together, which seems to be the most eligible course where both are amenable, there is no room to doubt, whether the accessary may not enter into the full defence of the principal, and avail himself of every matter of fact, and every point of law tending to his acquittal. For the accessary is in this case to be considered as *pariceps in lite*, and this sort of defence necessarily and directly tendeth to his own acquittal. *Fost.* 365.

Accessary may shew the principal not to be guilty.

But when the accessary is brought to his trial *after* the conviction of the principal, it is not necessary to enter into a detail of the evidence on which the conviction was founded. Nor doth the indictment aver that the principal was in fact *guilty*. It is sufficient if it recite, with proper certainty, the record of the *conviction*. This is evidence against the accessary, sufficient to put him upon his defence, for it is founded upon a legal presumption, that every thing in the former proceeding was rightly and properly transacted. But a presumption of this kind must, as it seemeth, give way to facts manifestly and clearly proved. *Fost.* 365.

Even after conviction of principal.

As against the accessary, therefore, the conviction of the principal will not be conclusive; it is as to him *res inter alios acta*: for an accessary may controvert the guilt of the principal, notwithstanding the record of his conviction. *Smith's case*, *O. B. Dec.* 1783. 1 *Leach*, 289.

On an indictment against an accessory, a confession by the principal is not admissible in evidence to prove the guilt of the principal; it must be proved aliunde. *R. E. T.* 1832. Especially if the principal be alive. *R. ib.* And a conviction of the principal upon a plea of "guilty," will not be evidence against the accessory to prove the principal's guilt. *Semb. ib.* Nor will a conviction upon a plea of not guilty. *Semb. ib.*

On indictment against prisoner for receiving from *Sarah Rich* six sovereigns of *M. C.*, feloniously stolen by *S. R.*, the confession of her guilt by *S. R.* was offered in evidence and received. *S. R.* was living. On case, the judges were unanimous that *S. R.*'s confession was no evidence against the prisoner; and many of them seemed to think, that had *S. R.* been convicted, and the indictment against the prisoner had stated, not her conviction, but her guilt, that must have been proved by other means. *E. T.* 1832. *R. v. Turner.* *MS. Bayley B. S. C.* 1 *M.* 347.

And therefore if it shall come out in evidence upon the trial of the accessory, as it sometimes hath and frequently may, that the offence of which the principal was convicted did not amount to felony in him, or *not to that species of felony with which he was charged*, the accessory may avail himself of this, and ought to be acquitted. *Fost.* 365.

Case of *Donally* and *Vaughan*. Objection on behalf of an accessory, that as the jury had acquitted the principal of burglary, and found him guilty only of stealing in the house, they could not find the accessory guilty as accessory to the "said felony and burglary;" but that they ought to have acquitted the accessory as they had negatived the burglary.

John Donally and *George Vaughan* were tried at the *O. B.* *Sept.* Sess. 1816. *Donally* being indicted for a burglary in the house of a *Mr. Poole*, and *Vaughan* as accessory before the fact to the "*said felony and burglary*." It appeared that by a previous concert between *Donally* and *Vaughan*, and a person named *Barrett*, *Donally* accompanied three other men, who went to rob *Mr. Poole's* house, *Vaughan* and *Barrett* watching in a passage on the opposite side of the street; and the purpose of *Donally*, *Vaughan*, and *Barrett*, clearly being to procure a burglary to be committed by the three other men, and afterwards to apprehend and convict them, in order to get shares of the reward. *Mr. Poole's* house was robbed; the three men who accompanied *Donally* were almost immediately apprehended by *Vaughan* and *Barrett*, and had been tried at a former sessions at the *Old Bailey* for burglary, but were convicted only of stealing in the dwelling-house to the amount of 40s., in consequence of *Mr. Poole's* evidence, as to its being possible at the time the robbery was committed, to see a person's face by the light of the day. — Upon the present indictment against *Donally* and *Vaughan*, the jury acquitted *Donally* of the burglary, but found him guilty of stealing in the dwelling-house to the amount of 40s., and they found *Vaughan* guilty as an accessory to the "*said felony and burglary*," the charge stated in the indictment. Upon this finding, *Curwood*, after taking an objection that this could not be larceny in *Donally*, because not done *animo furandi*, further objected on behalf of the prisoner *Vaughan*, that as the indictment was against him as accessory to a burglary committed by *Donally*, and as the jury had acquitted the principal of the burglary, the charge against the accessory must necessarily fail. That the offence of an accessory, though distinct, is yet derivative from that of the principal, and may be considered as the shadow of a substance. That by the reversal of an attainder against a principal, the attainder against the accessory, which depends upon the attainder of the principal,

is *ipso facto* utterly defeated and annulled. And that though the charge against the accessary in this indictment of which the jury had found him guilty, is as accessary to the "*said felony and burglary*," yet that the word felony, as thus used, is only descriptive of the character of the burglary, and by no means applies to any other or different offence. That in an indictment against an accessary to a murder, the charge would be laid against him as accessary to the "*said felony and murder*," but would not import two crimes, or any other crime than that which the law denominates murder. That upon the whole, therefore, the charge against *Vaughan* could only be considered as a charge of being accessary to a supposed burglary by *Donally*; and that as the jury had negatived such burglary, they ought consequently to have acquitted *Vaughan*. *Graham B.*, who tried the prisoners, respited judgment upon these objections, which, in *Michaelmas Term* following, were argued before the twelve judges in the Exchequer chamber. The opinion of the judges was not formally communicated; but it is understood to have been unanimous in favour of the objection on behalf of *Vaughan*; and in the proportion of ten to two in favour of the objection on behalf of *Donally*. 1 *Russ.* 30. 2 *Marsh.* 571. S. C.

And as in point of law, so also in point of fact, if it shall manifestly appear in the course of the accessary's trial that the principal was innocent, common justice seemeth to require that the accessary should be acquitted. *A.* is convicted upon circumstantial evidence, strong as that sort of evidence can be, of the murder of *B.*; *C.* is afterwards indicted as accessary to this murder; and it cometh out upon the trial by incontestible evidence that *B.* is still living; (Lord *Hale* somewhere mentioneth a case of this kind;) is *C.* to be convicted or acquitted? The case is too plain to admit of a doubt. Or suppose *B.* to have been in fact murdered, and that it should come out in evidence, to the satisfaction of the court and jury, that the witnesses against *A.* were mistaken in his person, (a case of this kind Mr. Justice *Foster* says he has known,) and that *A.* was not nor could possibly have been present at the murder. *Fost.* 367, 368.

Either in law,
or in fact.

If one person be indicted as principal, and another as accessary, and both be acquitted, yet the person indicted as accessary may be indicted as principal, and the former acquittal as accessary is no bar. 1 *Hale*, 626.

Accessary acquitted may be indicted as principal.

But if a person be indicted as principal, and acquitted, he shall not be indicted as accessary before: And if he be, he may plead his former acquittal in bar, for it is in substance the same offence. 1 *Hale*, 626.

Whether the principal acquitted may be indicted as accessary before.

But Mr. Justice *Foster* observes upon this, that in the eye of the law the offences of principal and accessary do specifically differ; and if a person indicted as principal, cannot be convicted upon evidence tending barely to prove him to have been accessary before the fact, which must needs be admitted, it doth not appear how an acquittal upon one indictment can be a bar to a second for an offence specifically different from it. *Fost.* 362.

Semb. that he may.

And the distinction is also taken in *R. v. Winifred Gordon*, 1 *East's P. C.* 352.: and there it was held by all the judges, that *W. G.* having been indicted as accessary before the fact, and acquitted upon that indictment, might be indicted again as principal.

Principal acquitted may be indicted as accessory after.

Accessory before acquitted may be indicted as accessory after.

Name of principal to be stated if known.

If a charge against an accessory is, that the principal felony was committed by persons unknown, it is no objection that the same grand jury found a bill imputing the principal felony to *H. M.*

So, if a man be indicted as principal, and acquitted, he may be indicted as accessory *after*; for they are offences of several natures. 1 *Hale*, 626.

And so it is, if he be indicted as accessory *before*, and acquitted: yet for the same reason he may be indicted as accessory *after*. *Id.*

Where the proceedings are against the accessory only, the name of the principal should be stated in the indictment, if it be known; and where it was stated in an indictment against an accessory to a felony, that the felony was committed by a *person to the jurors unknown*; and it appeared that the principal felon was a witness before the grand jury, it was held that the indictment could not be supported. *R. v. Walker, Gloucester Sum. Ass. 1812. cor. Le Blanc J.* 3 *Campb.* 264.

Rex v. James Bush, jun. The prisoner was tried before *Garrow B.*, at *Gloucester Sum. Ass.* 1818, was convicted, and received sentence of transportation for 14 years, but execution was stayed, in order that the opinion of the judges might be taken upon the propriety of the conviction. The indictment stated, that a certain person or certain *persons*, to the jurors *unknown*, the dwelling-house of *Hannah Wilmot* burglariously did break and enter, and certain silver plate, commonly called a silver cream-jug, her goods, did steal, and that *Bush* feloniously did receive and have the same, he then and there well knowing the same to have been feloniously and burglariously stolen, &c. Upon the trial it appeared, that among the records of indictments returned by the same grand jury, there was one charging one *Henry Moreton* as principal in the burglary, and the present prisoner *Bush* as accessory after, in receiving the cream-jug. *Mrs. Wilmot* proved that her house had been broken but once, that she had lost only one cream-jug, and that she had preferred two indictments to the grand jury. The counsel for the prosecution had declined to proceed on the indictment against *Moreton*. *Ludlow*, for the prisoner, objected, that the allegation in the present indictment, that the person or persons who committed the burglary were unknown to the jurors, is negatived by the other record, and that the prisoner was entitled to an acquittal. On case, and question whether the finding of the bill by the grand jury did not imply that the principal felons were known, the judge thought not, and conviction right. *M. T.* 1818. *C. C. R.* 372.

V. Receivers of Stolen Goods.

Receiving of stolen goods at *C. L.*
Statutes repealed.

At common law the offence of receiving stolen goods was punishable only as a misdemeanor, even after the thief had been convicted of felony in stealing them, but by several statutes commencing with 3 *W. & M. c. 9.*, and which are now repealed, such receivers were made accessories after the fact to the felony of the thief, where the thief had been convicted or was amenable to justice, and, in several cases, were also made liable to be prosecuted for a misdemeanor. See 2 *Russ.* 253.

The law respecting the prosecution of receivers of stolen goods is now regulated by the provisions of 7 & 8 *G. 4. c. 29.* (the larceny act).

By § 54. if any person shall receive any chattel, money, valu-

able security, or other property whatsoever, the stealing or taking whereof shall amount to a felony either at common law, or by virtue of this act, such person knowing the same to have been feloniously stolen or taken, every such receiver shall be guilty of felony, and may be indicted and convicted, either as an accessory after the fact, or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment: provided always, that no person, howsoever tried, for receiving as aforesaid, shall be liable to be prosecuted a second time for the same offence.

Receiver of
goods felo-
niously taken.

Punishment.

§ 55. If any person shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, or converting whereof is made an indictable misdemeanor by this act, such person knowing the same to have been unlawfully stolen, taken, obtained, or converted, every such receiver shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver shall, on conviction, be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

Receiver,
where the
taking of the
goods is a mis-
demeanor.

Punishment.

§ 56. If any person shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, or converted, every such person, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, may be dealt with, indicted, tried, and punished in any county or place, in which he shall have, or shall have had, any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the county or place where he actually received such property.

Receivers,
where to be
tried.

§ 57. And, to encourage the prosecution of offenders, be it enacted, that if any person guilty of such felony or misdemeanor as aforesaid, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the court before whom any such person shall be so convicted, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner:

Restitution of
stolen property,
on conviction
of thief, or
receiver.

Exception.

provided always, that if it shall appear before any award or order made, that any valuable security shall have been *bond fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bond fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had, by any felony or misdemeanor, been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award or order the restitution of such security.

Receivers —
summary con-
viction.

Sec. 60. Where the stealing or taking of any property whatsoever is by this act punishable on summary conviction, either for every offence, or for the first and second offence only, or for the first offence only, any person who shall receive any such property, knowing the same to be unlawfully come by, shall, on conviction thereof before a justice of the peace, be liable for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by this act made liable.

Whether prin-
cipal or re-
ceiver.

Questions of some nicety have arisen on prosecutions under the repealed statutes, as to whether the party indicted was a receiver or a principal.

Theft begun
without A.'s
privity, but A.
assisted in
making off
with the booty,
A. a principal.

A. furnished a large boat for hire to bring on shore some barilla out of a ship, and B., one of his men, separated a portion of the barilla in the boat, in order to steal it, without the privity of A.; but A. afterwards assisted in carrying it off. It was held that, as to A. it was a continuing transaction, which was not completed till the removal from the boat, and that so, A. was guilty as a principal. *R. v. Dyer and Disting, 2 East, P. C. 767. Acc. S. P. R. v. Atwell, Odonnell, and others, ib. and 2 Russ. 256.*

Aliter, where
the theft had
been com-
pleted.

But where two persons stole butter and cheese out of a warehouse, and deposited them in the adjoining street, at the distance of about 30 yards from the warehouse door, and afterwards the prisoner, being informed of what had been done, assisted in carrying them away to a cart: after conviction of the prisoner as a principal in the larceny, the judges held, on case reserved, that, as the property was removed from the owner's premises before the prisoner was present, he could not be considered a principal, and that the conviction was wrong. *E. T. 1817. R. v. King, C. C. R. 332. 2 Russ. 257.*

Prisoner not
present at the
taking — ac-
cessary only.

Where the prisoner and J. S. went to steal two horses, and J. S. left the prisoner half a mile from the place where the horses were, and brought the horses to him, and they both rode away with them; it was held, that the prisoner was an accessory only, because he was not present at the original taking. *M. T. 1820. R. v. Kelly, C. C. R. 421. 2 Russ. 257.*

Prisoner out-
side the house,
receiving the
booty — a prin-
cipal.

But where a man committed a theft in the room of a house in which he lodged, and threw a bundle containing the stolen property out of the window to an accomplice, who was waiting to receive it, it was held that under those circumstances the accomplice was a principal, and that the conviction of him, as a receiver, was wrong. *E. T. 1825. R. v. Owen, R. & M. 96.*

Indictment
against re-
ceivers.

The indictment against a receiver of stolen goods need not allege time and place to the fact of stealing the goods: it is

sufficient if they be alleged to the fact of the receipt. 2 *East's P. C.* 780.

Where an indictment charged the prisoner by the name of *Francis M.* with receiving stolen goods, "he the said *Thomas M.* knowing, &c." it was holden that the words "he the said *Thomas M.*" might be rejected as surplusage. *Morris's case*, 1 *Leach*, 109. *cit.* 2 *Russ.* 259.

Mistake as to name — surplusage.

The indictment having charged the principal with stealing a live sheep, and the accessary with receiving "20 pounds of mutton, part of the goods," &c. the conviction was holden to be proper, it being sufficient if the thing received be the same in fact as that which was stolen, though passing under a new denomination. *R. v. Cowell and Green*, 2 *East*, *P. C.* 617. 2 *Russ.* 259.

Larceny of sheep, averment of receiving mutton — good.

But the guilty knowledge, which is the gist of the offence, must be correctly averred, as where an indictment against a receiver, who was tried with the principal, stated that he knew the goods to have stolen (omitting the word "been"), the judges thought the indictment bad; but, it is added, that they afterwards took time to consider. *H. T.* 1788. *R. v. Kernon*, *MS. Bayley B. cit.* 2. *Russ.* 259.

Guilty knowledge must be sufficiently averred.

In the case of *John Thomas*, the indictment was for receiving goods stolen by persons unknown, which was objected to be insufficient, in not ascertaining the principal thief, and that it ought to appear to whom in particular the prisoner was accessary. This objection being referred to the judges, they were unanimously of opinion that the indictment was good; that the great view of the statutes was to reach the receivers where the principal thieves could not easily be discovered. *Thomas's case*, *O. B. May* 1766. 2 *MS. Sum.* 477. 2 *East's P. C.* 781.

Principal unknown.

No objection.

Where the principal, however, is known, it seems proper to state it according to the truth: and the common form of the indictment is to state the fact of stealing the goods by the principal, and the receipt of them by the receiver, he then and there well knowing the said goods and chattels to have been feloniously stolen, &c. It is sufficient in an indictment for felony against a receiver of stolen goods, to state that the principal was "*tried and duly convicted*," without going on to show what judgment was passed upon him, or how he was delivered. *Hyman's case*, 2 *Leach*, 925.

If known, must be stated.

Statement of conviction sufficient.

In an indictment for a misdemeanor against a receiver of stolen goods, an averment that the principal has not been convicted, is unnecessary. *R. v. Baxter*, 5 *T. R.* 83.

N.B. This is now made a felony. — See *ante*.

By 2 *G. 3. c.* 28. § 12. every person who shall buy or receive any part of the cargo, or any goods, stores, or things of or belonging to any ship or vessel in the *Thames*, knowing the same to be stolen or unlawfully come by; or shall privately buy or receive any such goods, &c. or any part thereof, by suffering any door, window, or shutter to be left open or unfastened between sun-setting and sun-rising for that purpose; or shall buy or receive the same at any time in any clandestine manner from any person whomsoever, shall, being thereof convicted by due course of law, though the principal felon or offender has not been convicted of stealing or unlawfully procuring the same, be transported for 14 years to any of the colonies in *America*, according to the laws in force for the transportation of felons.

2 *G. 3. c.* 28. Receivers of part of a cargo of a ship.

Held felony.

In the case of *Rex v. Wyer*, 2 T. R. 77. the court of K. B. were of opinion that the prisoner might be prosecuted as for a felony for an offence under this section of the act; and they refused to bail him.

Aliter 39 & 40
G. 3. c. 87.

Such receivers
shall plead in-
stantly.

But the legislature seems to have considered it only as a misdemeanor; for by the statute 39 & 40 G. 3. c. 87. § 22. (after reciting that by the last-mentioned act, 2 G. 3. c. 28. persons guilty of certain offences are punishable by transportation for 14 years, *but the said offences not being by the said act declared to be felony*, the trial thereof may in all cases be put off, by means of a traverse, to the next sessions, after the finding of the bill of indictment for the same, and the offender be in the mean time liberated, on being admitted to bail,) it is enacted, that in such cases the person so indicted shall plead to the same indictment without having time to traverse the same, as is usual in cases of misdemeanors.

Principal a
witness.

It is now agreed that the principal, though not convicted or pardoned, may be examined as a witness against the receiver. In *Patram's* case, and in *Haslam's* case, which were prosecutions for the misdemeanor on stat. 22 G. 3. c. 58., the principal felons, though not convicted, were admitted as witnesses on the part of the crown. The same was done in *Jonathan Wild's* case, on a prosecution on stat. 4 G. 1. c. 11. for taking a reward to help to stolen goods. 2 East's P. C. 782, 783. *Patram's* case, *Bridge-water Sum. Ass. cor. Grose* J. 1787. *Haslam's* case, O. B. 1786, 2 Leach, 418.

Indictment against an Accessary before the Fact, taken from *Coke's* Report of Lord *Sanchar's* Case, 9 Co. 116., on which *Robert Creighton*, Esquire (Lord *Sanchar*, of Scotland) was convicted and hanged; viz.

Middlesex. **THE** jurors present, for the lord the king upon their oath, That whereas Robert Carliel late of London, yeoman, and James Irweng late of London, yeoman, not having God before their eyes, but being seduced by the instigation of the devil, on the eleventh day of May in the 10th year of the reign of our lord James, by the grace of God of England, France, and Ireland king, defender of the faith, and so forth, and of Scotland, the forty-fifth, at London, that is to say, in the parish of St. Dunstan in the West, in the ward of Farringdon without London aforesaid, &c. with force and arms, &c. feloniously, and of their aforethought malice, in and upon one John Turner, then and there in the peace of God, and of the said lord the king being, made an assault and affray; and the aforesaid Robert Carliel with a certain gun [tormentum] called a pistol, of the value of 5s. then and there charged with gunpowder, and one leaden bullet, which gun the said Robert Carliel in his right hand then and there had and held, in and upon the aforesaid John Turner, then and there feloniously, voluntarily, and of his malice forethought, did shoot off and discharge; and the aforesaid Robert Carliel, with the leaden bullet aforesaid, from the gun aforesaid then and there sent out, the aforesaid John Turner, in and upon the left part of the breast of him the said John Turner, then and there feloniously struck, giving to the said John Turner, then and there with the leaden bullet as aforesaid, near the left pap of him the said John

Turner, one mortal wound of the breadth of half an inch, and depth of five inches, of which mortal wound the aforesaid John Turner at London aforesaid, in the parish and ward aforesaid, instantly died; And that James Irweng feloniously and of his forethought malice then and there was present, aiding, assisting, abetting, comforting, and maintaining the aforesaid Robert Carliel to do and commit the felony and murder aforesaid, in form aforesaid, and so the aforesaid Robert Carliel and James Irweng the aforesaid John Turner, at London aforesaid, in the parish and ward aforesaid, in manner and form aforesaid, feloniously, voluntarily, and of their forethought malice killed and murdered, against the peace of the lord the now king, his crown and dignity; And that one Robert Creighton, late of the parish of St. Margaret in the county of Westminster, esquire, not having God before his eyes, but being seduced by the instigation of the devil, before the felony and murder aforesaid, by the aforesaid Robert Carliel and James Irweng in manner and form aforesaid done and committed, that is to say, on the tenth day of May in the 10th year of the reign of our lord James, by the grace of God, of England, France, and Ireland king, defender of the faith, and of Scotland, the forty-fifth, the aforesaid Robert Carliel, at the aforesaid parish of St. Margaret in Westminster aforesaid, in the county of Middlesex aforesaid, to do and commit the felony and murder aforesaid, in manner and form aforesaid, maliciously, feloniously, voluntarily, and of his forethought malice did stir up, move, abet, counsel, and procure, against the peace of the said lord the king that now is, his crown and dignity, &c.

If after the Fact, then the form may be thus:

And that A. O. late of ——— in the county of ——— yeoman, well knowing the said (offender) to have done and committed the said felony in manner and form aforesaid, afterwards, to wit, on the ——— day of ——— in the ——— year of the reign of ——— at ——— aforesaid in the county aforesaid, with force and arms, him the said ——— did then and there feloniously, and of his malice forethought, receive, aid, and comfort; against the peace of the said lord the king that now is, his crown and dignity.

Indictment against an Accessary for receiving Goods, knowing them to have been stolen, in one County, the Principal having been indicted and convicted in another.

Middlesex. *THE jurors for our lord the king upon their oath present that at the delivery of the gaol of our lord the king of his county of Dorset, holden at Dorchester in and for the said county of Dorset, on the ——— day of ——— in the ——— year of the reign of our sovereign lord George the fourth, king of Great Britain, before sir Charles Abbott knight, lord chief justice of our lord the king assigned to hold pleas in the court of our lord the king, before the king himself, and sir John Bayley knight, one other of the justices of our said lord the king, assigned to hold pleas in the court of our said lord the king, before the king himself, then justices of our said lord the king, assigned to deliver the said*

gaol of the prisoners therein being; X. Y. late of the parish of ——— in the said county of Dorset, labourer, was convicted in due form of law, for that the said X. Y. on the ——— day of ——— in the said ——— year of the reign of our said lord the king, with force and arms, at the parish aforesaid, in the county aforesaid, ten yards of broad cloth of the value of thirty shillings, of the goods and chattels of one M. N. then and there being found, feloniously did steal, take and carry away, against the peace of our said lord the king, his crown and dignity, as by the record thereof remaining filed in the said court of gaol delivery may more fully and at large appear. And the jurors aforesaid upon their oath aforesaid do further present that A. O. late of the parish of ——— in the county of Middlesex, labourer, afterwards, to wit, on the said ——— day of ——— in the year aforesaid, with force and arms, at the said parish of ——— in the county of Middlesex aforesaid, the goods and chattels aforesaid, so as aforesaid feloniously stolen, taken and carried away, feloniously did receive and have (he the said A. O. then and there well knowing the aforesaid goods and chattels to have been feloniously stolen, taken and carried away) against the form of the statute in that case made and provided, and against the peace of our said lord the king, his crown and dignity.

Information against an Accessary before the Fact.

Staffordshire, } *THE information and complaint of A. B. of the
to wit. } parish of ——— in the said county, gentle-
man, taken upon oath before me J. P. esq., one of his majesty's
justices of the peace in and for the said county, this ——— day
of ——— in the year of our Lord one thousand eight hundred
and ———,*

*Who saith that on ——— the ——— day of ——— last,
his dwelling-house, situate in the parish of ——— in the said
county, was, about the hour of ——— in the night of the same
day, broken and entered by some person or persons [or, as the case
may be], and that [describe the property stolen] the property of
him the said A. B. [or, of C. D. as the case may be] was [or, were]
then and there feloniously stolen, and that he hath just cause to
suspect, and doth suspect that E. F. late of ——— aforesaid,
labourer, did commit the said felony [or, as the case may be], and
that G. H. late of ——— aforesaid, labourer, did counsel, hire,
procure, or command the said E. F. to commit the said felony [or, as
the case may be]. And thereupon he the said A. B. prayeth that
justice may be done in the premises.*

Sworn before me,

J. P.

A. B.

Warrant to apprehend thereupon.

*To the constable of the parish of ——— in the county of
Stafford, and to all other constables and peace officers within
the said county.*

Staffordshire, } *WHEREAS A. B. of the parish of ——— in
to wit. } the said county of Stafford, gentleman, hath this
day made oath before me J. P. esq., one of his majesty's justices*

of the peace in and for the said county, that his dwelling-house, situate in the parish of ——— in the said county, was, about the hour of ——— in the night of the same day, broken and entered by some person or persons [or, as the case may be], and that [describe the property stolen] the property of him the said A. B. [or, of C. D. as the case may be] was [or, were] then and there feloniously stolen, and that he hath just cause to suspect and doth suspect, that E. F. late of ——— aforesaid, labourer, did commit the said felony [or, as the case may be], and that G. H. late of ——— aforesaid, labourer, did counsel, hire, procure, or command the said E. F. to commit the said felony [or, as the case may be]. These are therefore, in his majesty's name, to charge and command you forthwith to apprehend and bring before me the said E. F. and G. H. to answer the said complaint, and to be further dealt with according to law. Given under my hand and seal, this ——— day of ——— one thousand eight hundred and ———.

J. P. (L. S.)

Commitment thereupon.

To the keeper of his Majesty's gaol at *Stafford*, for the county of *Stafford*, or his deputy.

Staffordshire, } *RECEIVE* into your custody the bodies of E. F. to wit. } and G. H. herewith sent you, brought before me J. P. esq., one of his majesty's justices of the peace in and for the said county, by A. C. constable of the parish of ——— in the said county, the said E. F. being charged upon the oath of A. B. with having on ——— the ——— day of ——— last, feloniously and burglariously broken and entered his dwelling-house, situate in the parish of ——— in the said county, [or, as the case may be], and feloniously stolen, taken, and carried away [describe the property stolen] the property of the said A. B. [or, C. D. as the case may be], and the said G. H. being also charged upon the oath of the said A. B. with having counselled, hired, procured or commanded the said E. F. to commit the said felony and burglary [or, as the case may be], and them safely keep in your custody until they shall be discharged by due course of law. Given under my hand and seal at ——— in the said county, this ——— day of ——— one thousand eight hundred and ———.

J. P. (L. S.)

To prosecute at the next assizes [or, sessions, as the case may require].

Addition.	See Indictment.
Adultery.	See Lewdness.

Admiralty Court.

A sketch of the jurisdiction of this court in criminal matters may be useful to point out the limits of the common law powers herein.

[See Stats. 15 R. 2. c. 3. 28 H. 8. c. 15. 35 H. 8. c. 2. 11 & 12 W. 3. c. 7. 2 & 3 A. c. 20. 4 G. 1. c. 11. 6 G. 1. c. 19. 8 G. 1. c. 24. 2 G. 2. c. 28. 18 G. 2. c. 30. 32 G. 2. c. 25. 39 G. 3. c. 37. Repealed by 6 G. 4. c. 105. 7 & 8 G. 4. c. 28. c. 29. c. 30. 9 G. 4. c. 31. 7 G. 4. c. 64.]

Jurisdiction.

THE court of Admiralty hath jurisdiction of all things done *super altum mare* out of any county (4 Inst. 134. Stat. 5 El. c. 5. § 30.), viz. on the main sea, or the coasts of the sea, out of any county, cinque port, haven, or pier. Stat. 27 El. c. 11. 4 Inst. 137.

Common law jurisdiction over offences committed at sea before stat. 28 H. 8. c. 15.

It appears that at common law, the K. B. had usually cognizance of felonies and treasons done on the narrow seas or coasts, though out of the bodies of counties: and that they were presented and tried by juries of the adjacent counties. 1 Hale's P. C. 154. 2 id. 12. The general commissions of oyer and terminer of felonies *infra comitatum* did not extend to such offences, 1 Hale's P. C. 154. 2 id. 15., and special commissions to hear and determine them on the coasts "*secundum legem et consuetudinem regni Angliæ*," were often issued, naming the admiral and his lieutenant commissioners, *ibid.* In 35 Ed. 3. A. D. 1360-61., this common law jurisdiction was interrupted by a special order of the King and Council, and no exercise of it had occurred in Lord Hale's time since 38 Ed. 3. 2 Hale's P. C. 15. citing *claus.* 35 Ed. 3. M. 28. *dorso*. From that period to stat. 28 H. 8. c. 15., offences committed on the high seas or on the coasts out of the body or extent of any English county, were usually tried by the admiral or his deputy (now styled judge of the admiralty), according to the course of civil law, and without a jury. No conviction or sentence of death could therefore take place except on the evidence of two witnesses or the confession of the offender. 4 Bla. Com. 268. Preamble to 28 H. 8. c. 15.

Admiralty jurisdiction within a county considered.

It is perfectly agreed that the admiral never had jurisdiction in any creek, river, or port within the body of a county: See *preamble to Stat.* 15 R. 2. c. 3. and *authorities collected*, 1 Stark. C. P. 16. n. (a), till authorized by stat. 15 Ric. 2. c. 3. to inquire of "deaths and mayhems done in great ships hovering in the main streams of great rivers below the bridges of the same rivers, nigh to the sea."* This peculiar jurisdiction of the admiral is concurrent with that of the K. B. and of *general* commissions of oyer and terminer *infra comitatum*, 2 Hale, 16. 54., and does not exclude the common law. 1 East's P. C. 368.

In a late case at the admiralty session, of a murder committed

* Or, "below the *points or reaches* of the same rivers, nearest to the sea." Pulton's Stat. 1618. Cay's Abridgt. cited Tomlins's Edit. of the Statutes at Large, 15 R. 2. c. 3. note (12.). 4 Inst. 137. but all the other authorities read "bridges."

in a part of Milford haven, never known to be dry except at the very lowest tide, and which was about three miles over, about seven or eight miles from the mouth of the river or open sea, and about 16 miles below any bridges over the river, a question was made whether the place where the murder was committed was to be considered as within the limits to which commissions granted under stat. 28 H. 8. c. 15. do by law extend. Upon reference to the judges they were unanimously of opinion that the trial was properly had, and it is said that during the discussion of the point, Lord Hale's construction of this act, in 2 *Hale*, P. C. 16, 17, 18. was much preferred to the doctrine of Lord Coke in 3 *Inst.* 111. 4 *Inst.* 134., and that most, if not all of the judges seemed to think that the common law has a concurrent jurisdiction with the admiralty in this haven, and in all other havens, creeks, and rivers in this realm. *Bruce's case*, 2 *Leach*, C. C. 1093. C. C. R. 248.

In the consideration of the above case, it appeared to the judges that the 28 H. 8. applied to all great waters frequented by ships; that in such waters the admiral in the time of H. 8. pretended jurisdiction; that by havens, &c., havens in England were meant to be included, though they are all within the body of some county; and that the mischief from the witnesses being seafaring men was likely to apply to all places frequented by ships. *MS. Bayley B. cit.* 1 *Russ.* 107.

By stat. 28 H. 8. c. 15. A.D. 1536, treasons, felonies, robberies, murders, and confederacies committed in or upon the sea, or in any haven, river, creek or place where the admiral has or pretends to have jurisdiction, shall be tried according to the course of common law, and in such places and counties as shall be appointed by the king's commission, in like manner and form as if the same had been committed upon land. 28 H. 8. c. 15.

Upon the sea.] This statute does not give the admiral jurisdiction in any river, creek or port within the body of a county; and the main question of jurisdiction arising on the statute is, Whether the fact happened at any place within the body of a county? If it did, the trial must be had before the ordinary jurisdiction: for the admiral can have no jurisdiction there, unless by positive statute. 1 *Russ.* 144. citing 4 *Inst.* 197. and see stat. 15 R. 2. c. 3.

Upon the open sea shore, the common law and admiralty have alternate jurisdiction over the space between high and low water mark, 3 *Inst.* 113. 2 *Hale's P. C.* 17. (a), so that if a man stricken on the high sea die on the shore on the reflux of the tide, the case is out of the admiral's jurisdiction. *Lacie's case*, 2 *Hale's P. C.* 17. 20. 1 *East's P. C.* c. 5. § 131.

A. standing on the shore of a harbour, fired a loaded musket at a revenue cutter which had struck on a sand-bank in the sea about 100 yards from shore, by which firing a person was maliciously killed on board the vessel. This was held to be piracy, for the offence was committed where the death happened, and not at the place from whence the cause of death proceeded. 1 *Russ.* 145, 146. citing 1 *Hawk. P. C.* c. 97. § 17. *Coombe's case*,

High and low water mark.

Shooting from the land, and killing on the sea.

(a) For though the land be *infra corpus comitatús* at the reflux, yet when the sea is full, the admiral hath jurisdiction *super aquam*, as long as the sea flows, 3 *Inst.* 113.; and see id. 54. and 2 *Hawk. c.* 9. § 14., as to the jurisdiction of the county coroner in offences on the sea shore, great rivers, &c.

1 *Leach*, 388. 1 *East's P. C. c. 5. § 131*. See *Grosvenor v. St. Augustine's Lath.* Tit. *Exrist and Customs*.

Goods stolen
on sea and
brought on
shore.

If it appears that the goods were taken at sea and afterwards brought on shore, the offender cannot be indicted as for a larceny in that county into which they were carried: because the original felony was not a taking of which the common law takes cognizance. 2 *East's P. C. c. 17. s. 12. p. 805*. 3 *Inst.* 113. 1 *Russ.* 145.

Criminal juris-
diction in har-
bours or below
the bridges in
great rivers.

It is sometimes difficult to fix the line of demarcation between the county and the high sea in harbours, or below the bridges in great rivers. The following general rules on the point are however collected by Sir *E. H. East*, 2 *P. C. c. 17. s. 10*. "It is plain that the admiral can have no jurisdiction in any rivers, or arms or creeks of the sea, within the bodies of counties, though within the flux and reflux of the tide; except in the particular instances of mayhem and homicide, done in great rivers, beneath the bridges near the sea, which depends on stat. 15 *Ric. 2. c. 3*. In general it is said, that such parts of the rivers, arms, or creeks are deemed to be within the bodies of counties, *where persons can see from one side to the other*. Lord *Hale*, in his treatise *De Jure Maris*, says, that the arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county. *Hawkins*, however, considers the line more accurately confined by other authorities to such parts of the sea, where a man standing on the one side of the land *may see what is done on the other*; and the reason assigned by Lord *Coke* in the Admiralty case (13 *Rep.* 52.), in support of the county coroner's jurisdiction, where a man is killed in such places, *because that the county may well know it*, seems rather to support the more limited construction. But at least, where there is any doubt, the jurisdiction of the common law ought to be preferred."

Where the admiral pretends to have power.] These words are not to be extended to such a pretence as is without any right at all. 2 *Hale's P. C. 17*. 1 *Hawk. P. C. c. 37. s. 11*. 4 *Inst.* 137. 2 *East, P. C. c. 17. s. 10*. Thus a felony committed between high and low water mark, after the water is reflowed, is not within the admiral's jurisdiction by these words, 2 *Hale's P. C. 17*; but these words are to be understood between the high and low water marks, 3 *Inst. supra*, 113.; and in great rivers, where the sea flows and reflows below the first bridges, and also in creeks of the sea, at full water, where the sea flows and reflows, and upon high water upon the shore, though these are possibly within the body of the county (a): for there at least, by stat. 15 *R. 2.*, they have a jurisdiction, and thus, accordingly, it has been constantly used in all times, even when common law judges have been named and sat in their commission: but the words *pretend to have* must not be extended to such a pretence as is without any right at all, as if the admiral pretend jurisdiction on the shore when the water is reflowed, yet he hath no cognizance of a felony committed there. 2 *Hale, P. C. 17*. *Lacie's case*, cited *ut supra*.

35 H. 8. c. 2.

This act, with respect to treasons done at sea, is not repealed by 35 H. 8. c. 2.

28 H. 8. c. 15.
Accessory at
land to felony or

Upon this statute, 28 H. 8. c. 15. a doubt arose, whether one who

(a) See *ante*, Bruce's case.

was accessory at land to a felony committed at sea, was triable by the admiral within the purview of it; but, by the stat. 11 & 12 W. 3. c. 7., made perpetual by 6 G. 1. c. 19., accessories to piracy may be inquired of, according to the stat. 28 H. 8. c. 15. Also by the same statute, piracies and felonies upon the sea, &c. may be inquired of in any place at sea, or upon land in H. M.'s dominions, appointed by the king's commission. Also, by the stats. 4 G. 1. c. 11., 8 G. 1. c. 24., and 2 G. 2. c. 28., several piratical offences therein mentioned, and by stat. 18 G. 2. c. 30. certain acts of hostility committed at sea in time of war, may be inquired of and tried in the admiral's court; and see 2 & 3 A. c. 20. § 35.

The stat. 39 G. 3. c. 37. enacts, that all offences committed on the high seas, out of the body of any county, shall be offences of the same nature, and liable to the same punishments, as if they had been committed on shore, and shall be inquired of, heard, tried, and adjudged, as offences under stat. 28 H. 8. c. 15.

By 7 & 8 G. 4. c. 28. (a) § 12. all offences prosecuted in the High Court of Admiralty of *England* shall, upon every first and subsequent conviction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon the land.

By 7 & 8 G. 4. c. 29. § 77. where any felony or misdemeanor punishable under this act (b) shall be committed within the jurisdiction of the Admiralty of *England*, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony or misdemeanor committed within that jurisdiction.

By 7 & 8 G. 4. c. 30. § 43. where any felony or misdemeanor punishable under this act (c) shall be committed within the jurisdiction of the Admiralty of *England*, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony or misdemeanor committed within that jurisdiction.

By 9 G. 4. c. 31. § 32. all indictable offences mentioned in this act (d), which shall be committed within the jurisdiction of the Admiralty of *England*, shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in *England*, and may be dealt with, inquired of, tried, and determined in the same manner as any other offences committed within the jurisdiction of the Admiralty of *England*: provided always, that nothing herein contained shall alter or affect any of the laws relating to the government of his Majesty's land or naval forces.

By 7 G. 4. c. 64. § 27. for enabling the High Court of Admiralty to order the payment of the costs and expenses of prosecutors, &c. and compensation for their trouble, &c. in cases where other courts have a like power under this act (e), it is enacted that it shall be lawful for the judge of the said Court of Admiralty in every case of felony, and in every case of misdemeanor of the denominations herein-before enumerated, committed upon the high seas, to order the assistant to the counsel for the affairs of the admiralty and navy to pay such costs, expenses, and compensation to pro-

piracy at sea.
11 & 12 W. 3.
c. 7.
6 G. 1. c. 19.
4 G. 1. c. 11.
8 G. 1. c. 24.
2 G. 2. c. 28.
18 G. 2. c. 30.
2 & 3 A. c. 90.

39 G. 3. c. 37.
Jurisdiction
over what
offences.

Punishment.

Trial, &c.

Trial, &c.

Trial, &c.

Costs, &c. in
Admiralty
Court.

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- (a) Act for further improving the administration of criminal justice.
(b) Larceny act. (c) Concerning malicious injuries to property.
(d) Relative to offences against the person.
(e) For improving the administration of criminal justice.

Offence of accessory committed on high sea.

28 H. 8. c. 15.
Mode of trial,
and judges.

Commissioners.

32 G. 2. c. 25.
Times for
holding the
court.

Ships.

Forging hand
of registrar.

secutors and witnesses in like manner as other courts may order the treasurer of the county to pay the same.

By 7 G. 4. c. 64. § 9. an accessory before the fact may be tried, &c. by any court which has jurisdiction to try the principal felon, though the offence of such accessory may have been committed on the high seas, or at any place on land, whether within his Majesty's dominions or without.

Sec. 10. makes a similar provision with respect to accessaries after the fact. See *antè*, tit. *Accessaries*.

All offences committed on the seas are tried before commissioners nominated by the Lord Chancellor, the indictment being first found by a grand jury of 12 men, and afterwards tried by another jury, as at common law: the course of proceedings being according to the law of the land. Among the commissioners are always the deputy of the admiral, or the judge of the Admiralty, and two or more of the common law judges. See stat. 28 H. 8. c. 15. §§ 1, 2. 4 *Bla. C.* 269. 1 *Chit. Cr. L.* 152. The stat. 28 H. 8. merely altered the mode of trial in the Admiralty Court, and its jurisdiction continues to rest on the same foundation as before that act. It is regulated by the civil law, *et per consuetudines marinas* founded on the law of nations, which may possibly give to that court a jurisdiction which our common law has not. Per *Mansfield C. J. Rex v. Depardo*, 1 *Taunt. R.* 29.

The stat. 32 G. 2. c. 25. § 20. for the more speedy bringing of offenders to justice, &c., enacts that a session of oyer and terminer and gaol delivery for the trial of offences committed on the high seas within the jurisdiction of the Admiralty of *England*, shall be holden twice at least in every year, viz. in *March* and *October*, at the Old Bailey (except when the sessions of oyer and terminer and gaol delivery for *London* and *Middlesex* shall be there holden), or in such other places in *England* as the Lord High Admiral, &c. shall in writing under his hand, directed to the judge of the Court of Admiralty, appoint.

For the acts against wilful destruction of ships, see *Malicious Injuries. Wreck*.

As to the forging the signature of the registrar of the Court of Admiralty, or High Court of Appeals for prizes, or his deputy, to certain instruments, see stat. 53 G. 3. c. 151. § 12. *Forgery*.

Affray.

- I. *What is an Affray.*
- II. *How far it may be suppressed by a private Person.*
- III. *How far by a Constable.*
- IV. *How far by a Justice of the Peace.*
- V. *Punishment of an Affray.*

I. What is an Affray.

What is an
affray.

AN affray is a public offence to the terror of the king's subjects; so called (according to Lord Coke), because it affrighteth and maketh men afraid. 3 *Inst.* 158.

From whence it seemeth clearly to follow, that there may be an assault, which will not amount to an affray; as where it happens

in a private place out of the hearing or seeing of any, except the parties concerned; in which case it cannot be said to be to the terror of the people. 1 *Haw. c. 63. § 1.*

Also it is said, that no quarrelsome or threatening words whatsoever shall amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth, that the constable may, at the request of the party threatened, carry the person, who threatens to beat him, before a justice, in order to find sureties. 1 *Haw. c. 63. § 2.*

Words do not amount to an affray.

Also, it is certain, that it is a very high offence to challenge another either by word or letter to fight a duel, or to be the messenger of such a challenge; or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight. 1 *Haw. c. 63. § 3.*

Challenge to fight.

Where a letter intended to provoke a challenge was written and put into the two-penny post in *Westminster*, addressed to the prosecutor in *London*, and received by him there, held by Lord *Ellenborough C. J.*, that the defendant might be indicted in *Middlesex*, there being sufficient publication in that county by putting it into the post there, with intent that it should be delivered to the prosecutor elsewhere, and that if the letter had never been delivered the defendant's offence would have been the same. *R. v. Williams, 2 Campb. 506. cit. 1 Russ. 276.*

Written challenge.

Publication, by putting it into the post.

But although no bare words, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain, that in some cases there may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at the common law, and is strictly prohibited by statute; for by stat. 2 *Ed. 3. c. 3.* it is enacted, "that no man of what condition soever, except the king's servants in his presence, and his ministers in executing their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, shall come before the king's justices, or other of the king's ministers doing their office, with force and arms, nor bring any force in affray of peace, nor go nor ride armed, by night or day, in fairs or markets, or in the presence of the king's justices or other ministers, or elsewhere; upon pain to forfeit their armour to the king, and their bodies to prison at the king's pleasure. And the king's justices in their presence, sheriffs and other ministers in their bailiwicks, lords of franchises and their bailiffs in the same, and mayors and bailiffs of cities and boroughs within the same, and borough-holders, constables, and wardens of the peace within their wards, shall have power to execute this act. And the judges of assize may punish such officers as have not done their duty herein." 1 *Haw. c. 63. § 4.*

Affray, though no actual violence.

2 *Ed. 3. c. 3.*

Going armed.

Upon a cry made for arms to keep the peace.] It is holden upon these words of exception, that no person is within the intention of this statute, who arms himself to suppress dangerous rioters, rebels, or enemies, and endeavours to suppress or resist such disturbers of the peace and quiet of the realm. 1 *Haw. c. 63. § 10.*

Exception

In affray of peace.] *En affrayer de la pees*, *L. Coke* has it *pais*,

of the country, or the people: and so, he observes, that the writ grounded upon this statute saith, In quorundam *de populo* terrorem; and therefore the printed book, in *affray of peace*, ought to be amended. 3 *Inst.* 158.

Exception.

And it is holden upon these words, that no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against this statute by wearing common weapons, or having their usual number of attendants with them, for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace. 1 *Haw. c.* 63. § 9.

Nor to go nor ride armed.] It is holden that a man cannot excuse the wearing such armour in public, by alleging that such a one threatened him, and that he wears it for the safety of his person from his assault: but it hath been resolved, that no one shall incur the penalty of the said statute for assembling his neighbours and friends in his own house against those who threaten to do him any violence therein, because a man's house is as his castle. 1 *Haw. c.* 63. § 8.

Defence of house.

20 R. 2. c. 1.

Power of peace-officers.

Their bodies to prison.] Stat. 20 R. 2. c. 1. adds a fine likewise.

Wardens of the peace.] It is holden that any justice of the peace or other person who is empowered to execute this statute, may proceed thereon *ex officio*; and if he find any person in arms, contrary to the form of the statute, he may seize the arms, and commit the offender to prison; and that he ought also to make a record of the whole proceeding, and certify the same into the exchequer. 1 *Haw. c.* 63. § 5.

II. How far it may be suppressed by a private Person.

It seems agreed, that any one who sees others fighting, may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, to be carried before a justice to find sureties for the peace. 1 *Haw. c.* 63. § 11.

Protection by law.

And the law doth encourage him hereunto: for if he receive any harm by the affrayers, he shall have his remedy by law against them; and if the affrayers receive hurt by endeavouring only to part them, the standers-by may justify the same, and the affrayers have no remedy by law. 3 *Inst.* 158.

In case of dangerous wound.

But if either of the parties be slain, or wounded, or so stricken that he falleth down for dead, in that case the standers-by ought to apprehend the party so slaying, wounding, or striking, or to endeavour the same by hue and cry; or else for his escape they shall be fined and imprisoned. 3 *Inst.* 158.

III. How far by a Constable.

Constable's power over affrays in his presence.

His duty.

It seems agreed that a constable is not only empowered, as all private persons are, to part an affray which happens in his presence, but is also bound at his peril to use his best endeavours to this purpose; and not only to do his utmost himself, but also to demand the assistance of others, which if they refuse to give

him, they are punishable by fine and imprisonment. 1 *Haw. c. 63.* § 13.

And it is said, that if a constable see persons either actually engaged in an affray, as by striking, or offering to strike, or drawing their weapons, or the like, or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice, to find sureties for the peace, or he may imprison him of his own authority for a reasonable time, till the heat shall be over, and also afterwards detain him till he find such surety by obligation: But it seems, that he has no power to imprison such an offender in any other manner or for any other purpose; for he cannot justify the committing an affrayer to gaol till he shall be punished for his offence: And it is said, that he ought not to lay hands on those, who barely contend with hot words, without any threats of personal hurt; and that all which he can do in such case, is to command them under pain of imprisonment to avoid fighting.

How he may
imprison.

1 *Haw. c. 63.* § 14.

But he is so far entrusted with a power over all actual affrays, that though he himself is a sufferer by them, and therefore liable to be objected against, as likely to be partial in his own cause, yet he may suppress them; and therefore, if an assault be made upon him, he may not only defend himself, but also imprison the offender, in the same manner as if he were no way a party.

1 *Haw. c. 63.* § 15.

And if an affray be in a house, the constable may break open the doors to preserve the peace; and if affrayers fly to a house, and he follow with fresh suit, he may break open the doors to take them. 1 *Haw. c. 63.* § 16.

Break open
doors.

But it is said that a constable hath no power to arrest a man for an affray done out of his own view, without a warrant from a justice, unless a felony were done, or likely to be done; for it is the proper business of a constable to preserve the peace, and not to punish the breach of it. 1 *Haw. c. 63.* § 17. See tit. *Constable*, § IV.

Affray must be
in his view.

IV. How far by a Justice of the Peace.

There is no doubt but that a justice of the peace may and must do all such things to the aforesaid purpose, which a private man or constable is either enabled or required by the law to do: But it is said that he cannot, without a warrant, authorise the arrest of any person for an affray out of his own view; yet it seems clear that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. 1 *Haw. c. 63.* § 18.

Affray out of
his view.

And a justice has a greater power over one who has dangerously wounded another in an affray, than either a private person or a constable; for there does not seem to be any good authority that these have any power at all to take sureties of such an offender; but it seems certain, that a justice has a discretionary power either to commit him, or to bail him, till the year and day be past. But it is said that he ought to be very cautious how he takes bail if the wound be dangerous; for that if the party die, and the offender appear not, he is in danger of being severely fined, if he shall ap-

His duty where
there is a
dangerous
wound.

pear upon the whole circumstances of the case to have been too favourable. 1 *Haw. c. 63. § 19.*

V. Punishment of an Affray.

All affrays in general are punishable by fine and imprisonment. 1 *Haw. c. 63. § 20.*

And they are inquirable in the leet, as common nuisances. 3 *Inst. 158.*

Warrant to apprehend Affrayers.

Westmoreland.

} To the constable of ———

WHEREAS A. I. of ——— yeoman, hath this day made oath before me J. P. esquire, one of his majesty's justices of the peace for the said county, that on the ——— day of ——— in the ——— year of the reign of ——— A. O. of ——— yeoman, and B. O. of ——— yeoman, at ——— in the said county, in a tumultuous manner made an affray, wherein the person of the said A. I. was beaten and abused by them the said A. O. and B. O. without any lawful or sufficient provocation given to them, or to either of them, by him the said A. I. These are therefore to command you forthwith to apprehend the said A. O. and B. O., and bring them before me, or some other of his said majesty's justices of the peace for the said county, to answer the premises, and to find sureties as well for their personal appearance at the next general quarter sessions of the peace, to be holden for the said county, then and there to answer to an indictment to be preferred against them by the said A. I. for the said offence, as also for their keeping the peace in the mean-time towards his said majesty and all his liege people, and especially towards him the said A. I. Hereof fail not, as you will answer the contrary at your peril. Given under my hand and seal at ——— in the said county, the ——— day of ——— in the year ———.

Indictment for an Affray.

THE jurors for our lord the king upon their oath present, that A. O. of ——— in the county of ——— tailor, and B. O. of ——— in the said county, blacksmith, with force and arms on the ——— day of ——— in the ——— year of the reign of our sovereign lord George the fourth, by the grace of God of the united kingdom of Great Britain and Ireland, king, defender of the faith, and so forth, at ——— aforesaid in the county aforesaid, being arrayed and unlawfully assembled together in a warlike manner, did make an affray, to the terror and disturbance of divers of the subjects of our said sovereign lord the king then and there being, and to the evil example of all other the subjects of our said sovereign lord the king, and against the peace of our said lord the king, his crown and dignity.

Approver.

A^N approver (probator) is a person indicted of treason or felony, and in prison for the same, who upon his arraign-

ment, before any plea pleaded, doth confess the indictment, and takes a corporal oath to reveal all treasons and felonies that he knoweth of, and therefore prays a coroner, before whom he is to enter his appeal or accusation against those that are partners in the crime contained in the indictment. 3 *Inst.* 129.

This accusation of himself, and oath, makes his accusation of another person of the same crime to amount to an indictment; and if his partners are convicted, he shall have his pardon of course. 3 *Inst.* 129, 130.

But justices of the peace cannot take cognizance hereof, because they have no authority by their commission to assign a coroner. 3 *Inst.* 130.

And besides, as it is in the discretion of the court, whether they will suffer one to be an approver, this method of late hath been seldom practised.

Great inconvenience arose out of the practice of approvement: and there is no doubt, if it were not absolutely necessary for the execution of the law against notorious offenders, that accomplices should be received as witnesses, the practice is liable to many objections. And though, under this practice, accomplices are clearly competent witnesses, their single testimony alone is seldom of sufficient weight with a jury to convict the offender; it being so strong a temptation to a man to commit perjury, if by accusing another he can escape himself. Let us see, then, what has come into the room of this practice of approvement: it is a kind of *hope*, that accomplices who behave fairly and disclose the whole truth, and bring others to justice, should themselves escape punishment, and be pardoned. This is in the nature of a recommendation to mercy. But no authority is given to a justice of the peace to pardon an offender, and to tell him that he shall be a witness against others. The accomplice is not assured of his pardon; but gives his evidence *in vinculis*, in custody: and it depends on the title he has from his behaviour, whether he shall be pardoned or executed. A justice has no authority to select whom he pleases to pardon or prosecute; and the prosecutor himself has even a less power, or rather pretence, to select than the justice of peace. It rests, therefore, on *usage* and on the offender's own good behaviour, whether he shall be prosecuted or not. *Per* *Ld. Mansfield* C. J. *Mrs. Rudd's case*, 1 *Leach*, 120. 1 *Cowp.* 336.

Accomplices competent witnesses.

Justices have no authority to pardon an accomplice, and tell him that he shall be a witness against others. Nor to select whom to pardon or prosecute.

In cases not within any statute, an accomplice who fully and truly discloses the joint guilt of himself and of his companions, and truly answers all questions that are put to him, and is admitted by justices of the peace as a witness against his companions, and who, when called upon, does give evidence accordingly, and appears, under all the circumstances of the case, to have acted a fair and ingenuous part, and to have made a full and true information, ought not to be prosecuted for his own guilt so disclosed by him, nor perhaps for any other offence of the same kind, which he may accidentally, and without any bad design, have omitted in his confession; but he cannot by law plead this in bar to any indictment against him, nor avail himself of it upon his trial; for it is merely an equitable claim to the mercy of the crown, from the magistrates' express or implied promise of an indemnity, upon certain conditions, that have been performed; it can only come before the court by way of application to put off the trial, in order

to give the prisoner time to apply elsewhere. *Per Aston J.*, in delivering the opinion of the judges in *Mrs. Rudd's case*, *O. B.*, *Dec. Sess.* 1775. 1 *Leach*, 123. All the circumstances relative to a prisoner's claim of indemnity in such a case, not only may, but ought to be laid before the court, to enable them to exercise their discretion, whether, upon the grounds before them, the trial should be put off, and consequently have intimation given that the prisoner ought not to be prosecuted; for the discretionary power exercised by justices of the peace in admitting accomplices to be witnesses, founded in practice only, cannot control the authority of the court of gaol delivery, and exempt at all events the accomplice from being prosecuted. *So held by nine of the judges*, *S. C.*

Mr. Justice Blackstone says, that an accomplice who has been admitted as a witness against his fellows "*shall not afterwards be prosecuted for that or any other previous offence of the same degree.*" 4 *Bla. Com.* 331. *Mrs. Rudd's case* does not, however, warrant this position; and *Mr. Christian* is of opinion, that an accomplice has no claim to mercy beyond the offences in which he has been connected with the prisoners, and concerning which he has previously undergone an examination. 4 *Bla. Com.* 331. (*notis*) *edit.* 1809. And so it appears to be settled in the following cases:—

Giving evidence for the crown as king's evidence, does not entitle a person to a pardon in respect of undiscovered offences.

George Duce, a prisoner in *Nottingham gaol* for felony, was admitted king's evidence against *Richard Barber*, tried at the *Lent Assizes*, 1801, for the town of *Nottingham*, before *Graham B.*, for receiving stolen goods from a bleaching ground; and on his evidence, fully and satisfactorily given, *Barber* was convicted. *Duce* was, of course, discharged from the gaol at *Nottingham*; but being under a charge of horse-stealing at *Derby*, he was sent to the gaol of that county, and afterwards tried before the same learned judge for that offence; was convicted and received sentence of death, with respite for transportation. But a doubt arising, whether his case did not fall within that equitable claim to mercy which is usually indulged to accomplices becoming witnesses for the crown, the question was submitted to the judges, who were unanimously of opinion, that the pardon was not to extend to offences for which the party might be liable to prosecution out of the county, and the prisoner underwent his sentence. *Duce's case*, *Nott. & Derby Lent Ass.* 1801, *cor. Graham B.*, *MS. C. C. R.*

So also at *Northampton Lent Assizes*, 1818, *Thomas Lee*, an accomplice, was, upon application by the counsel for the crown, taken before the grand jury, and examined as a witness on the trial of *William Franklin* and *Abraham Cook* for a highway robbery, and conducted himself with propriety, and told the truth. On a subsequent day, the said *Thomas Lee* was tried and convicted of burglary. *Garrow B.* submitted to the judges, Whether it were proper to prosecute him after he had been received as a witness for the crown. The judges held, that there was no legal objection to the prosecution, nor any general rule upon the subject; and the prisoner was transported for life. *Thomas Lee's case*, *Northampton Lent Ass.* 1818, *cor. Garrow B.*, *C. C. R.* 361.

And in a still more recent case, at *Thetford Lent Ass.* 1821, *Thomas Brunton* was admitted king's evidence on an indictment for burglary; but his account being in some parts almost incredible, and differing in others from what he had stated before the

magistrate, *Graham B.* thought him unworthy of credit, and directed an acquittal. *Brunton* was afterwards tried for sheep-stealing and convicted. On case, the judges thought the conviction right. *R. v. Brunton*, E. T. 1821. C. C. R. 454. Vide 1 *Phill. Ev.* 37. sixth edit.

Arraignment.

(7 & 8 G. 4. c. 28.)

WHEN an offender comes into court, or is brought in by process, sometimes of *capias*, and sometimes of *habeas corpus*, directed to the gaoler of another prison, the first thing that follows thereupon is his arraignment. 2 *Hale*, 216.

Now arraignment is nothing else but calling the offender to the bar of the court, to answer the matter charged upon him. 2 *Hale*, 216. What.

By 7 & 8 G. 4. c. 28. § 1. if any person not having privilege of peerage, being arraigned upon any indictment for treason, felony or piracy, shall plead thereto a plea of "not guilty," he shall by such plea, without any further form, be deemed to have put himself upon the country for trial; and the court shall in the usual manner, order a jury for the trial of such person accordingly. "Not guilty."

§ 2. If any person being arraigned upon or charged with any indictment or information, for treason, felony, piracy, or misdemeanor, shall stand mute of malice or will not answer directly to the indictment or information, in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of "not guilty" on behalf of such person, and the plea so entered shall have the same force and effect as if such person had actually pleaded the same. Prisoner refusing to plead, Court may enter "not guilty."

The prisoner, on his arraignment, though under an indictment of the highest crime, must be brought to the bar without irons and all manner of shackles and bonds, unless there be a danger of escape, and then he may be brought with irons. 2 *Hale*, 219. 4 *Bla. Com.* 323. 2 *Haw. c.* 28. § 1. Question of irons being taken off.

But *note*, at this day they usually come with their shackles upon their legs, for fear of an escape, but stand at the bar unbound, till they receive judgment. 2 *Hale*, 219.

In *Layer's* case, a difference was taken between the time of arraignment and the time of trial, and accordingly the prisoner was obliged to stand in irons at the bar during his arraignment; but when brought to trial, upon counsel desiring that his irons might be taken off, *Ld. C. J. Pratt* said, "The irons must be taken off; we will not stir till the irons are taken off." *Layer's case*, K. B. 9 G. 1. 16 *Howel's St. Tri.* 94. 99. 129. See all the authorities upon this subject collected in a note to the trials of the *regicides*. 5 *Howel's St. Tri.* 979.

In *R. v. Waite* (for embezzlement), the prisoner at the time of arraignment, desired that his irons might be taken off; but the court informed him, that they had no authority for that purpose until the jury were charged to try him. He accordingly pleaded

Not Guilty; and being put upon his trial, the Court (a) immediately ordered his fetters to be knocked off. *Waite's case*, O. B. Feb. Sess. 1743. 1 *Leach*, 28. 36. 2 *East's P. C.* 570. S. C.

Also, there is no necessity that a prisoner, at the time of his arraignment, hold up his hand at the bar, or be commanded so to do; for this is only a ceremony for making known the person of the offender to the court; and if he answer that he is the same person, it is all one. 2 *Haw. c.* 28. § 2. *R. v. Radcliffe*, 1 *Blac. Rep.* 3. *Fost.* 40. S.C. 4 *Bla. Com.* 323. *T. Raym.* 408.

For other matters relating to this subject, see title **Sessions**.

Arrest.

THIS title is to be understood of arrests in criminal cases only, and not in civil cases.

In law, an arrest doth signify the restraint of a man's person, depriving him of his own will and liberty, and binding him to become obedient to the will of the law; and it may be called the beginning of imprisonment. *Lamb.* 95.

Concerning which I will show,

- I. *Who may or may not be arrested.*
[29 C. 2. c. 7. § 6.]
- II. *For what Causes of Suspicion an Arrest may be.*
[84 Ed. 3. c. 1.]
- III. *By whom an Arrest shall be made.*
[5 G. 4. c. 18. c. 83.—7 & 8 G. 4. c. 29. c. 30.]
- IV. *The Manner of an Arrest.*
[29 C. 2. c. 7.—24 G. 2. c. 55.—27 G. 2. c. 20.—7 G. 4. c. 64.]
- V. *What is to be done after the Arrest.*
[23 H. 6. c. 9.—24 G. 2. c. 44.]

I. ~~Who~~ **Who may or may not be arrested.**

Privilege of
parliament.

Generally, a member of parliament shall have the privilege of parliament for himself and his servants to be freed from arrests; but for treason, felony, and breach of the peace, there can be no privilege. 4 *Inst.* 24. 25. 1 *Black. Com.* 145.

Bodies cor-
porate.

Bodies corporate, acting in a way that would render an individual liable to arrest, cease to retain, of course, their corporate character, and become individually responsible.

Persons
charged in
execution.

In the case of *R. v. Woodham*, 2 *Str.* 828. upon a motion for an information against the defendant, who was a justice of the peace, it was holden that a person in execution in the K. B. may be there charged criminally by a justice of the peace's warrant;

Law.] Arrest (*Who may be arrested*).

but that no such justice can take a prisoner of this court out of the custody of the court, and send him to the county gaol.

Also by stat. 29 C. 2. c. 7. § 6. a warrant executed against any person whatsoever on the Lord's day, is void; and the persons serving the same shall answer damages, as if they had done the same without warrant; except in cases of treason, felony, or breach of the peace. 29 C. 2. c. 7. On Sundays.

II. For what Causes of Suspicion an Arrest may be.

By the statute of 34 Ed. 3. c. 1. power is given to the justices of the peace, to arrest all those whom they find by indictment, or by suspicion, and to put them in prison. Suspicion.

The causes of suspicion, which are generally agreed to justify the arrest of an innocent person for felony, are these that follow. Causes of suspicion.

(1) The common fame of the country: but it seems, that it ought to appear upon evidence, in an action brought for such arrest, that such fame had some probable ground. 2 Haw. c. 12. § 9. Common fame.

(2) Being found in such circumstances as induce a strong presumption of guilt; as coming out of a house wherein murder has been committed, with a bloody knife in one's hand; or being found in possession of any part of goods stolen, without being able to give a probable account of coming honestly by them. Ib. § 12. Circumstance of guilt.

(3) The behaving one's self in such a manner as betrays a consciousness of guilt; as where a man accused of felony, on hearing that a warrant is taken out against him, doth abscond. Ib. § 13. Flight.

But the party who flies from an arrest for a capital offence, is not thereby guilty of a capital offence, but only liable to forfeit his goods, when such flight is found against him by the coroner's inquest. 2 Haw. c. 17. § 13.

(4) The being found in company with one known to be an offender, at the time of the offence, or generally at other times keeping company with persons of scandalous reputation. 2 Haw. c. 12. § 11. 2 Inst. 52. Evil company.

(5) The living an idle, vagrant, and disorderly life, without having any visible means to support it. 2 Haw. c. 12. § 10. Living idle.

A woman walking up and down the streets to pick up men, a night-walker, may be apprehended. *Per Lawrence J., Lawrence v. Hedger*, 3 Taunt. 15. post, p. 39. See stat. 5 G. 4. c. 83. § 3. & 6. post, tit. Vagrant.

(6) The being pursued by hue and cry. 2 Haw. c. 12. § 14. Hue and cry.

For if a felony is done, and one is pursued upon hue and cry, that is not of ill fame, suspicious, unknown, nor indicted, he may be attached and imprisoned by the law of the land. 2 Inst. 52.

(7) But generally, no such cause of suspicion as any of the above mentioned will justify an arrest by a private person, where in truth no such crime hath been committed; unless it be in the case of hue and cry. 2 Haw. c. 12. § 16. Where no crime is committed.

Difference between arrest by a peace officer and by a private person.

Private persons may prevent the commission of a felony.

A constable may justify an arrest on probable ground that a felony has been committed, although no positive charge be made.

A constable is not a judicial officer.

(8) In the case of *Samuel v. Payne and others*, Doug. 359. it was determined that a peace officer may justify an arrest on a reasonable charge of felony, without a warrant, although it should afterwards appear that no felony had been committed: but that a private individual in such a case cannot.

It is lawful for a private person to do any thing to prevent the perpetration of a felony. Therefore, in a case where the defendants broke and entered the plaintiff's house to prevent him from murdering his wife, the court of C. P. held that they were justified. *Per Chambre J., Handcock v. Baker and others*, 2 Bos. & Pull. 260.

Ledwith v. Catchpole, E. 23 G. 3. Cald. 291. This was an action of trespass and false imprisonment tried before Lord Mansfield at Guildhall. The defendant was one of the marshmen of the lord mayor of London. The jury found a verdict for the plaintiff with 20*l.* damages. Upon motion for a new trial, Lord Mansfield reported the evidence to have been: That one Smith, who had lost some linens to a large amount, brought one Stevens to the defendant, who said, that one Maddox had called a coach, and put Smith's bale of goods into it at a public house; that the plaintiff put his head into the coach; that afterwards the coach stopped at another house, and that the plaintiff met it there; that Smith, suspecting the plaintiff to have been concerned in the theft, from the circumstance of his having been twice so seen at the coach, took the defendant on a Sunday to the plaintiff for the purpose of having him apprehended; that when they came to him, neither Smith nor any other person charged the plaintiff with a felony; that Smith said, "I have lost some cloth; but I don't say that it was he who stole it; I know nothing of that, but stolen it was." The defendant, being asked by the plaintiff what authority he had to arrest him, produced a hanger, and said, "That was his authority:" That he then did arrest the plaintiff, and took him to the Poultry Compter; from whence he was taken the next day before the sitting alderman, and discharged. — Buller J. I think, if we were to say that a constable is justifiable in this case, we should go the length of saying that he is to some purposes a judicial officer, which is going further than has ever yet been adjudged. It would be to allow a constable to examine witnesses, act upon their testimony, though he cannot administer an oath, and judicially to conclude whether there is or is not a reasonable ground of suspicion, and this might be attended with danger. Where a positive charge is made, the party making it is obliged to follow it up with a prosecution, or is himself liable to an action. In such case the constable is merely ministerial, and bound to take the party up, and carry him before a magistrate. The magistrate must then examine into the matter upon oath, which the constable cannot do. — Willes J. A felony is committed. The prisoner looked into the coach where the stolen goods were deposited at the time, and afterwards met the coach where it stopt. Then, called upon as the constable was to act, and under such strong circumstances of suspicion, I think it became his duty to act, and that there ought to be a new trial. — Lord Mansfield. The question is, Whether a felony has been committed or not. And then the fundamental distinction is, that if a felony has actually been committed, a private person may, as

well as a peace officer, arrest; if not, the question always turns upon this, Was the arrest *bond fide*? was the act done fairly and in pursuit of an offender, or by design, or malice and ill-will? Upon a highway robbery being committed, an alarm spread, and particulars circulated, and, in the case of crimes still more serious, upon notice given to all the sea-ports, it would be a terrible thing, if under probable cause an arrest could not be made; and felons are usually taken up on descriptions in advertisements. Many an innocent man has been and may be taken up upon suspicion: but the mischief and inconvenience to the public in this point of view are comparatively nothing. It is of great consequence to the police of the country. I think there should be a new trial. *Per Lord Mansfield and Willes J.*—Rule absolute.—The new trial came on at the sittings after E. T. 23 G. 3., when a verdict was found for the defendant.

Arrest made *bond fide*, on probable cause.

Guppy v. Brittlebank & Potter, E. 58 G. 3. 5 Price, 525. It appears that an arrest may be made without warrant, if there be sufficient matter of presumption of the party's guilt, and those circumstances may be pleaded in justification; as where a person of character paid away a forged note in the purchase of a horse at a fair, and on searching, another was found on him; at all events the Exchequer held the arrest so far justified by the circumstances, that they ought not to disturb a verdict found for the defendant. But in *Beckwith v. Philby*, 6 B. & C. 635., where plaintiff having been seen under suspicious circumstances, was arrested by defendant, a peace officer, and kept in custody a whole night, an action was brought for false imprisonment, and a verdict found for defendant on its being left to the jury, whether there was a probable cause of detention for felony; on motion for a new trial it was refused, and *per Lord Tenterden C. J.*,—There is this distinction between a private individual and a constable; the former must not only make out a reasonable cause of suspicion, but also that a felony has been actually committed; whereas, a constable having reasonable ground to suspect that a felony has been committed may detain the party till inquiry can be made by the proper authority. Now here the jury have found that the party gave just cause for suspicion.

Arrest without warrant, how far justified by suspicion.

In felony, on suspicion, a private person is not justified in arresting unless a felony has been actually committed.

Where persons were discovered concealed in prosecutor's yard, having attempted to break open his stable: Held, that being detected in the night, attempting to commit a felony, they might be lawfully detained without a warrant, till they could be carried before a magistrate. *R. v. Hunt, R. & M.* 93. 1 Russ. 503.

Person detected attempting to commit a felony at night.

If a peace officer receives a person into custody, on a charge, preferred by another, of felony or breach of the peace, there he is to be considered a mere conduit, and if no felony or breach of the peace was committed, the person who preferred the charge alone is answerable. *Per Lord Ellenborough C. J. Hobbs Gent. one, &c. v. Branscomb, Drinkwater, and others. Sittings after T. T.* 53 G. 3. 3 Campb. 420.

Peace officer arresting of his own head, or receiving into custody on charge by another.

The constable will be justified and protected in holding the prisoner in custody, on a charge which imputes guilt to the party, but which is imperfectly expressed, as where it was for "having forged notes in his possession," without adding that he "knew them to be forged." *E. T.* 1817. *R. v. Ford, C. C. R.* 929. 1 Russ. 504.

Charge imputing guilt, but imperfectly expressed.

Distinction
aliter.

But aliter, where neither the charge nor the fact is such as will legally justify an arrest. *H. T.* 1825. *R. v. Thomson, R. & M.* 80. See further, as to the power of arrest, the cases of *R. v. Woolmer, post*, *R. v. Williams, post*, *R. v. Gardener, post*, *R. v. Hood, post*.

III. By whom the Arrest shall be made.

Arrest *without*
warrant.

In criminal cases, a person may be apprehended and restrained of his liberty, not only by process out of some court, or warrant from a magistrate, but frequently by a constable, watchman, or private person, without any warrant or precept.

By a justice of
the peace.

If a justice see a felony, or other breach of the peace, committed in his presence, he may in his own person apprehend the offender. And he may also, by word of mouth, command any one to arrest another who shall be guilty of any felony, or actual breach of the peace, in his presence, and such command is a good warrant, without writing. 2 *Hale*, 86.

By private per-
sons.

And all persons who are present when a felony is committed, or a dangerous wound given, are bound to apprehend the offender, on pain of being fined and imprisoned for their neglect, unless they were under age at the time. 2 *Haw. c.* 12. § 1.

Also every private person is bound to assist an officer demanding his help for the taking of a felon or the suppressing of an affray. *Ib.* § 7.

Apprehension
of vagrants.

By the Vagrant Act, 5 *G. 4. c.* 83. § 6., it is made lawful for any person whatever to apprehend persons found offending against that act, and forthwith to take them before some magistrate, or to deliver them to a constable, &c. to be so taken. See tit. Vagrant.

Of persons of-
fending against
Larceny Act.

By § 63. of 7 & 8 *G. 4. c.* 29. (Larceny Act), any person found committing any offence punishable, either upon indictment or conviction, by virtue of this act, except angling in the day-time, may be immediately apprehended without a warrant by any peace officer, or by the owner of the property on or with respect to which the offence shall be committed, or by his servant, or by any person authorised by him, and forthwith taken before some neighbouring justice, to be dealt with according to law.

Of persons of-
fending against
Malicious Tres-
pass Act.

By § 28. of 7 & 8 *G. 4. c.* 30. (Malicious Trespass Act), any person found committing any offence against this act, whether punishable upon indictment or conviction, may be immediately apprehended without a warrant by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice, &c.

Constable act-
ing on charge
of another
person.

Where the constable acts upon the charge of another person, the party suspecting ought to be present at the arrest, as the justification must be that the constable aided him in taking the party suspected; and the constable ought to be informed of all the grounds of suspicion, that he may judge how far it is reasonable. 1 *East*, *P. C.* 301. 1 *Russ.* 504.

By watchmen.

Also a watchman may arrest a night-walker, by a warrant in law. 2 *Inst.* 52. and see 5 *G. 4. c.* 83. § 3. tit. Vagrant.

Watchmen and beadles have authority at common law to arrest and detain in prison, for examination, persons walking in the streets at night whom there is reasonable ground to suspect of felony,

although there is no proof of a felony having been committed. *Lawrence v. Hedger*, T. 50 G. 3. C. P. 3 Taunt. 14.

In 2 Burr. 164., *R. v. Bootie*, is an indictment against a constable for suffering a street-walker, taken up by a watchman, to escape.

In like manner, a constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice. 1 *Hale*, 587. By constables.

Or any person whatsoever, if an affray be made to the breach of the king's peace, may without any warrant from a magistrate restrain any of the offenders, to the end the king's peace may be kept: but after the affray is ended, they cannot be arrested without an express warrant. 2 *Inst.* 52. By others in cases of affray.

It seems that any one may lawfully lay hold of another, whom he shall see upon the point of committing treason or felony, or doing any act which would manifestly endanger another's life; and may detain him till it may be reasonably presumed that he hath changed his purpose. 2 *Haw. c.* 12. § 19. Or to prevent the commission of felony.

So, if one menace another to kill him, and complaint be made to the constable forthwith, he may arrest the party, in order to prevent the danger, and detain him till he can conveniently take him before a justice. 2 *Hale*, 88. 1 *Russ.* 506. See *East*, P. C. 306. Threat of killing.

So much concerning an arrest without a warrant: next follows arresting with such warrant. Arrest with warrant.

The warrant is ordinarily directed to the sheriff or constable, and they are indictable, and subject thereupon to a fine and imprisonment, if they neglect or refuse it. 1 *Hale*, 581. By the sheriff or constable.

If it be directed to the sheriff, he may command his bailiff, under-sheriff, or other sworn and known officer, to serve it, without writing any precept. But if he will command another man that is no such officer to serve it, he must give him a written precept, otherwise an action of false imprisonment will lie. *Lamb.* 89. Sheriff may depute.

But every other person to whom it is directed must personally execute it; yet it seems, that any one may lawfully assist him. 2 *Haw. c.* 14. § 29.

If a warrant be generally directed to all constables, no one can execute it out of his own precinct; for in such case it shall be taken respectively to each of them within their several districts, and not to one of them to execute it within the district of another: but if it be directed to a particular constable (Mr. *Hawkins* says, to a particular constable *by name*), he may execute it anywhere within the jurisdiction of the justice, but is not compellable to execute it out of his own constablewick. 1 *Lord Raym.* 546. 1 *Hale*, 581. 2 *Hale*, 110. 2 *Haw. c.* 13. § 30. 1 *Salk.* 176. Whether a constable may execute it out of his own district.

And in *Rex v. Weir and others*, H. 1823. 1 B. & C. 288., a warrant of distress for a poor-rate, directed to the constables of *Woolwich*, without naming them as individuals, was held not legally executed by them out of their jurisdiction, viz. in *St. Paul's, Deptford*. If directed to him by name, not otherwise.

But now, by stat. 5 G. 4. c. 18. § 6., reciting that whereas warrants addressed to constables, headboroughs, tithingmen, borsholders, or other peace officers of parishes, townships, hamlets, or places, in their characters of and as constables, headboroughs, tithingmen, borsholders, or other peace officers of such respective parishes, townships, hamlets, or places, cannot be lawfully executed by them 5 G. 4. c. 18. Constables may execute warrants out of their precincts, provided it be within the ju-

jurisdiction of the justice granting or backing the same.

out of the precincts thereof respectively, whereby means are afforded to criminals and others of escaping from justice: for remedy thereof, it is enacted, "that it shall be lawful to and for each and every constable, and to and for each and every headborough, tithingman, borsholder, or other peace officer, for every parish, township, hamlet, or place, to execute any warrant or warrants of any justice or justices of the peace, or of any magistrate or magistrates, within any parish, township, hamlet, or place, situate, lying, or being within that jurisdiction for which such justice or justices, magistrate or magistrates shall have acted when granting such warrant or warrants, or when backing or indorsing any such warrant or warrants, in such and the like manner as if such warrant or warrants had been addressed to such constable, headborough, tithingman, borsholder, or other peace officer, specially by his name or names, and notwithstanding the parish, township, hamlet, or place in which such warrant or warrants shall be executed, shall not be the parish, township, hamlet, or place for which he shall be constable, headborough, tithingman, or borsholder, or other peace officer, provided that the same be within the jurisdiction of the justice or justices, magistrate or magistrates, so granting such warrant or warrants, or within the jurisdiction of the justice or justices, magistrate or magistrates, by whom any such warrant or warrants shall be backed or indorsed." [§ 5. This act does not extend to *Scotland*.]

Extent of act.

Any person may execute it.

But not to be directed to the party.

Where directed to two jointly.

The justice that issues the warrant may direct it to a private person, if he please, and it is good; but he is not compellable to execute it, unless he be a proper officer. 1 *Hale*, 581.

But by the justice's oath of office the warrant ought not to be directed to the party, but to some indifferent person, to execute it.

If a warrant be directed to two or more jointly, yet any one of them alone may execute it. *Dalt. c.* 169.

IV. The Manner of an Arrest.

To be gone about immediately.

Opposing the execution.

Arresting in the night.

Or on Sunday, 29 *C. 2. c.* 27.

24 *G. 2. c.* 55. Arresting in another county.

The officer to whom a warrant is directed and delivered, ought with all speed and secrecy to find out the party, and then to execute the warrant. *Dalt. c.* 169. p. 404.

It is certainly an offence of a very high nature to oppose one who lawfully endeavours to arrest another for *treason or felony*; and it seems that a person who so opposes an arrest for treason, whereof he knows the party to have been guilty, is thereby guilty of the treason; and that he who so opposes an arrest for felony, is an accessory to the felony. 1 *Haw. c.* 17. § 1.

An arrest in the night is good, both at the suit of the king and of the subject; else the party may escape. 9 *Rep.* 66.

So by stat. 29 *C. 2. c.* 7. § 6. an arrest for treason, felony, or breach of the peace may be made on Sunday. See tit. *Lord's Day*.

By stat. 24 *G. 2. c.* 55. constables and others may, on having the warrant indorsed by a justice in another county, into which an offender shall have escaped, which the justices shall do, on proof, on oath, of the hand-writing of the first justice who signed the warrant, arrest an offender in such other county, and carry him before the justice who indorsed the warrant, or some other justice of such other county, if the offence be bailable, to find

bail; or else shall carry him back again before a justice in the county from whence the warrant did first issue. See *R. v. Kynaston*, 1 *East*, 117.

In the case of *Mayhew v. Parker*, 8 *T. R.* 110. it was determined that a warrant to arrest the party, to the end that he may become bound to appear at the *next sessions*, &c., means the *next sessions after the arrest*, and not after the date of the warrant; therefore the officer executing it may justify an arrest after the sessions next ensuing the date of the warrant.

Arrest in order to find sureties to appear at the next sessions.

A private person cannot raise power to arrest or detain a felon. 1 *Hale*, 601.

Taking the power of the county.

But any justice, or the sheriff, may take of the county any number that he shall think meet, to pursue, arrest, and imprison traitors, murderers, robbers, and other felons; or such as do break, or go about to break, or disturb, the king's peace: and every man, being required, ought to assist and aid them, on pain of fine and imprisonment. *Dalt. c.* 171.

It is not justifiable for a justice, sheriff, or other officer, to assemble the *posse comitatus*, or raise a power or assembly of people, upon their own heads, without just cause. *Dalt. c.* 171.

But where a justice, sheriff, or other officer, is enabled to take the power of the county, it seemeth they may command and ought to have the aid and attendance of all knights, gentlemen, yeomen, husbandmen, labourers, tradesmen, servants, and apprentices, and of all other persons being above the age of fifteen years, and able to travel. *Dalt. c.* 171.

Women, ecclesiastical persons, and such as be decrepit, or diseased, shall not be compelled to attend them. *Id.*

And in such case it is referred to the discretion of the justice, sheriff, or other officer, what number they will have to attend on them, and how and after what manner they shall be armed or otherwise furnished. *Id.*

As to the case of breaking open doors, in order to apprehend offenders, it is to be observed that the law doth never allow of such extremities but in cases of necessity; and therefore no one can justify breaking open another's door to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance. 2 *Haw. c.* 14. § 1.

Breaking open doors.
Previous notice.

Where an outer door had been broken open by two constables and a gamekeeper, to execute a warrant under 22 & 23 *C. 2. c.* 25. § 2., to search for, and seize guns, &c. for destroying game; and it appeared that no previous demand had been made to open it, *Abbot C. J.* held clearly, that in the case of a misdemeanor a previous demand of admittance is necessary; and per *Bayley J.*, even in the execution of criminal process you must demand admittance before you can justify breaking open the outer door. *Lannock v. Brown*, 2 *B. & A.* 592.

Previous demand of admittance is necessary.

No precise form of words is required in a case of this kind. It is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority, provided that the officer has a legal warrant. *Fost.* 137.

No particular form necessary.

But where a person authorised to arrest another, who is sheltered in a house, is denied quietly to enter into it, in order to take him, it seems generally to be agreed that he may justify breaking open the doors in the following instances:—

Breaking outer door, in what cases.

Capias on indictment, or for sureties of peace, &c., or warrant.

Process for contempt.

Courts may order compensation to those who have been active in the apprehension of certain offenders.

(4 W. & M. c. 8. s. 1.
10 & 11 W. 3. c. 23. ss. 1, 2.
5 Ann. c. 31. s. 1.
14 G. 2. c. 6.
58 G. 3. c. 70. ss. 4, 5.)

Independent of costs of prosecution.

Such orders to be paid by the sheriff, who may obtain immediate repayment,

(1) Upon a *capias* grounded on an indictment for any crime whatsoever; or upon a *capias* from the chancery or king's bench, to compel a man to find sureties for the peace or good behaviour, or even upon a warrant from a justice of peace for such purpose, 2 Haw. c. 14. § 3.; or on warrant for breach of the peace. *Fogt*. 320.

So where an offence has been committed amounting to a contempt of court, and process is thereupon issued, the officer charged with the executing of it may break open doors, if necessary, in order to execute it. *Semaine's case*, Cro. El. 909. 5 Rep. 92. a. And the same was held in *Burdett v. Abbott*, 14 E. R. 157., where the process of contempt proceeded upon the order of the house of commons. See 1 Russ. 519.

By 7 G. 4. c. 64., provision is made for giving compensation to persons who have been active in the apprehension of offenders charged with certain crimes, and also for making payments to the family of a person who may have been killed in endeavouring to apprehend such offenders. § 28. enacts, that "for the better remuneration of persons who have been active in the apprehension of certain offenders, be it enacted, that where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at any other person, or with stabbing, cutting, or poisoning, or with administering any thing to procure the miscarriage of any woman, or with rape, or with burglary or felonious house-breaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen, every such court is hereby authorised and empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums or money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expences, exertions, and loss of time in or towards such apprehension; and where any person shall appear to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with receiving stolen property knowing the same to have been stolen, such court shall have power to order compensation to such person in the same manner as the other courts herein-before mentioned: provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expences, and compensations, as courts are by this act empowered to allow to prosecutors and witnesses respectively."

§ 29. "And be it further enacted, that every order for payment to any person in respect of such apprehension as aforesaid, shall be forthwith made out and delivered by the proper officer of the court unto such person, upon being paid for the same the sum of 5s. and no more; and the sheriff of the county for the time

being is hereby authorised and required, upon sight of such order, forthwith to pay to such person, or to any one duly authorised on his or her behalf, the money in such order mentioned; and every such sheriff may immediately apply for repayment of the same to the commissioners of his majesty's treasury, who, upon inspecting such order, together with the acquittance of the person entitled to receive the money thereon, shall forthwith order repayment to the sheriff of the money so by him paid, without any fee or reward whatsoever."

§ 30. "And be it further enacted, that if any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any of the offences herein-before last mentioned, it shall be lawful for the court before whom such person shall be tried to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children in case his wife shall be dead, or to his father or mother in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his or her behalf, to be named in such order by the direction of the court; and every such order shall be paid by and repaid to the sheriff in the manner herein-before mentioned."

on application to the treasury. (58 G. 3. c. 70. s. 5. 3 G. 1. c. 15. s. 4.)

If any man is killed in attempting to take certain offenders, the court may order compensation to his family. (58 G. 3. c. 70. s. 3.)

(2) When one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued either with or without a warrant by a constable or private person; but where one lies under a probable suspicion only, and is not indicted, it seems the better opinion at this day (*Mr. Hawkins* says c. 14. § 7.) that no one can justify the breaking open doors in order to apprehend him: And this opinion he founds on *Coke's 4 Inst.* 177. and *Hale's Pleas of the Crown*, 91. See 1 *Russ.* 520.

Pursuit for treason or felony.

But upon a warrant for probable cause of suspicion of felony, the person to whom such warrant is directed may break open doors to take the person suspected, if upon demand he will not surrender himself, as well as if there had been an express and positive charge against him; and so (he says) hath the common practice obtained, notwithstanding the contrary opinion of *Lord Coke*; for in such case the process is for the king, and therefore a *non omittas* is implied. 1 *Hale*, 580. 583. 2 *Hale*, 117.

By warrant on suspicion only.

And as he may break open such person's own house, so much more may he break open the house of another, to take him; for so the sheriff may do upon a civil process: But then he must at his peril see that the felon be there; for if the felon be not there, he is a trespasser to the stranger whose house it is. 2 *Hale*, 117. *Semayne's case*, 5 *Rep.* 92. a.

In house of another person.

But it seems that he that arrests as a *private man*, barely upon suspicion of felony, cannot justify the breaking open of doors to arrest the party suspected, but he doth it at his peril; that is, if in truth he be a felon, then it is justifiable; but if he be innocent, but upon a reasonable cause suspected, it is not justifiable. 1 *Hale*, 82.

Distinction between private persons and peace officers.

But a *constable* in such case may justify, and the reason of the difference is this; because in the former case it is but a thing permitted to private persons to arrest for suspicion, and they are

not punishable if they omit it; and therefore they cannot break open doors; but in case of a constable, he is punishable if he omit it upon complaint. 2 *Hale*, 92.; but query as to this. See 1 *Russ*. 520.

Warrant where the king is party.

And in general, an officer upon any warrant from a justice, either for the peace or good behaviour, or in any case where the king is party, may by force break open a man's house, to arrest the offender. *Dalt. c.* 169.

Private person to prevent murder.

It is justifiable for a private person to break and enter the house of another, and imprison his person, in order to prevent him murdering his wife. *Handcock v. Baker*, 2 *Bos. & Pull.* 260. *antè*, p. 37.

For execution of a search warrant.

(3) On a warrant to search for stolen goods the doors may be broke open, if the goods are there; and if they are not there, the constable seems indemnified, but he that made the suggestion is punishable. 2 *Hale*, 151.

Forcible entry, &c.

(4) Where forcible entry or detainer is found by inquisition before justices of the peace, or appears on their view. 2 *Haw. c.* 14. § 6.

Capias utlagatum, &c.

(5) On a *capias utlagatum*, or *capias pro fine*. *Id.* § 2.

Levying forfeiture, &c. for the king.

(6) On the warrant of a justice of the peace for the levying of a forfeiture, in execution of a judgment, or conviction for it, grounded on any statute, which gives the whole or any part of such forfeiture to the king. *Id.* § 5.

Affray in a house in view of officer.

(7) Where an affray is made in a house, in the view or hearing of the constable, he may break open the doors to take them. 1 *Haw. c.* 63. § 16. 2 *Haw. c.* 14. § 8.

Disorderly public-house.

(8) If there be disorderly drinking or noise in a house at an unreasonable time of night, especially in inns, taverns, or ale-houses, the constable, or his watch, demanding entrance, and being refused, may break open the doors to see and suppress the disorder. 2 *Hale*, 95.

Escape after arrest.

(9) Wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself in a house. 2 *Haw. c.* 14. § 9.

Aliter, where warrant expresses no offence.

(10) But upon a general warrant, without expressing any felony or treason, or surety of the peace, the officer cannot break open a door. 1 *Hale*, 584.

Or not grounded on any precedent offence.

(11) Neither ought doors to be broken open to take a person, who is required to take certain oaths by virtue of a statute, because in such case the warrant is not grounded on a precedent offence. 2 *Haw. c.* 14. § 11. 12 *Rep.* 131.

In a civil suit.

(12) In a civil suit, the officer cannot justify the breaking open an outward door or window in order to execute process. If he doth, he is a trespasser. But if he findeth the outward door open, and entereth that way, or if the door be opened to him from within, and he entereth, he may break open inward doors, if he findeth that necessary, in order to execute his process. *Fost.* 319.

Protection not extended to a stranger;

For a man's house is his castle, for safety and repose to himself and family; but if a stranger, who is not of the family, upon a pursuit taketh refuge in the house of another, this rule doth not extend to him; it is not his castle; he cannot claim the benefit of sanctuary therein. *Fost.* 320. See *Semayne's case*, *antè*, p. 43.

nor in process for felony or breach of peace.

And it is always to be remembered that this rule must be confined to the case of arrest upon process in civil suits only. For

where a *felony* hath been committed, or a dangerous wound given, or even where a minister of justice cometh armed with process founded on a breach of the peace, the party's own house is no sanctuary for him; in these cases, the justice which is due to the public must supersede every pretence of private inconvenience. *Post.* 320.

(13) Finally, in all these cases, if an officer, to serve any warrant, enter into a house, the doors being open, and then the doors are locked upon him, he may break them open in order to regain his liberty. 2 *Haw. c. 14. § 11.*

If there be a warrant against a person for a trespass or breach of the peace, and he fly and will not yield to the arrest, or being taken, make his escape; if the officer kill him, it is murder. 2 *Hale*, 117. 1 *East's P. C.* 302.

But if such person, either upon the attempt to arrest, or after the arrest, assault the officer, to the intent to make his escape from him, and the officer standing upon his guard kill him, this is no felony; for he is not bound to go back to the wall as in common cases of *se defendendo*, for the law is his protection. 2 *Hale*, 118. 1 *East's P. C.* 302.

But where a warrant issueth against a person for *felony*, and either before arrest or after he flies and defends himself with stones or weapons, so that the officer must give over his pursuit, or otherwise cannot take him without killing him, if he kill him it is no felony. And the same law is for a constable that doth it by virtue of his office, or on hue and cry. *Id.*

But then there must be these cautions: — 1. He must be a lawful officer; or there must be a lawful warrant. 2. The party ought to have notice of the reason of the pursuit, namely, because a warrant is against him. 3. It must be a case of necessity, and that not such a necessity as in the former case, where an assault is made upon the officer; but this is the necessity, namely, that he cannot otherwise be taken. 2 *Hale*, 119. 1 *East's P. C.* 312.

If an innocent person be indicted of a felony, where in truth no felony was committed, and will not suffer himself to be arrested by the officer who has a warrant for that purpose, he may lawfully be killed by him if he cannot otherwise be taken; for there is a charge against him upon record, to which, at his peril, he is bound to answer. 1 *Haw. c. 28. § 12.* [*See tit. Homicide.*]

But though a private person may arrest a felon, and if he fly so as he cannot be taken without he be killed, it is excusable in this case for the necessity, yet it is at his peril that the party be a felon; for if he be innocent of the felony, the killing (at least before the arrest) seems at least manslaughter; for an innocent person is not bound to take notice of a private person's suspicion. 2 *Hale*, 119.

A person sworn and commonly known and acting within his own precinct, need not show his warrant, but he ought to acquaint the party with the substance of it. 2 *Haw. c. 13. § 28.*

An officer giveth sufficient notice what he is, when he saith to the party, *I arrest you in the king's name*; and in such case the party at his peril ought to obey him, though he knoweth him not to be an officer; and if he have no lawful warrant, the party grieved may have his action of false imprisonment. *Dalt.* c. 169.

Killing in the arrest or pursuit, in misdemeanor.

On assault with intent to escape.

Flight for felony.

After indictment.

Private person.

Whether the constable need to show his warrant.

Or give notice.

But the learned editor of *Hale's* history observes hereupon, that the books referred to intend the general warrant constituting such person an officer, as a bailiff, or the like, in a civil action; though it may be otherwise in case of felony; because in such case a private person may arrest a felon without any warrant at all. 2 *Hale*, 116. 1 *Id.* 458. *notis.*

Hall v. Roche.

Even in a civil action, if the officer make the arrest without any warrant, and before the writ be delivered to the sheriff, the arrest is illegal. And in *Hall v. Roche*, 8 *T. R.* 188. (in which such was the fact), Lord *Kenyon* C. J. said, if it be established as law by the cases cited that it is not necessary to show the warrant to the party arrested who demands to see it, I will not shake those authorities: but I cannot forbear observing, that if it be so established, it is a most dangerous doctrine; because it may affect the party criminally in case of any resistance; and if homicide ensue, the legality of the warrant enters materially into the merits of the question. I do not think that a person is to take it for granted that another, who says he has a warrant against him, without producing it, speaks truth. It is very important that in all cases where an arrest is made by virtue of a warrant, the warrant (if demanded at least) should be produced.

Necessity of showing warrant.

What constitutes an arrest.

A warrant was issued to apprehend the plaintiff upon a charge of a conspiracy: a constable went to the plaintiff's house with the warrant, showed it to him, allowed him to take a copy of it, and then was accompanied by the plaintiff to the magistrate, who, after examining him, dismissed him. Trespass for assault and false imprisonment was brought against the magistrate, and a verdict was given for the defendant. Upon showing cause against a rule for setting aside the verdict, Sir *J. Mansfield* C. J. held, that as the plaintiff went voluntarily before the magistrate, the warrant being made no other use of than as a summons, this was no arrest, and therefore the verdict was right. *Arrowsmith v. Le Mesurier*, 2 *N. R.* 211.

Constable in no case to part with warrant.

But if he act out of his precinct, or be not sworn and commonly known, he must show his warrant, if demanded. 2 *Haw. c.* 13. § 28. Otherwise the party may make resistance, and needs not to obey it. *Dalt. c.* 169. In no case, however, is a constable required to part with the warrant out of his own possession; for that is his justification. 1 *East's P. C.* 319. 2 *Ld. Raym.* 1196. 24 *G. 2. c.* 44. § 6. See tit. *Constable, et infra*, p. 49.

But if the constable hath no warrant, but doth it by virtue of his office as a constable, it is sufficient to notify that he is a constable, or that he arrests in the king's name. 1 *Hale*, 589.

Warrant of distress.
27 *G. 2. c.* 20.

But in the case of a warrant of distress, issued by a justice of the peace, for levying a pecuniary forfeiture or sum of money, it is specially provided by stat. 27 *G. 2. c.* 20. that the officer executing the same shall, if required, show his warrant to the person whose goods are distrained, and shall suffer a copy thereof to be taken.

No arrest by words only.

If the constable come unto the party, and require him to go before the justice, this is no arrest nor imprisonment. *Dalt. c.* 170. and see *Arrowsmith v. Le Mesurier, ante*.

For bare words will not make an arrest, without laying hold on the person, or otherwise confining him. But if an officer come into a room, and tell the party he arrests him, and lock the door,

this is an arrest ; for he is in custody of the officer. 1 *Salk.* 79. 2 *Haw. c. 19. § 1. Cas. Temp. Hardw.* 301.

It hath been holden that if a constable, after he hath arrested the party by force of a warrant, suffer him to go at large upon his promise to come again and find sureties, he cannot afterwards arrest him by force of the same warrant : However, if the party return, and put himself again under the custody of the constable, it seems it may be probably argued that the constable may lawfully detain him, and bring him before the justice in pursuance of such warrant ; but in this the law doth not seem to be clearly settled. 2 *Haw. c. 13. § 9.*

Retaking after arrest, after voluntary dismissal.

But if the party arrested do escape, the officer upon fresh suit may take him again and again, so often as he escapeth, although he were out of view, or that he shall fly into another town or county. *Dalt. c. 169.*

After escape.

V. What is to be done after the Arrest.

When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody, till he can reasonably dismiss himself of him ; but with as much speed as conveniently he can, he may do any of these three things :

By a private person.

(1) He may carry him to the common gaol ; but that is now rarely done. 1 *Hale*, 589. 2 *Hale*, 77.

(2) He may deliver him to the constable, who may either carry him to gaol, or to a justice of the peace. 1 *Hale*, 589.

(3) He may carry him immediately to a justice of the peace. *Id.*

If the constable or his watch hath arrested affrayers, or persons drinking in an alehouse disorderly at an unseasonable time of night, he may put the persons in the stocks, or in a prison, if there be one in the vill, till the heat of their passion or intemperance is over, though he deliver them afterwards, or till he can bring them before a justice. 2 *Hale*, 95.

By a watchman.

If the arrest be by virtue of a warrant, when the officer hath made the arrest, he is forthwith to bring the party, according to the direction of the warrant. If it be to bring the party before the justice who granted the warrant specially, then the officer is bound to bring him before the same justice ; but if the warrant be to bring him before any justice of the county, then it is in the election of the officer to bring him before what justice he thinks fit, and not in the election of the prisoner. *Foster's Case*, 5 *Rep.* 59. b. 1 *Hale*, 582. 2 *Hale*, 112.

By an officer by warrant.

But if the time be unseasonable, as in or near the night, whereby he cannot attend the justice, or if there be danger of a present rescue, or if the party be sick, he may secure him in the stocks, or in a house, till the next day, or such time as it may be reasonable to bring him. 2 *Hale*, 120.

And when he hath brought him to the justice, yet he is in law still in his custody till the justice discharge, or bail, or commit him. *Id.*

But it is said, the constable is not obliged to return the warrant itself, but may keep it for his own justification, in case he should be questioned for what he had done, but only to return what he has done upon it. 2 *Ld. Raym.* 1196. 1 *East's P. C.* 319.

Returning the warrant.

24 G. 2. c. 44.
Constable indemnified, on giving copy of warrant.

And this seems to be implied in the statute of the 24 G. 2. c. 44. § 6. which enacts, That no action shall be brought against any constable or other officer, or person acting by his order, and in his aid, for any thing done in obedience to any warrant of a justice of the peace, under his hand and seal, until demand hath been made, or left at the usual place of his abode, by the party intending to bring such action, or by his attorney, in writing, signed by the party demanding the same, of the perusal and copy of such warrant, and the same hath been refused or neglected for six days after such demand; and if, after compliance therewith, any such action shall be brought, without making the justice or justices who signed or sealed the warrant defendant or defendants, on producing and proving such warrant at the trial, the jury shall give their verdict for the defendant.—And it is certain that the constable cannot grant a perusal or copy of the warrant, unless he hath it in his custody.

23 H. 6. c. 9.
Fee for arrest.

By an ancient statute, 23 Hen. 6. c. 9.," no sheriff shall take for any arrest but 20*d.* and the bailiff which maketh the arrest 4*d.* on pain of 40*l.*; half to the king, and half to him that will sue in sessions (or the courts above), and treble damages to the party injured: and see *Dew v. Parsons*, E. 1819, 2 B. & A. 562.

Upon which statute perhaps may be founded the custom in many places, of giving 4*d.* to the constable with the warrant, for his trouble in executing the same; which indeed at that time might be a reasonable satisfaction; for 4*d.* then was worth more than ten times the value of 4*d.* now. Which decrease in the value of money, in this and many other cases, depending upon ancient statutes, may seem to require some consideration.

Arson. See Burning.

Assault and Battery.

- I. *Assault, what.*
- II. *Battery, what.*
- III. *In what Cases they may be justified.*
- IV. *How punished.*

[43 Eliz. c. 6.—22 & 23 C. 2. c. 9.—58 G. 3. c. 30.—
7 & 8 G. 4. c. 29.—11 & 12 W. 3. c. 7.—9 G. 4. c. 31.]

I. Assault, what.

What is an assault.

AN assault, *assultus*, from the French *assayler*, is an attempt or offer, with force and violence, to do a corporal hurt to another; whether from malice or wantonness; as by striking at him with or without a weapon, though the party striking misses his aim: so, drawing a sword, throwing a bottle or glass, with intent to wound or strike, presenting a gun at a person within the distance to which the gun will carry, or pointing a pitchfork at a person standing within reach; holding up one's fist at him, in a threatening or insulting manner; or with such other circumstances

as denote at the time an intention (coupled with a present ability) of using actual violence against his person, will amount to an assault. 1 *Haw. c.* 62. § 1, 2. *Bull. N. P.* 15. 1 *Schw. N. P.* 27. 1 *East's P. C.* 496. 1 *Russ.* 862. 3 *Blac. Com.* 120.

So there may be an assault by encouraging a dog to bite another person; by riding over a person with a horse; or by wilfully and violently driving a cart, &c. against the carriage of another person, and thereby causing bodily injury to the person travelling in it. 1 *Russ.* 606.

Assault by intermediate means.

So, where a person pushed a drunken man against another, and thereby hurt him; but aliter, if he only intended to do a right act, as to assist the drunken man. 1 *Russ. ib.*

Pushing a drunken man.

So, it was held that exposing a servant to the inclemency of the weather was an act in the nature of an assault. Per *Lawrence J.*, 2 *Campb.* 650. *cit.* 1 *Russ. ib.*

Exposing a servant in inclement weather.

From hence it clearly follows that one charged with an assault and battery may be found guilty of the assault, and yet acquitted of the battery: but every battery includes an assault: therefore on an indictment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery, it is sufficient. 1 *Haw. c.* 62. § 1.

Battery includes assault.

If a master takes indecent liberties with a female scholar, without her consent, though she does not resist, he is liable to be punished as for an assault. *R. M. T.* 1807.

Liberties taken with females.

A master took very indecent liberties with a female scholar of 13, by putting her hand into his breeches, pulling up her petticoats, and putting his private parts to hers: she did not resist, but it was against her will. The jury found him guilty of an assault with intent to commit a rape, and also of a common assault: on case, the judges thought the finding as to the latter clearly right. *R. v. Nichol*, *Sum. Ass.* 1807. cor. *Graham B. C. C. R.* 130. *M. T.* 1807.

Rez v. Dawson, 3 *Stark. C. N. P.* 62. *York Sum. Ass.* 1821. Indictment for assaulting a female child with intent to abuse and carnally to know her: the jury found that the prisoner assaulted the child with intent to abuse her, but negatived the intention charged carnally to know her. *Holroyd J.* held that the averment of intention was divisible, and sentenced the prisoner to 12 months' imprisonment: and see *R. v. Evans*, 3. *Stark. C. N. P.* 35. So, where a female came to consult a quack doctor, and he made her strip naked and pulled off all her clothes, which was done against her will; the jury finding that he did not really think it would assist him towards effecting her cure, it was held to constitute an assault, and that a conviction on a count for a common assault was good. *R. v. Rosinski*, *R. & M.* 19.

Stripping a female by a quack doctor.

An unlawful imprisonment is also an assault, 1 *Russ.* 606.; and it will be an unlawful imprisonment whenever there is a detention of the person without authority; and also, though the warrant or process is regular, yet if the arrest be made at an unlawful time, as on a Sunday, or in a place privileged from arrests. 1 *Russ. ib.* But where two persons were fighting, and A. came up and took hold of one of them by the collar in order to separate the combatants, it was held to be no assault. 1 *Russ.* 607. So, to lay one's hand gently on another, against whom an officer has a warrant,

Unlawful imprisonment.

Separation of combatants.

Pointing out a person to be arrested.

and to tell him "this is the man he wants," is said to be no battery. See authority cited, 1 *Russ.* 607.

Horse running away.

Caused by a third person.

Words cannot amount to an assault.

So, it is no battery, if a horse by a sudden fright runs away with his rider, and runs against a man. 1 *Russ. ib.* But aliter, if the running away of the horse were occasioned by a third person whipping him, for such third person would be a trespasser. 1 *Russ. ib. n. (w.)*

It seems agreed at this day, that no words whatsoever can amount to an assault, though perhaps they may in some cases serve to explain a doubtful action; as, if *A.* lays his hand upon his sword, and says, "If it were not assize time, I would not take such language from you." These words would prevent the action from being construed to be an assault, because they shew he had no intent to do him any corporal hurt at that time, and a man's intention must operate with his act in constituting an assault. 1 *Haw. c.* 62. § 1. *Bull. N.P.* 15. 1 *Mod.* 3.

II. Battery, what.

Battery, what.

Battery (from the Saxon *batte*, a club, or *beaten*, to beat, from whence cometh also the word *battle*) seemeth to be, when any injury whatsoever, be it never so small, is actually done to the person of a man in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, and the like. 1 *Haw. c.* 62. § 2.

Touching.

The least touching of another's person wilfully, or in anger, is a battery: for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner. 3 *Blac. Com.* 120.

Spitting on.

The indictment was for a battery upon Dr. *R.* The evidence was that the defendant spit in his face. *Holt C. J.* It is a battery. 6 *Mod.* 170. *Reg. v. Catesworth.*

III. In what Cases they may be justified.

When justifiable.

If an officer, having a lawful warrant against one who will not suffer himself to be arrested, but resists and endeavours to rescue himself, beat or wound him in the attempt to take him, he may justify it. So, if a *parent* in a reasonable and proper manner chastise his child, or a *master* his servant, being actually in his service at the time, or a *schoolmaster* his scholar (*a*), or a gaoler his prisoner, or even a *husband* his wife; or if a man force a sword from one who offers to kill another; or if a man gently lay his hands on another, and thereby stay him from inciting a dog against a third person; or if I beat one (without wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to dispossess me of my land or goods, or of the goods of another delivered to me to be kept for him, and will not desist upon my laying my hands gently on him and disturbing him; or if a man beat, wound, or maim one who makes an assault upon his person, or that of his wife, parent, child, or master; or if a man fight with, or beat one who attempts to kill any stranger; or

if a man even threaten to kill one who puts him in fear of death, in such a place where he cannot safely fly from him; or if one imprison those whom he sees fighting, till the heat is over; in all these cases it seems the party may justify the assault and battery. 1 Haw. c. 60. § 23. 1 Bac. Abr. tit. Assau. & Batt. 244. 1 Ld. Raym. 231. Bull. N. P. 18. 3 Blac. Com. 121.

In *Keir's* case, 3 Salk. 47., it was adjudged *per Holt* C. J. that a master may justify beating his apprentice, servant, scholar, &c. if the beating is in nature of correction only, and with a proper instrument (a); otherwise, immoderate correction is a good reply to a justification of the action.

Master may correct his apprentice, scholar, &c.

A wife may justify an assault in defence of her husband; so also a servant in defence of his master, but not a master in defence of his servant, because he may have an action *per quod servitium amisit*. *Loeward v. Basikee*, 1 Ld. Raym. 62. 1 Salk. 407. Bull. N. P. 18.

Servant may justify in defence of his master.

Lord Mansfield, however, held that a master would be justified in interposing where his servant was assaulted, as well as a servant for his master, saying that it rested on the relation between master and servant. *Tickell v. Read*, *Lofft*. 215. cit. 1 Russ. 608.

Master in defence of servant.

It has been holden that a military officer may, as such, justify a battery, and even a mayhem, for disobedience of orders. Bull. N. P. 19. cit. 1 Russ. 609.

Military officer.

It is said that a servant may not justify beating another in defence of his master's son, though he were commanded to do so by the master, because he is not a servant to the son; and that for the like reason a tenant may not beat another in defence of his landlord. 1 Haw. c. 16. § 24. 1 Salk. 407.

Servant cannot justify in defence of master's son. *Semb.*

If A. enters into the ground of B. unlawfully, B. must request him to depart before he can lay hands on him to turn him out; for every *impositio manuum* is an assault and battery, which cannot be justified upon the account of breaking the close in law without a request. But if the entry be forcible, as by breaking down a gate, or the like, a request to depart is unnecessary; for acts of violence on the part of the trespasser may be instantly opposed by such acts of violence on the part of the owner as may be necessary for the immediate defence of his possession. 2 Salk. 641. 1 Sel. N. P. 33. *Green v. Goddard*.

In defence of possession.

Mere trespass.

Act of violence.

If there be an attempt made to dispossess a man of his land, or dispossess him of his goods, or to disturb him of his highway, or to turn an ancient watercourse from his mill, he may lawfully use force to resist it. Pult. 42. § 33.

Likewise, if a person comes into my house, and will not go out, I may justify laying hold of him, and turning him out.

But in general, unless there be violence in the trespass, a party should not, either in defence of his person, or his real or personal property, begin by striking the trespasser, but should request him to depart or desist, and if that is refused, should gently lay his hands upon him in the first instance, and not proceed with greater force than is made necessary by resistance. *Weaver v. Bush*, 8 T. R. 78. 1 Russ. 609. Thus, where a churchwarden justifies taking off the hat of a person who wore it in church at the time of divine service, the plea stated, that he first requested the plaintiff

Generally there ought to be a previous request to a trespasser to desist.

Son assault
demeanor.

to be uncovered, and that the plaintiff refused. *Hawe v. Planner*, 1 *Saund.* 13. *Com. Dig.* (*Esglise.*) *F. 2.*

And where a man in his own defence beats another who first assaults him, he may take advantage thereof, both upon an indictment and upon an action; but with this difference, that on an indictment he may give it in evidence upon the plea of not guilty, but on an action he must plead it specially. 1 *Haw. c. 62.* § 3.

And if a defendant prove that the plaintiff first lifted up his staff, and offered to strike him, it is a sufficient assault to justify his striking the plaintiff, and he need not stay till the plaintiff has actually struck him. *Bull. N. P.* 18.

However, every assault will not justify every battery, but it is matter of evidence whether the assault were proportionable to the battery.

It is not every trifling assault that will justify a grievous and immediate mayhem, such as cutting off a leg or hand, or biting off a joint of a man's finger, unless it happened accidentally, without any cruel and malignant intention, or after the blood was heated in the scuffle; but it must appear that the assault was in some degree proportionable to the mayhem. 1 *East's P. C.* 402.

IV. How punished.

By action and
indictment.

There is no doubt but that the wrong-doer is subject both to an action at the suit of the party, wherein he shall render damages, and also to an indictment at the suit of the king, wherein he shall be fined according to the heinousness of the offence. 1 *Haw. c. 62.* § 4. Nor will the court in which the action is brought compel the plaintiff to make his election to pursue either the one or the other; for the fine to the king, upon the criminal prosecution, and the damages to the party in the civil action, are perfectly distinct in their natures. *Jones v. Clay*, 1 *Bos. & Pull.* 191. 1 *Selw. N. P.* 28. n. (2).

43 *Eliz. c. 6.*
23 *C. 2. c. 9.*
Certificates for
costs.

But in an action of assault and battery, where the jury shall give less than 40s. damages, the plaintiff shall have no more costs than damages, unless the judge shall certify on the back of the record that an actual battery (and not an assault only) was proved upon the trial. 43 *El. c. 6.* 22 & 23 *C. 2. c. 9.* § 136.

58 *G. 3. c. 30.*
In actions of
trespass for
assault, in in-
ferior courts, if
damages are
given under
40s. plaintiff to
recover only so
much costs as
damages so
given.

And by stat. 58 *G. 3. c. 30.* for preventing frivolous and vexatious actions and suits of assault and battery, and for slanderous words in inferior courts, it is enacted, that "in all actions or suits of trespass for assault and battery, to be commenced in any court having, or which by H. M.'s writ of *justicies* may have, jurisdiction to hold pleas in actions or suits to the amount of 40s. (other than H. M.'s courts at *Westminster*, the court of great sessions for the principality of *Wales*, the court of great sessions for the county palatine of *Chester*, the court of common pleas for the county palatine of *Lancaster*, or the court of pleas for the county palatine of *Durham*), if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under 40s., then the plaintiff or plaintiffs in such action or suit shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same.

By § 2. it is enacted, "that in all actions or suits of assault and battery, or for slanderous words, to be sued or prosecuted in any court whatsoever which hath not jurisdiction to hold plea to the amount of 40s., in such actions or suits, if the jury upon the trial of the issue in such action or suit, or the jury that shall inquire of the damages, do find or assess the damages under 30s., then the plaintiff or plaintiffs in such action or suit shall have and recover only so much costs as the damages so given or assessed shall amount to, without any further increase of the same."

If damages be laid under 40s. and assessed under 30s. plaintiff shall recover only costs to the amount of damages given.

It is an aggravation of the offence, on account of the person on whom, or the place where, the same is committed: As where a man assaults or threatens another for suing him; a counsel or attorney for being employed against him; a juror for his verdict; or a gaoler [constable] or other ministerial officer for keeping him in custody, and properly executing his duty. 4 *Blac. Com.* 126.

Aggravation of offence.

By 7 & 8 G. 4. c. 29. § 6. if any person shall assault any other person with intent to rob him, or shall with menaces or by force demand any such property (*i.e.* any chattel, money, or personal security) of any other person, with intent to steal the same, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice, publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

7 & 8 G. 4. c. 29. Assault, &c. with intent to rob.

By 7 G. 2. c. 21. (now repealed) it was enacted, that any person who should with an offensive weapon unlawfully and maliciously assault with intent to rob, &c. was guilty of felony. On this statute it has been held, that the assault must be made upon the person intended to be robbed, and consequently, that where it was proved that the prisoner held a pistol to the post-boy, who was driving, but it appeared that his intention was to rob the person in the chaise, it was held not to be within the statute. *Thomas's case*, 1 *East*, P. C. 418. 1 *Russ.* 617.

Assault must be on the party intended to be robbed.

The authorities shew, that on a charge on this statute, for an assault with intent to rob, it is not necessary that there should have been an actual demand of money, &c., if it sufficiently appear from the circumstances of the case, that such was the prisoner's intention. See cases cited 1 *Russ.* 618.

Actual demand of money not necessary.

By 4 G. 4. c. 54. § 5. (now also repealed) it was enacted, that if any person shall maliciously assault any other person, with intent to rob such other person, or shall, by menaces or by force, maliciously demand money, &c. of any other person, with intent to steal the same, he should be adjudged guilty of felony.

In a prosecution under this statute, for demanding money by menaces, it was held that it must be distinctly stated in the indictment upon whom the demand for money, &c. was made. *R. v. Dunkley & others*, R. & M. 90. *cit.* 1 *Russ.* 619.

It must be averred on whom the demand was made.

By 11 & 12 W. 3. c. 7. § 9., if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods committed to his trust, he shall be adjudged to be a pirate, felon, and robber; and being convicted, shall suffer

Assaulting captain to prevent defence of ship.

death, and loss of lands, goods, &c., as pirates, felons, and robbers upon the seas ought to suffer.

Arresting a clergyman during divine service.

By 9 G. 4. c. 31. § 23., if any person shall arrest any clergyman upon any civil process, while he shall be performing Divine Service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall suffer such punishment, by fine or imprisonment, or by both, as the court shall award.

Punishment for assaults on officers, &c. for their endeavours to save shipwrecked property.

§ 24. If any person shall assault and strike or wound any magistrate, officer, or other person whatsoever lawfully authorised, on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, every such offender, being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the court shall award.

Cases of assault for which there may be sentence of hard labour. See title Excise and Customs, 3 & 4 W. 4. c. 53. s. 61.

§ 25. If any person is convicted of the following offences as misdemeanors; viz., an assault with *intent to commit felony*; an *assault upon a peace officer or revenue officer in the due execution of his duty, or upon any person acting in aid of such officer*; an assault upon any person with *intent to resist or prevent the lawful apprehension, or detainer, of the party so assaulting, or of any other person for any offence for which they may be liable by law to be apprehended or detained*, or of an assault committed *in pursuance of any conspiracy to raise the rate of wages*, the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and may also (if it shall think fit) fine the offender, and require sureties for keeping the peace.

Forcibly hindering seamen, &c. from working.

Assaulting with intent to prevent sale of grain, &c.

Summary conviction.

Hard labour.

Power of summary conviction for common assault.

Fine not exceeding 5*l*.

§ 26. If any person shall unlawfully and with force hinder any seaman, keelman, or caster from exercising his lawful trade &c., or shall beat, wound, or use violence to him, with intent to deter him from exercising the same; or if any person shall beat, &c. any person, with intent to deter or hinder him from selling or buying any wheat or other grain, flour, &c. in any market or other place, or shall beat, &c. any person having the care or charge of any wheat, &c. while on its way to or from any city, market, &c., with intent to stop the conveyance of the same, such offender may be convicted thereof before two justices of the peace, and imprisoned and kept to hard labour for any term not exceeding three calendar months, provided that no person so punished shall be punished for the same offence under any other law.

§ 27. Where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence; and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to them to be meet, not exceeding together with costs (if ordered) the sum of 5*l*., which fine shall be paid to some one of the overseers of the poor or some other officer of the parish, &c., to be by him paid over to the use of the general rate of the county, &c. in which such parish, &c. shall be situate, whether it shall or shall not contribute to such general rate; and the evidence of any inhabitant of the county, &c.

shall be admitted in proof of the offence, notwithstanding such application of the fine; and if such fine, together with the costs (if ordered), shall not be paid, either immediately after the conviction, or within such period as the said justices shall at the time of the conviction appoint, it shall be lawful for them to commit the offender, to be imprisoned for any term not exceeding two calendar months, unless such fine and costs be sooner paid; but if the justices shall deem the assault or battery not to be proved, or shall find the assault or battery to be justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred.

Commitment in default.

§ 28. Any person who shall have obtained such certificate, or having been convicted shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment awarded, he shall be released from all further or other proceedings for the same cause.

Bar to other proceedings.

§ 29. Provided that if the justices shall find the assault or battery complained of to have been accompanied by any *attempt to commit felony*, or shall be of opinion, *from any other circumstance*, that it is a fit subject for a prosecution by indictment, they shall abstain from any judication thereupon, and shall deal with the case in all respects as they would have done before the passing of this act: Provided also, that nothing herein shall authorise any justices to hear and determine any case of assault or battery, in which any questions shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein, or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice.

If attempt to commit felony or case fit for indictment, magistrates not to proceed judicially.

Not to extend to any question of title. Or of bankruptcy or insolvency. Or of process of execution.

§ 30. If any master of a merchant vessel shall, when abroad, force any man on shore, or wilfully leave him behind in any of his Majesty's colonies, or elsewhere, or shall refuse to bring home with him again all such of the men whom he carried out with him as are in a condition to return when he shall be ready to proceed homeward, he shall be guilty of a misdemeanor, and, on conviction, shall be imprisoned for such term as the court shall award; and such offences may be prosecuted by indictment or by information, at the suit of the Attorney General, in the court of K. B., and may be alleged to have been committed at *Westminster*, in the county of *Middlesex*; and the court may issue one or more commissions, if necessary, to examine witnesses abroad, and the depositions taken under the same shall be received in evidence on the trial of every such information.

Master of vessel leaving one of his crew abroad against his will a misdemeanor.

Venue.

By § 35. it is enacted, That the justices before whom any person shall be summarily convicted of any offence against this act may cause the conviction to be drawn up in the following form of words, or in any other form of words to the same effect, as the case shall require; (that is to say,)

Form of conviction.

Be it remembered, that on the ——— day of ———, in the year of our Lord ———, at ——— in the county of ——— [or, riding, division, liberty, city, etc. as the case may be], A. O. is convicted before us [naming the justices], two of his majesty's justices of the peace for the said county [or, riding, &c.], for that he the said A. O.

did [specify the offence, and the time and place when and where the same was committed, as the case may be]; and we the said justices adjudge the said A. O. for his said offence to be imprisoned in the ———, and there kept to hard labour for the space of ——— [or, we adjudge the said A. O. for his said offence to forfeit and pay the sum of] [here state the amount of the fine imposed], and also to pay the sum of ——— for costs; and in default of immediate payment of the said sums, to be imprisoned in the ——— for the space of ——— unless the said sums shall be sooner paid, [or, and we order that the said sums shall be paid by the said A. O. on or before the ——— day of ———]; and we direct that the said sum of ——— [i. e. the amount of the fine] shall be paid to ——— of ——— aforesaid in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; and we order that the said sum of ——— for costs shall be paid to C. D. [the party aggrieved]. Given under our hands the day and year first above mentioned.

Shooting at,
cutting,
stabbing, &c.

Tit. Malicious
Injuries.

Private assault.

Punishment.

§ 12. of 9 G. 4. c. 31. (which has superseded 43 G. 3. c. 58. commonly called Lord *Ellenborough's* Act), by which it is made a capital offence if any one unlawfully and maliciously shoots at any person, &c., or stabs, cuts, or wounds any person, with any intent there specified, will be found, together with the cases decided on that description of crime, under tit. "Malicious Injuries," in accordance with the arrangement followed in previous editions of this work; though, perhaps, it more properly belongs to the class of Aggravated Assaults.

A private assault is not inquirable in the leet, not being a common nuisance, as all affrays are. 1 *Haw. c. 63. § 1.*

The punishment usually inflicted upon persons convicted of assaults and batteries, is fine, imprisonment, and the finding of sureties to keep the peace.

In cases where the offence more immediately affects the individual, the defendant is sometimes permitted by the court, even after conviction, to speak with the prosecutor, before any judgment is pronounced, and a trivial punishment (generally a fine of a shilling) is inflicted if the prosecutor declares himself satisfied. 4 *Blac. Com. 363, 364.*

And where, in a case of indictment for ill treating a parish apprentice, a security for the fair expenses of the prosecution has been given by the defendant after conviction, upon an understanding that the court would abate the period of his imprisonment, the security was held to be good, upon the ground that it was given with the sanction of the Court, and to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him. *Beeley v. Wingfield, 11 East, 46.*

A.

A. Warrant for an Assault.

County of } To the constable of ——— in the said county.

WHEREAS complaint hath been made before me J. P. esquire, one of his majesty's justices of the peace in and for the said county, upon the oath of A. I. of ——— in the said county, tailor, that A. O. of ——— aforesaid, butcher, did on the ——— day

of ——— violently assault and beat him the said A. I. at ——— aforesaid, in the county aforesaid: These are therefore, in his said majesty's name, to command you forthwith to apprehend the said A. O. and to bring him before me to answer unto the said complaint, and to be farther dealt withal according to law. Given under my hand and seal the ——— day of, &c.

B. Indictment for an Assault.

B.

County of } *THE* jurors for our lord the king upon their
oath present, that A. O. of ——— in the said
county of ———, butcher, on the ——— day of ——— in the
—— year of the reign of ———, at ——— aforesaid in the county aforesaid, in and upon A. I. tailor, then and there being in the peace of God and of our said lord the king, with force and arms, an assault did make, and him the said A. I. then and there did beat, wound, and evil intreat, and then and there to him other enormous things did, to the great damage and hurt of him the said A. I., to the evil example of all others offending in the like kind, and against the peace of our said lord the king, his crown and dignity.

C. Indictment against Sir Edward Littleton, Bart. for assaulting Samuel Hellier, Esq. in his own House. *From the MSS. of the late Mr. Serjeant Williams.*

C.

Staffordshire. *THE* jurors for our lord the king upon their oath present, that Sir Edward Littleton, of Teddesley Coppice, otherwise the Coppice, in the county of Stafford, Baronet, on the twenty-second day of October, in the thirty-second year of the reign of our Sovereign lord George the Second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, &c., with force and arms, to wit, with a certain horsewhip, which he the said Sir Edward then had and held in his right hand, at the parish of Wombourn in the county aforesaid, made an assault upon Samuel Hellier, esquire, then and there being in his own dwelling-house there situate, in the peace of God and our said lord the king, and him the said Samuel then and there did beat, strike, and whip several times with the said horsewhip, giving to the aforesaid Samuel divers severe and violent blows and strokes by the same whip, and then and there otherwise greatly ill-treated the said Samuel, to the great damage of the said Samuel, and against the peace of our said lord the king, his crown and dignity.

D. Indictment for an Assault with an Intent to ravish.

D.

Staffordshire. *THE* jurors for our lord the king upon their oath present, that A. O. late of the parish of Stone in the said county of Stafford, on the ——— day of ——— in the ——— year, &c., with force and arms, at the parish aforesaid, in the county aforesaid, in and upon A. V. spinster, in the peace of God and our said lord the king then and there being, did make an assault, and her the said A. V. then and there did beat, wound, and ill-treat, so that of her life it was greatly despaired, with an intent her the said A. V. against her will then and there feloniously to ravish and carnally know, and other wrongs to the said A. V. then and there did, to the great damage of the said A. V., and against the peace of our said lord the king, his crown and dignity. [Another count for a common assault:]

Assizes.

[19 G. 3. c. 74.—38 G. 3. c. 52.—39 G. 3. c. 46.—49 G. 3. c. 91.—
3 G. 4. c. 10.—7 & 8 G. 4. c. 38.—3 & 4 W. 4. c. 71.]

Assize, what.

ASSIZE (*assessio*) anciently signified in general, a court where the judges or assessors heard and determined causes; and more particularly upon writs of *assize* brought before them, by such as were wrongfully put out of their possession. Which writs heretofore were very frequent; but now men's possessions are more easily recovered by ejectments, and the like. Yet still the judges in their circuits have a commission of *assize*, directed to themselves and the clerk of assize, to take assizes, and to do right upon such writs.

To which commission of *assize*, four other commissions are now superadded; to wit,

The circuit commissions.

(1) A commission of *general gaol delivery*, directed to the judges and the clerk of assize associate; which gives them power to try every prisoner in the gaol, committed for any offence whatsoever; but none but prisoners in the gaol.

At *Stafford Lent Assizes*, 1810, *Wood B.* ordered eight prisoners, against whom no bills had been preferred, and who were committed for trial at the general quarter sessions of the peace, to be discharged out of custody; observing that every prisoner had a right to be tried by the first competent tribunal, and that he was bound by his commission to deliver the gaol. *MS.*

But this was over-ruled by a majority of the judges, who held that it was not imperative on the judges to discharge a prisoner committed under such circumstances. *C. C. R.* 178.

(2) A commission of *oyer and terminer*, directed to the judges, and many other gentlemen of the county; by which they are empowered to *hear and determine* treasons, felonies, and other misdemeanors, by whomsoever committed, whether the persons to be tried be in gaol or not in gaol.

(3) A commission or writ of *nisi prius*, directed to the judges and clerk of assize, by which civil causes brought to issue in the courts above, are tried in the vacation by a jury of twelve men of the county where the cause of action arises; and on return of the verdict of the jury to the court above, the judges there give judgment.

Sheriffs, justices, and others, to attend there.

(4) A commission of the *peace* in every county of their circuit. By the precept for the general gaol delivery before-mentioned, the sheriff is commanded to attend there in person, with his undersheriff; and to give notice to all justices of the peace, mayors, coroners, escheators, stewards, and also to all chief constables and bailiffs of hundreds and liberties, that they be then and there in their own persons with their rolls, records, indictments, and other remembrances, to do those things which to their offices in that behalf appertain to be done.

Justices of peace are bound to attend the assizes.

By virtue whereof all justices of the peace, mayors, and others above-mentioned, of that county where the judges have their assizes, are bound to be present; and if they make default, without lawful impediment, the judges may set a fine upon them for their neglect. *Cro. Circ. C. 3.* & *Blac. Com.* 270.

Also, by ancient custom (that is, by the common law of the land), before the coming of the judges, the high constables issue their warrants to the petty constables, headboroughs, borsholders, &c. to make presentments of all crimes and offences cognizable at the assizes; to the intent (as it seemeth) that the judges thereby may have a general information and knowledge how the peace hath been kept; which presentments, being delivered to the high constables, are by them delivered into court, and make up part of the rolls and other remembrances above-mentioned.

Constable's
presentment.

By statute 7 & 8 G. 4. c. 38., "no petty constable shall be required at any petty session or elsewhere to make, nor shall any high constable be required at any general gaol delivery, great session, or general or quarter session of the peace in *England* to deliver any presentment respecting popish recusants, persons absenting themselves from their parish church or any other place of religious worship licensed by authority, rogues and vagabonds, inmates, retailers of brandy, ingrossers, forestallers, regraters, profane swearers and cursers, servants out of service, felonies and robberies, unlicensed or disorderly alehouses, false weights and measures, highways and bridges, riots, routs, and unlawful assemblies, and whether the poor are well provided for, and the constables are legally chosen and sworn."

7 & 8 G. 4. c. 38.
Exceptions.

The warrants of the high constables perhaps may be best drawn upon the words of the commission of oyer and terminer, which is the largest of all the five commissions above-mentioned; and then the form thereof may be thus subject to the above enactment.

County of _____,
Hundred of _____,
or _____ ward, &c. } To the constable of _____ in the
said county.

THESE are to require you the said constable, in his majesty's name, to make out a presentment in writing of all treasons, misprisions of treasons, insurrections, rebellions, counterfeittings, dippings, washings, false coinings, and other falsities of the money of Great Britain, and of other kingdoms and dominions whatsoever; and of all the murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenance, oppressions, champerty, deceits, and all other evil doings, offences, and injuries whatsoever, and also the accessories of them; by whomsoever, and in what manner soever done, committed, or perpetrated, within your constableness. Which said presentment so made in writing as aforesaid, and signed by you, you are to deliver to me at _____ in the said county, on the _____ day of _____ at the hour of _____ in the forenoon of the same day, that I may have the said presentment ready to be delivered to his said majesty's justices of oyer and terminer and general gaol delivery at the next assizes to be holden for the said county. Herein fail you not, as you will answer the contrary at your peril. Given under my hand, the _____ day of _____, in the year of our Lord _____.

J. B. High Constable.

Constable's *Presentment*, pursuant to the above Precept.

County of _____	}	At a Special Sessions held at _____ in the said County the _____ day of _____ one thousand eight hundred and _____.
Hundred of _____		

THE presentment of J. C. constable of the parish (or township) of _____ in the said county, for the next general assizes, or general quarter sessions of the peace, as the case may be) to be holden at _____, in and for the said county, made upon oath, before me, one of his majesty's justices of the peace acting in and for the said hundred and county, the _____ day of _____ one thousand eight hundred and _____.

I the above-named J. C. do make oath and declare, that I have none of those things given me in charge to present, within my constableness; [if any matter presentable, state the facts and circumstances.]

J. C. Constable.

Taken and sworn the day and year above written. Before me,
J. P.

19 G. 3. c. 74.
In what cases
the judges may
act, though out
of the proper
county.

By stat. 19 G. 3. c. 74. § 70. made perpetual by 39 G. 3. c. 46., reciting, that "whereas the courts of assize, nisi prius, oyer and terminer, and gaol delivery, for several counties at large, are often held in or near cities or towns that are counties of themselves, and at the same time with the like courts for the said cities or towns; and inconveniences frequently arise in transacting the business of the several courts, for that the lodgings of the judges are situate either only in the county at large, or only in the county of such city or town;" it is therefore enacted, that whenever the said courts for any county at large in *England*, shall be held in or near any city or town which is also a county of itself, with the like or any of the like courts for the said city or town, the lodgings of the judges shall be construed and taken to be situate both within the county at large, and also within the county of such city or town, for transacting the business of the assizes for such county at large, and for the county of such city or town, during the time that such judge or judges shall continue therein for the execution of their several commissions.

Judges'
lodgings.

38 G. 3. c. 52.

By stat. 38 G. 3. c. 52. § 1., reciting, whereas there at present exists in the counties of cities and of towns corporate within this kingdom an exclusive right that all causes and offences which arise within their particular limits should be tried by a jury of persons residing within the limits of the county of such city or town corporate; which ancient privilege, intended for other and good purposes, has in many instances been found by experience not to conduce to the ends of justice: and whereas it will tend to the more effectual administration of justice in certain cases, if actions, indictments, and other proceedings, the causes of which arise within the counties of cities and towns corporate, were tried in the next adjoining counties, enacts, that from and after the 1st of *June*

1798, in every action, whether transitory or local, which shall be prosecuted or depending in any of H. M.'s courts of record at *Westminster*; and in every indictment removed into the K. B. by *certiorari*; and in every information filed by H. M.'s Attorney or Solicitor General, or by the leave of the court of K. B.; and in all cases where any person or persons shall plead to or traverse any of the facts contained in the return to any writ of mandamus, if the venue in such action, indictment, or information, be laid in the county of any city or town corporate within that part of *G. B.* called *England*, or if such writ of mandamus be directed to any person or persons, body politic and corporate, that it shall be lawful for the court in which such action, &c. or other proceeding shall be depending, at the instance of the prosecutor or plaintiff, or of any defendant, to direct the issue or issues joined in such action, &c. to be tried by a jury of the county next adjoining to the county of such city or town corporate; and to award proper writs of *venue* and *istringas* accordingly, if the said court shall think it fit so to do.

§ 2. Indictments for offences committed within the county of any city or town corporate, may be preferred to the jury of the county next adjoining.

§ 3. Indictments found by the grand jury, or inquisitions taken before the coroner of the county of a city or town corporate, may be ordered by the court to be filed with the proper officer of the next adjoining county, and defendants may be removed to the gaol thereof. See *Indictment*.

By stat. 49 G. 3. c. 91. the judges may act in counties in which they reside or were born.

By stat. 3 G. 4. c. 10, intituled *An act to enable, in certain cases, the opening and reading of commissions under which the judges sit upon the circuits, after the day appointed for holding assizes*; § 1., it is enacted, "that whenever it shall so happen that commissions of assize shall not be opened and read in the presence of one of the quorum commissioners, at any place specified for holding the assize, on the very day appointed for such purpose, it shall and may be lawful to open and read the same in the presence of one of the quorum commissioners therein named on the following day; or if the following day shall be a *Sunday*, or any other day of public rest, then on the succeeding day; and such opening and reading thereof shall be as effectual, to all intents and purposes, as if the same had been opened and read in the presence of one of the quorum commissioners on the very day appointed for that purpose, and shall be deemed and taken to be an opening and reading thereof on the day for that purpose appointed; and all records and other proceedings under or relating to any commission which may be opened and read by virtue of this act, shall and may be drawn up, entered, and made out under the same date, and in the same form, in all respects, as if such commission had been opened and read on the day originally appointed for that purpose: Provided always, that the judges and quorum commissioners are hereby directed and required to have such commissions opened and read on the very days appointed for that purpose, unless the same shall be prevented by the pressure of business elsewhere, or by some unforeseen cause or accident."

In what case the court may direct an issue to be tried by a jury of the county next adjoining to the county of the city or town corporate in which the venue is laid.

Indictments.

49 G. 3. c. 91.

3 G. 4. c. 10.

When commissions shall not be opened and read at any places specified on the day named therein, the same may be opened and read the following day, not being Sunday, &c.

But commissions shall be opened and read on the days appointed, if not prevented.

When commission shall be opened under this act, the cause of delay shall be certified to the Lord Chancellor, &c.

§ 2. "In every case in which it shall happen that any such commission shall be opened and read under the provisions of and according to this act, the quorum commissioner, before whom the same shall be opened and read, shall, under his hand and seal, certify to the lord chancellor, lord keeper, or lords commissioners of the great seal for the time being, that the said commission was so opened, and the cause of the delay of opening and reading the same; which certificate shall be enrolled in the high court of chancery."

3 & 4 W. 4. c. 71. His majesty in council may direct at what places in any county assizes and sessions of gaol delivery shall be held, and that they may be holden in more than one place in a county on the same circuit.

By 3 & 4 W. 4. c. 71., repealing so much of 6 R. 2. c. 5. and of 11 R. 2. c. 11. as relates to the places for holding assizes, it is enacted, § 2. "that his majesty, by and with the advice of his privy council, shall have power from time to time to order and direct at what place or places in any county in *England* or *Wales* the assizes and sessions under the commissions of gaol delivery and, other commissions for the despatch of civil and criminal business, shall be holden, and to order and direct such assizes and sessions for the despatch of criminal and civil business to be holden at more than one place in the same county on the same circuit, and to order and direct the assizes and sessions under such commissions for the despatch of criminal business to be holden for the whole county at one place, and for the despatch of civil business at one or more place or places in such county, on the same circuit; and further to order and direct any special commissions of oyer and terminer and gaol delivery to be holden at any one or more places in any such county."

Power to divide counties for the purpose of holding assizes in different divisions of the same county.

§ 3. "In case his majesty, by and with the advice of his privy council, shall think fit to order and direct that the assizes or any such special commissions shall be holden at more than one place in any one county, it shall be lawful for his majesty, by and with the advice aforesaid, to divide any such county for the purposes of this act, and to make rules and regulations touching the venue in all cases, civil and criminal, then pending or thereafter to be pending, and to be tried within any division of such county so to be made as aforesaid; and touching the liability and attendance of jurors, whether grand jurors, special jurors, or common jurors, at the assizes and sessions as aforesaid, or at any sessions under any special commissions to be holden within any such division; and touching the use of any house of correction or prison as a common gaol, and the government and keeping thereof; and touching the alterations of any commissions, writs, precepts, or other proceedings whatsoever for carrying into effect the purposes of this act; and touching any other matters that may be requisite for carrying into effect the purposes of this act; and all such rules and regulations shall be of the like force and effect as if the same had been made by the authority of parliament, and shall be notified in the *London Gazette*, or in such other manner as his majesty, by and with the advice of his privy council, shall think fit to direct."

Power to direct the court of Common Pleas at Lancaster to be holden at any one or more places in the county, and

§ 4. "His majesty shall have power, from time to time, for the purpose of carrying this act into effect, to order and direct that the court of Common Pleas at *Lancaster* shall be holden at any one or more places in the county palatine of *Lancaster* as he shall think fit, and to divide the said county palatine for the purpose of the trial of civil causes and the transaction of other civil business in the said court, and to make the like rules and regulations

touching the venue in civil cases to be tried within any division of the said county, and the liability and attendance of jurors, whether special or common, at the court to be held within any such division, and touching the alterations of commissions, writs, precepts, or other proceedings for carrying into effect the purposes of this act, and touching any other matter that may be requisite for carrying into effect the purposes of this act; and all such rules and regulations shall be of the like force and effect as if the same had been made by the authority of parliament, and shall be notified in the *London Gazette*, or in such other manner as his majesty shall think fit.”

to divide the county for that purpose.

Attachment.

THIS word, as a law term, we have immediately from the French *attacher*, to tie, or make fast. The Italian word is *attacare*; the Spanish *attacar*; and the Saxon *tæcan*, to take.

It signifieth the taking of a man's body by commandment of a writ or precept; and is properly grantable in cases of contempt, against which for the most part all courts of record generally, but more especially those of *Westminster Hall*, and above all, the court of King's Bench, may proceed in a summary manner, according to their discretion. 2 *Haw. c. 22. § 1.* 4 *Blac. Com. 284.*

Definition.

In the case of *R. v. Bartlett*, 2 *Sess. Cas.* 176., it is said that generally the sessions have not a power to award an attachment: but the Court said, they would not determine how it would have been, if they had committed the person for contempt; but the ordinary and proper method is by indictment.

Power of sessions.

When an order, however, is confirmed by the court above, an attachment lies for non-performance of it; and therefore the court will not take security of the party for performance of it. *Q. v. Chaffey*, 2 *Ld. Raym.* 858. 1 *Bott.* 472.

Attainder.

[Stat. 54 G. 3. c. 145. 3 & 4 W. 4. c. 106.]

THE difference between a man attainted and convicted is, that a man is said to be convicted before he hath judgment, as if a man be convicted by verdict or confession, and when he hath his judgment upon the verdict or confession, then he is said to be attainted. 1 *Inst.* 390. b.

That is to say, his blood is become (*attinctus*) tainted, stained, or corrupted; insomuch that by the common law, in cases of treason or felony, his children or other kindred cannot inherit his estate, nor his wife claim her dower; and the same cannot be restored or saved, but by act of parliament; and therefore, in divers instances, there is a special provision by act of parliament that such or such an attainder shall not work corruption of blood, loss of dower, nor disherison of heirs. 1 *Inst.* 391. b.

Corruption of blood.

54 G. 3. c. 145.
Limiting corruption of blood to certain cases.

By stat. 54 G. 3. c. 145., intituled "An act to take away corruption of blood save in certain cases," it is enacted, that no attainder for felony which shall take place from and after the passing of this act, save and except in cases of the crime of high treason, or of the crimes of petit-treason or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons other than the right or title of the offender or offenders during his, her, or their natural lives only; and that it shall be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained if no such attainder had been, to enter into the same.

3 & 4 W. 4.
c. 106.
Descent allowed through attainted person, who has died.

By 3 & 4 W. 4. c. 106. § 10., when the person from whom the descent of any land is to be traced shall have had any relation, who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same by tracing his descent through such relation if he had not been attainted, unless such land shall have escheated in consequence of such attainder before Jan. 1., 1834.

By § 11., this act shall not extend to any descent which shall take place on the death of any person, who shall die before Jan. 1., 1834.

Attaint. See title Jurors.

Bail.

- I. *What it is.*
- II. *Difference between Bail and Mainprize.*
- III. *Who may or may not be bailed, and in what manner.*
[7 G. 4. c. 64.]
- IV. *Requiring excessive Bail.*
[1 W. & M. sess. 2. c. 2.]
- V. *Denying Bail where it ought to be granted.*
- VI. *Granting Bail where it ought to be denied.*
- VII. *Of Bail by Writ of habeas corpus.*
[31 C. 2. c. 2. — 43 G. 3. c. 140. — 44 G. 3. c. 102. 56 G. 3. c. 100.]
- VIII. *Acknowledging Bail in another Man's Name.*
[1 W. 4. c. 66.]

I. ~~What~~ What it is.

BAIL (from the French *bailler*, to deliver) signifies the delivery of a man out of custody, upon the undertaking of one or more persons for him, that he shall appear at a day limited, to answer and be justified by the law. 1 *Hale's Sum.* 96.

II. *Difference between Bail and Mainprize.*

The difference between bail and mainprize is, that mainpernors are only surety, but bail is a custody; and therefore the bail may retake the prisoner, if they doubt he will fly, and detain him, and bring him before a justice, and the justice ought to commit the prisoner in discharge of the bail, or put him to find new sureties. 1 *Hale's Sum.* 96.

III. *Who may or may not be bailed, and in what manner.*

[7 G. 4. c. 64.]

By the ancient law of the land, in all cases of felony, if the party accused could find sufficient sureties, he was not to be committed to prison; but afterwards it was provided by parliament that in case of homicide and certain other felonies the offender was not bailable. 2 *Inst.* 186. 4 *Bl. Comm.* 298.

By 7 G. 4. c. 64., which repeals the 3 *Edw.* 1. c. 15. and 1 & 2 *Ph. & M.* c. 13., the law respecting the taking of bail on charges of felony is now regulated. § 1. enacts, that where any person shall be taken on a charge of felony, or suspicion of felony, before one or more justices of the peace, and the charge shall be supported by positive and credible evidence of the fact, or by such evidence as, if not explained or contradicted, shall, in the opinion of the justice or justices, raise a strong presumption of the guilt of the person charged, such person shall be committed to prison in the manner herein-after mentioned; but if there shall be only one justice present, and the whole evidence given before him shall be such as neither to raise a strong presumption of guilt, nor to warrant the dismissal of the charge, such justice shall order the person charged to be detained in custody until taken before two justices at the least; and where any person so taken, or any person, in the first instance, taken before two justices of the peace, shall be charged with felony, or on suspicion of felony, and the evidence given in support of the charge shall, in their opinion, not be such as to raise a strong presumption of the guilt of the person charged, and to require his or her committal, or such evidence shall be adduced on behalf of the person charged as shall, in their opinion, weaken the presumption of his or her guilt, but there shall notwithstanding appear to them, in either of such cases, to be sufficient ground for judicial inquiry into his or her guilt, the person charged shall be admitted to bail by such two justices, in the manner herein-after mentioned; provided always, that nothing herein contained shall be construed to require any such justice or justices to hear evidence on behalf of any person so charged as aforesaid, unless it shall appear to him or them to be meet and conducive to the ends of justice to hear the same.

Bail at common law.

7 G. 4. c. 64.
Strong presumption of guilt.

Evidence which neither raises strong presumption nor warrants dismissal of charge.

Bail in felony, two justices necessary.
Not imperative on justices to hear evidence on behalf of the party charged.
Examination and information to be taken in writing.

§ 2. The two justices of the peace before they shall admit to bail, and the justice or justices before he or they shall commit to prison any person arrested for felony, or on suspicion of felony, shall take the examination of such person, and the information, upon oath, of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall

Bailment to be certified in writing.

Authority to bind by recognizance.

Justices to subscribe the bailment, &c.

Depositions, bailments, &c. to be returned to officer of court. So, in misdemeanor.

So, as to coroners.

Justice, &c. acting contrary to such provisions may be fined.

Insufficient bail.

Bail may be examined on oath.

Number of sureties and amount.

Special cases of imprisonment under particular statutes.

be material, into writing; and the two justices shall certify such bailment in writing; and every such justice shall have authority to bind by recognizance all such persons as know or declare any thing material touching any such felony or suspicion of felony, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great session or sessions of the peace at which the trial thereof is intended to be, then and there to prosecute or give evidence against the party accused; and such justices and justice respectively shall subscribe all such examinations, informations, bailments, and recognizances, and deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court.

§ 3. requires the examination and information in cases of misdemeanor to be taken in writing by the justice, and directs that he shall subscribe all examinations, informations, bailments, and recognizances, and return them to the proper officer of the court, in like manner as in cases of felony.

§ 4. contains an enactment to the like effect in regard to inquisitions taken before coroners.

§ 5. If any justice or coroner shall offend in any thing contrary to the true intent and meaning of these provisions, the court to whose officer any such examination, information, evidence, bailment, recognizance, or inquisition ought to have been delivered shall, upon examination and proof of the offence, in a summary manner, set such fine upon every such justice or coroner as the court shall think meet.

It is to be observed, that the provisions of the above statute in regard to taking bail, apply only to the case of prisoners brought before magistrates on a charge of felony.

If a person who has power to take bail be so far imposed upon as to suffer a prisoner to be bailed by insufficient persons, it is said, that either he, or any other person who hath power to bail him, may require the party to find better sureties, and to enter into a new recognizance with them, and may commit him on his refusal; for that insufficient sureties are no sureties. 2 *Haw. c. 15. § 4.*

And the person who is to take the bail may examine them on their oaths concerning their sufficiency. 2 *Haw. c. 15. § 4. 2 Hale, 125.*

No person ought, in any case, to be bailed for felony by less than two; and it is said to be the practice of the K. B. not to admit any person to bail upon a *habeas corpus*, on a commitment for treason or felony without four sureties. The only sure way of proceeding in this case is to take care that every one of the bail be of ability sufficient to answer the sum in which they are bound, which ought never to be less than 40*l.* for a capital crime, but may be as much higher as the justices in discretion shall think fit to require, upon consideration of the ability and quality of the prisoner, and the nature of the offence. 2 *Haw. c. 15. § 4.*

There are furthermore many statutes which prohibit bail and mainprize in very many cases, and allow the same in many others, which are interspersed among the several titles which treat of those matters.

And where a statute ordaineth that an offender shall be imprisoned at the king's will or pleasure, there the prisoner cannot be bailed till he hath redeemed his liberty by such fine or ransom as shall be assessed by the king's justices in his courts. *Dalt.* c. 167. pp. 294, 295.

And those who, on their examination, own themselves guilty of a felony alleged against them, and are charged in their *mitimus* with the felony so confessed, seem to be excluded from bail; for bail is only proper where it stands indifferent whether the party be guilty or innocent of the accusation against him. 2 *Haw.* c. 15. § 40.

Although a person be committed to be detained without bail or mainprize, yet, if the offence be by law bailable, he that hath power of bailing may bail him. 2 *Hale*, 135.

It seems to be agreed that any one justice might always in his discretion either bail or imprison one who has given another a dangerous wound, according as it shall appear from the whole circumstances that the party is most likely to live or die; for that every such justice being a principal conservator of the peace, the offence at present being only an enormous breach thereof, and no felony, seems properly to come under his consuance. 2 *Haw.* c. 15. § 54.

Commitment without bail or mainprize.

Bail in case of a dangerous wound.

IV. Requiring excessive Bail.

By the Declaration of Rights, stat. 1 W. & M. sess. 2. c. 2., excessive bail ought not to be required.

V. Denying Bail where it ought to be granted.

To refuse bail where the party ought to be bailed (the party offering the same) is a misdemeanor, punishable not only by the suit of the party, but also by indictment. 2 *Haw.* c. 15. § 13. *Hale's Sum.* 97.

VI. Granting Bail where it ought to be denied.

Admitting bail where it ought not is punishable by the judges of assize by fine; or punishable as a negligent escape at common law. *Hale's Sum.* 97.

A justice of *Surrey* committed a man on suspicion of stealing a mare, and bound over the owner to prosecute. Afterwards, upon examining two other persons, he admitted the party to bail. The prosecutor appeared at the assizes, and found a bill; but the party accused did not appear. And the court granted an information against the justice, declaring they should not have bailed the man themselves. *R. v. Clarke*, 2 *Stra.* 1216.

Information granted against a justice for bailing a felon.

"If any justice of the peace shall take bail where he ought not, or wittingly or willingly take insufficient bail, and the party appear not, the said justice not only to be proceeded against according to law, but likewise to be complained of to the lord chancellor, that he may be turned out of his commission." 6th Order of the Judges to be observed by Justices of the Peace, O. B. 16 C. 2. From *Kelyng's Reports*, p. 3.

VII. Of Bail by Writ of Habeas Corpus.

31 C. 2. c. 2.

If bail cannot otherwise be obtained, the law hath provided a remedy in most cases by the *habeas corpus* act, 31 C. 2. c. 2. The substance of which is briefly this:—

31 C. 2. c. 2.

Causes of commitment.

If the commitment be for any crime, unless for treason or felony, plainly and specially expressed in the warrant of commitment; or unless the person be committed and charged as accessory before the fact to any petty treason or felony, or upon suspicion thereof, or with suspicion of petty treason or felony, which petty treason or felony shall be plainly and specially expressed in the warrant of commitment; the person so committed, by suing out a *habeas corpus*, shall be discharged on bail, unless detained for such offence as by law is not bailable. §§ 2, 3. 21.

Within what

time to be

brought to trial.

§ 7. Also if a person be committed for treason or felony especially expressed, yet if he shall, in open court, the first week of the term, or first day of assize, petition to be tried, and shall not be indicted some time in the next term or assize after the commitment, he shall upon motion the last day of the term or assize be bailed, unless it shall appear to the judge upon oath that the king's witnesses could not be produced within that time, and then, if he be not tried in the second term or assize, he shall be discharged.

Penalty upon officers.

§ 5. If any officer or officers, his or their under-officer or under-officers, under-keeper or under-keepers, or deputy, shall, upon demand made by the prisoner or person in his behalf, refuse to deliver, or within six hours after demand shall not deliver, to the person so demanding, a true copy of the warrant of commitment, all and every the head-gaoler and keepers of such prisons, and such other person in whose custody the prisoner shall be detained, his executors or administrators, shall forfeit to the prisoner or party grieved, his executors or administrators, the sum of 100*l.* for the first offence, and 200*l.* for the second.

Demand of copy of commitment.

Governor, under keepers, &c.

The construction of this section is, that if the governor be present, there is then no deputy or under-keeper, on whom a service of the demand can be made; but if the governor be not present, then the deputy may be served: and if the deputy have no deputy, then in the absence of the deputy, service may be on the turnkey, or may be left at the gaol, for it is the duty of the governor to leave some person in his place. But if the gaoler be in the gaol and accessible, the demand must be made on him; if he be not accessible, it may be on the deputy. And at all events, the demand should be served in such a way that the person to whom it was delivered should understand its nature; and where the principal is (as in this case he was) within the gaol, some pains should be taken that it should come to his hands. *Huntley v. Luscombe*, M. 42. G. 3. 2 Bos. & Pull. 530.

How application for writ is to be made in vacation time.

By § 3., the writ is to be marked, *Per statutum tricesimo primo Caroli secundi regis*, and to be signed by the person awarding the same; and out of term time, the application for the writ is to be made in writing by the prisoner or any person for him, attested and subscribed by two witnesses who were present at the delivery thereof to the lord chancellor or one of the judges; and a copy of the warrant of commitment shall be produced before them, or oath made that such copy was denied.

Upon such application, the lord chancellor or judges respectively shall award a *habeas corpus* under the seal of their court, directed to the officer or keeper, returnable *immediatē*. To be awarded immediatē.

By § 10., if, on such application, in vacation time, the lord chancellor, or any of the judges, on view of the warrant of commitment, &c., deny any writ of *habeas corpus* by that act required to be granted, they shall forfeit 500*l.* to the prisoner or party grieved. Denial of writ.
Penalty.

§ 4. But if any person had wilfully neglected by the space of two terms to apply for his enlargement, he shall not have a *habeas corpus* granted in the vacation. Laches.

§ 2. And the charges of bringing the prisoner shall be ascertained by the judge or court that awarded the writ, and indorsed thereon, not exceeding 12*d.* a mile. Charges of removal.

The writ shall be served on the keeper, or left at the gaol with any of the under officers; and the charges so indorsed shall be paid or tendered to him, and the prisoner shall give bond to pay the charges of carrying him back, if he shall be remanded, and that he will not make any escape by the way. *Ibid.*

This done, the officer shall, within three days after service (if it be within twenty miles), return the writ and bring the body, and shall then likewise certify the true cause of the imprisonment; if above twenty miles and less than a hundred, then within ten days; if above a hundred, then within twenty days; on like pain as before, § 5. *supra.* *Ibid.* Time of removal.

§ 18. But after the assizes are proclaimed for the county where the prisoner is detained, he shall not be removed, but before the judge of assize.

§ 3. If it shall appear to the said lord chancellor or judges that the prisoner is detained on a legal process, order, or warrant, out of some court that hath jurisdiction of criminal matters, or by warrant of a judge or justice of the peace for matters, for which by law he is not bailable; in such case the prisoner shall not be discharged. If detainer be legal.

And if he shall be discharged, he shall thereupon enter into recognizance to appear on his trial; and the writ and return thereof and recognizance shall be certified into the court where the trial must be. *Ibid.*

§ 8. But persons charged in debt, or other action, or with process in any civil cause, after their discharge for a criminal offence, shall be kept in custody for such other suit.

§ 6. And persons so set at large shall not be recommitted for the same offence, unless by order of court, on pain of 500*l.* to the party grieved.

This is a remedial act, and indeed the most highly remedial act which stands upon the statute book. But in respect to the penal part, the most remedial act may contain penal clauses. *Per Chambre J. 2 Bos. & Pull. 539.* Statute remedial.

Two things I shall observe upon this statute : —

1. That although the constable, by his own authority, without any warrant of commitment, may carry offenders to gaol, and this was the method of securing prisoners before there were any justices of the peace, yet, since the institution of the office of justices of the peace, it is better that they be carried before a justice, to be sent by him to gaol by warrant of commitment; otherwise Party may be bailed, unless there be warrant of commitment.

they have a right to be bailed upon this act, whatever the offence may be.

Warrant must specify the nature of the treason or felony.

Court of K. B. may bail in all cases.

2. That the warrant of commitment ought to set forth the cause specially; that is to say, not for treason, or felony in general, but treason *for counterfeiting the king's coin*, or felony, *for stealing the goods of such an one of such a value*, and the like; that so the court may judge thereupon, whether or not the offence be such for which a prisoner ought to be admitted to bail.

The court of king's bench (or any judge thereof in time of vacation) may bail for any crime whatsoever, be it treason, murder, or any other offence, according to the circumstances of the case. 4 *Bla. Com.* 299. 2 *Haw. c.* 15. § 77.

This court (K. B.) has undoubtedly a discretionary power to bail in all cases whatsoever. *Per* *Ld. Mansfield C. J., Rudd's case*, 1 *Cowp.* 333.

A warrant of commitment for felony must contain the species of felony. *Vide per* *Pratt C. J., 2 Wils.* 158.

Warrant of commitment informal.

But although a warrant of commitment be defective or informal, yet, if upon the depositions returned, the court see that a felony has been committed, and that there is reasonable ground of charge against a prisoner, they will not bail, but remand him. *R. v. Marks and others*, 3 *East*, 157. *R. v. Horner, Cald.* 295. *S. P.*

Rule by K. B. for bailment by a magistrate.

Where it appears to the court of K. B. that a prisoner ought to be bailed for felony, if he be unable to defray the expences of being brought to *Westminster* for that purpose, they will grant a rule to shew cause why he should not be bailed by a magistrate in the country, with a *certiorari* to return the depositions before them. *R. v. Jones, M.* 58 *Geo.* 3. 1 *B. & A.* 209. *N. B.* This was a case of manslaughter. The rule was afterwards made absolute.

43 *G. 3. c.* 140. Any judge of the courts at Westminster may award a writ of *habeas corpus* for bringing up prisoners for trial or examination before courts-martial, commissioners of bankrupt, &c.

By stat. 43 *Geo.* 3. *c.* 140., after reciting that "Whereas writs of *habeas corpus* have been frequently awarded by the judges of H. M.'s courts of record at *Westminster*, for bringing persons detained in custody under civil or criminal process before magistrates or courts of record, as well for trial as for examination, touching matters depending before such magistrates or courts respectively (a): but doubts have arisen whether such judges have power to award writs of *habeas corpus* for bringing persons de-

(a) The court of K. B. will grant a *habeas corpus* to the Warden of the Fleet to take the body of a debtor confined there before a magistrate, to be examined from time to time respecting a charge of felony or misdemeanor. *Ex parte Griffiths, E.* 1822. 5 *B & A.* 730. *Chitty* moved for a writ of *habeas corpus* to be directed to the Warden of the Fleet, commanding him to carry the body of *G.* before the Lord Mayor or some other justice of the city of *London*, at the Mansion House, there from day to day to be examined touching a charge of felony and misdemeanor. It appeared that a warrant had been obtained from the Lord Mayor against *G.*, who had been a master of a ship, for the purpose of proceeding to convict him of the offence of refusing to deliver up the certificate of registry, pursuant to the stat. 34 *G. 3. c.* 68. § 18. (see now 3 & 4 *W. 4. c.* 55. *Ship's*) and in order to enable the owner to obtain a registry *de novo* of the ship, if necessary. *G.* being, however, at this time a prisoner in the Fleet for debt, there was no power of taking him under the warrant, (see *R. v. Woodham, Stra.* 828.) unless the Court granted this writ. The Court thought it a proper case for their interference, and thereupon directed the writ to issue.

tained as aforesaid before courts martial, commissioners of bankrupt, commissioners for auditing the public accounts, or other commissioners acting under commission or warrant from H. M.; and whereas it is expedient to make provision for bringing prisoners before such courts martial or commissioners for the purposes herein-before mentioned, enacts, that any judge of the courts at Westminster may award a writ of *habeas corpus* to bring any prisoner, in any gaol in England, before a court-martial, commissioners of bankrupt, commissioners for auditing the public accounts, or other commissioners acting by virtue of any commission or warrant from H. M., in like manner as they award such writs to bring persons detained in gaol before magistrates or courts of record.

By stat. 44 Geo. 3. c. 102., any judge of the courts of K. B. or C. P. of England and Ireland respectively, or any baron of the court of exchequer of the degree of the coif in England, or any justice of O. and T. or gaol delivery, being such judge or baron aforesaid, may, at his discretion, award a writ of *habeas corpus*, for bringing any prisoner detained in any gaol or prison before any of the said courts, or any sitting of *nisi prius*, or before any other court of record, to be there examined as a witness, and to testify the truth before such courts, or any other grand, petit, or other jury, in any causes or matters, civil or criminal, whatsoever, which now are or hereafter shall be depending, or to be inquired into or determined in any of the said courts.

The privileges of the famous act of *habeas corpus* before mentioned, which (as *De Lolme*, p. 191., observes) "is considered in England as the second great charter, and has extinguished all the resources of oppression," have been still further extended by stat. 56 Geo. 3. c. 100. intituled "An act for more effectually securing the liberty of the subject," which, after reciting that "whereas the writ of *habeas corpus* hath been found by experience to be an expeditious and effectual method of restoring any person to his liberty, who hath been unjustly deprived thereof: and whereas extending the remedy of such writ, and enforcing obedience thereunto, and preventing delays in the execution thereof, will be advantageous to the public: and whereas the provisions made by an act passed in England in the thirty-first year of king Charles the Second, intituled "An act for the better securing the liberty of the subject, and for prevention of imprisonment beyond the seas," and also by an act passed in Ireland in the twenty-first and twenty-second years of his present Majesty, intituled 'An act for better securing the liberty of the subject,' only extend to cases of commitment or detainer for criminal or supposed criminal matter;" it is enacted, "that where any person shall be confined or restrained of his or her liberty (otherwise than for some criminal or supposed criminal matter, and except persons imprisoned for debt or by process in any civil suit) within that part of G. B. called England, dominion of Wales, or town of Berwick-upon-Tweed, or the isles of Jersey, Guernsey, or Man, it shall and may be lawful for any one of the barons of the exchequer, of the degree of the coif, as well as for any one of the justices of one bench or the other; and where any person shall be so confined in Ireland, it shall and may be lawful for any one of the barons of the exchequer, or of

44 G. 3. c. 102.
Any judge of the superior courts in England or Ireland may award writs of *habeas corpus* for bringing prisoners before courts of record to be examined as witnesses.

56 G. 3. c. 100.

As to persons restrained of their liberty, otherwise than for criminal matters or by process in civil suit.

56 G. S. c. 100. the justices of one bench or the other in *Ireland*, and they are hereby required, upon complaint made to them by or on the behalf of the person so confined or restrained, if it shall appear by affidavit or affirmation (in cases where by law an affirmation is allowed) that there is a probable and reasonable ground for such complaint, to award in vacation time a writ of *habeas corpus ad subjiciendum*, under the seal of such court, whereof he or they shall then be judges or one of the judges, to be directed to the person or persons in whose custody or power the party so confined or restrained shall be, returnable immediately before the person so awarding the same, or before any other judge of the court under the seal of which the said writ issued."

Non-obedience to such writ to be a contempt of court, and punishable accordingly.

§ 2. enacts, "that if the person or persons to whom any writ of *habeas corpus* shall be directed according to the provision of this act, upon service of such writ, either by the actual delivery thereof to him, her, or them, or by leaving the same at the place where the party shall be confined or restrained, with any servant or agent of the person or persons so confining or restraining, shall wilfully neglect or refuse to make a return or pay obedience thereto, he, she, or they shall be deemed guilty of a contempt of the court, under the seal whereof such writ shall have issued; and it shall be lawful to and for the said justice or baron, before whom such writ shall be returnable, upon proof made by affidavit of wilful disobedience of the said writ, to issue a warrant under his hand and seal, for the apprehending and bringing before him, or before some other justice or baron of the same court, the person or persons so wilfully disobeying the said writ, in order to his, her, or their being bound to the king's majesty, with two sufficient sureties, in such sum as in the warrant shall be expressed, with condition to appear in the court of which the said justice or baron is a judge, at a day in the ensuing term to be mentioned in the said warrant, to answer the matter of contempt with which he, she, or they are charged; and in case of neglect or refusal to become bound as aforesaid, it shall be lawful for such justice or baron to commit such person or persons so neglecting or refusing to the jail or prison of the court of which such justice or baron shall be a judge, there to remain until he, she, or they shall have become bound as aforesaid, or shall be discharged by order of the court in term time, or by order of one of the justices or barons of the court in vacation; and the recognizance or recognizances to be taken thereupon shall be returned and filed in the same court, and shall continue in force until the matter of such contempt shall have been heard and determined, unless sooner ordered by the court to be discharged: provided, that if such writ shall be awarded so late in the vacation by any one of the said justices or barons, that, in his opinion, obedience thereto cannot be conveniently paid during such vacation, the same shall and may, at his discretion, be made returnable in the court of which the said justice or baron shall be a justice or baron, at a day certain in the next term; and the said court shall and may proceed thereupon, and award process of contempt in case of disobedience thereto, in like manner as upon disobedience to any writ originally awarded by the said court: provided also, that if such writ shall be awarded by the court of king's bench, or the court of common pleas, or court of exchequer, in the said countries respectively, which last-

Judges may make writs of *habeas corpus* issued in vacation, returnable in court in the next term, in certain cases.

Courts to make writs issued in term, returnable in vacation.

mentioned court shall have like power to award such writs as the respective courts of king's bench and common pleas in each of the said countries now have, in term, but so late that, in the judgment of the court, obedience thereto cannot be conveniently paid during such term, the same shall and may, at the discretion of the said court, be made returnable at a day certain in the then next vacation, before any justice or baron of the degree of the coif, or if in *Ireland*, before any justice or baron of the same court, who shall and may proceed thereupon, in such manner as by this act is directed concerning writs issuing in and made returnable during the vacation." 56 G.S. c. 100.

§ 3. enacts, "that in all cases provided for by this act, although the return to any writ of *habeas corpus* shall be good and sufficient in law, it shall be lawful for the justice or baron, before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in such return, by affidavit or by affirmation (in cases where an affirmation is allowed by law), and to do therein as to justice shall appertain; and if such writ shall be returned before any one of the said justices or barons, and it shall appear doubtful to him, on such examination, whether the material facts set forth in the said return, or any of them, be true or not; in such case it shall and may be lawful for the said justice or baron to let to bail the said person so confined or restrained, upon his or her entering into a recognizance with one or more sureties, or, in case of infancy or coverture, or other disability, upon security by recognizance, in a reasonable sum, to appear in the court of which the said justice or baron shall be a justice or baron, upon a day certain in the term following, and so from day to day as the court shall require, and to abide such order as the court shall make in and concerning the premises; and such justice or baron shall transmit into the same court the said writ and return, together with such recognizance, affidavits, and affirmations; and thereupon it shall be lawful for the said court to proceed to examine into the truth of the facts set forth in the return, in a summary way, by affidavit or affirmation (in cases where by law affirmation is allowed), and to order and determine touching the discharging, bailing, or remanding the party."

Judges to inquire into the truth of facts contained in return, by affidavit.

Judge to bail on recognizance to appear in term, &c.

§ 4. enacts, "that the like proceeding may be had in the court for controverting the truth of the return to any such writ of *habeas corpus*, awarded as aforesaid, although such writ shall be awarded by the said court itself, or be returnable therein."

Court may controvert the truth of the return.

§ 5. enacts, "that a writ of *habeas corpus*, according to the true intent and meaning of this act, may be directed and run into any county palatine or cinque port, or any other privileged place within that part of *G. B.* called *England*, dominion of *Wales*, and town of *Berwick-upon-Tweed*, and the isles of *Jersey*, *Guernsey*, and *Man*, respectively; and also into any port, harbour, road, creek, or bay, upon the coast of *England* or *Wales*, although the same should lie out of the body of any county; and if such writ shall issue in *Ireland*, the same may be directed and run into any port, harbour, road, creek or bay, although the same should not be in the body of any county; any law or usage to the contrary in anywise notwithstanding."

Writ may run into counties palatine, cinque ports, and privileged places, &c.

§ 6. enacts, "that the several provisions made in this act, touching the making writs of *habeas corpus* issuing in time of this act respect-

56 G. 3. c. 100.

ing return of
writs, disobedience thereof,
&c. to be applicable to all
cases within
31 C. 2. c. 2.

vacation, returnable into the said courts, or for making such writs awarded in term time, returnable in vacation, as the cases may respectively happen, and also for making wilful disobedience thereto a contempt of the court, and for issuing warrants to apprehend and bring before the said justices or barons, or any of them, any person or persons wilfully disobeying any such writ; and in case of neglect or refusal to become bound as aforesaid, for committing the person or persons so neglecting or refusing to jail as aforesaid, respecting the recognizances to be taken as aforesaid, and the proceeding or proceedings thereon, shall extend to all writs of *habeas corpus* awarded in pursuance of the said act, passed in *England* in the thirty-first year of the reign of king *Charles* the Second, or of the said act passed in *Ireland* in the twenty-first and twenty-second years of his present majesty, and hereinbefore recited, in as ample and beneficial a manner as if such writs and the said cases arising thereon had been herein-before specially named and provided for respectively."

VIII. Acknowledging Bail in another Man's Name.

Fraudulently
acknowledging
any recognizance or bail.

By 1 *W. 4. c. 66. § 11.*, if any person shall, before any court, judge, or other person lawfully authorized to take any recognizance or bail, acknowledge any recognizance or bail in the name of any other person not privy or consenting to the same, whether such recognizance or bail, in either case, be or be not filed, he shall be guilty of felony, and liable, at the discretion of the court, to be transported for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years. See tit. *Forgery*.

Transportation
for life, &c.

Form of Bail.

Westmorland. *BE it remembered, that on the* ——— *day of* ——— *in the* ——— *year of the reign of* ——— *A. O. of* ——— *yeoman, A. B. of* ——— *yeoman, and B. B. of* ——— *yeoman, came before us John Moore, esquire, and Richard Burn, doctor of laws, two of his majesty's justices of the peace in and for the said county, one whereof is of the quorum, and severally acknowledged themselves to owe to our said lord the king, that is to say, the said A. O. 20*l.* and the said A. B. and B. B. 10*l.* each, to be respectively levied of their lands and tenements, goods and chattels, if the said A. O. shall make default in the performance of the condition indorsed [or underwritten].*

John Moore,
Richard Burn.

The condition of this recognizance is such, that if the within [above] bound A. O. shall personally appear before the justices of our sovereign lord the king assigned to keep the peace within the said county, and likewise to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at the next general quarter sessions of the peace [or, before his majesty's justices of gaol delivery, at the next general gaol delivery] to be holden in and for the said county, then and there to answer to our said sovereign lord the king, for and concerning the felonious taking and

stealing of——the property of A. M. of——yeoman, with the suspicion whereof the said A. O. stands charged before us the said justices, and to do and receive what shall by the court be then and there enjoined him, and shall not depart the court without licence, then the above [within] written recognizance shall be void.

Or if the Party is in Prison, and so absent, Lord Hale says, this is the true Form from Lambard.

Westmorland. **BE** it remembered, that on the——day of —— in the —— year of the reign of —— before us John Moore, esquire, and Richard Burn, doctor of laws, two of the justices of our said lord the king, assigned to keep the peace within the said county, and one of us of the quorum, at Grimeshill in the said county, did come A. B. and B. B. of —— in the said county, yeomen, and took in bail until the next gaol delivery to be holden in the said county, one A. O. of —— labourer, taken and detained in prison for suspicion of a certain felony in stealing —— the property of —— and took upon themselves each of the said A. B. and B. B., under the penalty of 20*l.* of good and lawful money of Great Britain, of the goods and chattels, lands and tenements of them and each of them, to the use of our said lord the king, his heirs and successors, to be levied, if the said A. O. shall not personally appear at the said next gaol delivery, before the justices of our said lord the king, assigned to deliver the said gaol, to stand to right concerning the felony aforesaid, according to the law and custom of England. Given under our seals, &c.

[But the seal need not be, for they are judges of record; only it may be barely subscribed by them: or thus,]

Taken and acknowledged the day and
year above written, before us the
abovesaid

John Moore,
Richard Burn.

And hereupon a Warrant issues for his Deliverance, thus:—

Westmorland. **JOHN MOORE**, esquire, and Richard Burn, doctor of laws, two of the justices of —— and one of us of the quorum, to the keeper of his majesty's gaol at —— in the said county, greeting. Forasmuch as A. O. of —— labourer, hath before us found sufficient sureties to appear before the justices of gaol delivery at the next general gaol delivery to be holden in the said county, to answer to such things as shall be then on the behalf of our said sovereign lord objected against him, and namely, to the felonious taking of —— (for the suspicion whereof he was taken and committed to your said gaol); We command you on the behalf our said sovereign lord, that if the said A. O. do remain in your said gaol for the said cause, and for none other, then you forbear to detain him any longer, but that you deliver him thence, and suffer him to go at large, and that upon the pain that will thereon ensue. Given under our seals at Orton in the said county, the —— day of —— in the year ——.

Lord Hale says, the advantage of this latter kind of bail is this; that it is not only a recognizance in a sum certain, but also a real

bail, and they are his keepers, and may be punished by fine beyond the sum mentioned in the recognizance, if there be cause; and may reseize him if they doubt his escape, and have him committed, and so be discharged of the recognizance. 2 Hale, 127.

Bank Notes, &c. See Larceny.

Banks, destroying.

[22 H. 8. c. 11.—42 G. 3. c. 32.—7 & 8 G. 4. c. 30.]

22 H. 8. c. 11.
Powdike.

BY stat. 22 H. 8. c. 11., every perverse and malicious person cutting down and breaking up of any part of the dike called *New Powdike* in *Marshland*, in the county of *Norfolk*, and the broken dike called *Old Field Dike*, by *Marshland*, in the isle of *Ely*, or any other bank being parcel of the rind and uppermost part of the said country of *Marshland*, made for the defence and salvation of the said country of *Marshland*, shall be adjudged guilty of felony. And the sessions may determine the same.

42 G. 3. c. 32.
Banks, &c.
near Plymouth.

By stat. 42 G. 3. c. 32., which is intituled, "An act to enable H. M. to grant certain parcels of land, situate between *Great Prince Rock* and the village of *Crab Tree*, called *Tothill Bay Bank*, and *Lipson Bay*, near to the borough of *Plymouth*, in the county of *Devon*, to certain persons therein named, for the purpose of em-banking and preserving the same from the sea," it is enacted, § 46., "that if any person or persons shall wilfully and maliciously break, throw down, damage, or destroy any of the banks, mounds, dams, or other works to be erected or made by virtue of this act, every such person shall be deemed guilty of felony, and shall, on being lawfully convicted thereof, be subject to the like pains and penalties as in cases of felony; and the court by or before whom such person shall be tried and convicted shall have power and authority to cause such person to be punished in like manner as felons are directed to be punished by the laws and statutes of this realm, or, in mitigation of such punishment, such court may award such sentence as the law directs in cases of petty larceny." Satisfaction (§ 47.) shall also be made upon damaging works.

As to destroying bent on the north-west coasts of *England*, see tit. Bent.

Destroying any
sea bank, &c.
or works on any
river or canal.

By 7 & 8 G. 4. c. 30. § 12., "if any person shall unlawfully and maliciously break down or cut down any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or shall unlawfully and maliciously throw down, level, or otherwise destroy any lock, sluice, floodgate, or other work on any navigable river or canal, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment; and if any person shall un-

Punishment.

lawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground and used for securing any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, or shall unlawfully and maliciously open or draw up any flood-gate, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

Removing the piles of any sea bank, &c., or doing any damage to obstruct the navigation of a river or canal.
Felony.
Punishment.

Bankrupt.

In what cases he may be liable criminally.

BY 6 G. 4. c. 16. § 99., any bankrupt who shall, in any examination before the commissioners, or in any affidavit, &c. wilfully and corruptly swear falsely, shall suffer the pains and penalties of wilful and corrupt perjury; and the same of the affirmation of Quakers.

6 G. 4. c. 16.
False oath,
perjury.

By § 112., if any bankrupt shall not within the time there prescribed surrender himself to the commissioners, and sign or subscribe such surrender, and submit to be examined before them, or if such bankrupt on such examination shall not discover all his real or personal estate, &c. or shall not on such examination give up to the commissioners all such part of such estate, and all such books, &c. relating thereto as are in his possession, &c. (except the necessary wearing apparel of himself, his wife and children), or if he shall remove, conceal, or embezzle any part of such estate, to the value of 10*l.* or upwards, or any books of account, &c. relating thereto, with intent to defraud his creditors, such bankrupt shall be deemed guilty of felony, and shall be liable to be transported for life, or for such term not less than seven years as the court shall adjudge, or to be imprisoned only, or imprisoned and kept to hard labour in any gaol, penitentiary, or house of correction for any term not exceeding seven years.

Not surrendering, &c., concealing or embezzling estate, &c.

Punishment.

Barratry.

- I. *What it is.*
- II. *How punished.*

I. *What it is.*

THIS word *barratry* we have received either from the *Danes* or *Normans*, or both; for *barrata* in the *Danish* and *baret* in the *Norman*, do equally signify a quarrel or contention.

Definition.

And a *barrator* in legal acceptation, doth signify a *common mover, exciter, or maintainer of suits or quarrels, either in courts or in the country*. 1 Inst. 368. 1 Haw. c. 81. § 1.

A common mover.] It seems clear that no one can be a barrator in respect of one act only; but every indictment for such crime must charge the defendant with being a *common barrator*. 1 Haw. c. 81. § 5.

Mover, exciter, or maintainer.] Yet it seemeth that an attorney is in no danger of being judged guilty of an act of barratry, in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy. 1 Haw. c. 81. § 1.

Also it hath been holden that a man shall not be judged a barrator in respect of any number of false actions brought by him in his own right; for in such cases he is liable to costs. 1 Haw. c. 81. § 4.

In courts.] Either courts of record, or not of record, as in the county, hundred, or other inferior courts. 1 Inst. 368.

Or in the country.] In three manners: 1. In disturbance of the peace. 2. In taking or keeping possession of lands in controversy, not only by force, but also by subtilty and deceit, and most commonly in suppression of truth and right. 3. By false inventions, and sowing calumniation, rumours, and reports, whereby discord and disquiet may grow between neighbours. 1 Inst. 368.

II. *How punished.*

[34 Ed. 3. c. 1.—12 G. 1. c. 29.]

34 Ed. 3. c. 1.

By stat. 34 Ed. 3. c. 1., the justices of the peace shall have power to restrain all barrators, and to pursue, arrest, take, and chastise them, according to their trespass or offence.

And although this statute does not create the offence, but supposes it at common law, and only appoints the punishment, yet an indictment of barratry, concluding *against the form of the statute*, is holden to be good, and agreeable to many precedents. Cro. Eliz. 148. 1 Haw. c. 81. § 10.

But it hath been resolved that such indictment is not good, without also concluding *against the peace*; for this is an essential part of it, as being an offence by the common law. *Id.* § 12.

Indictment
need not allege
particulars.

And it hath been holden that an indictment of this kind may be good, without alleging the offence at any certain place; because, from the nature of the thing, consisting of the repetition of several acts, it must be intended to have happened in several places: for which cause it is said that a trial ought to be by a jury from the body of the county. *Id.* § 11.

This case, and that of a common scold, seem to be the only offences for which a general indictment will lie, without shewing any of the particular facts in the indictment; for barratry is an offence of a complicated nature, consisting in the repetition of divers acts in disturbance of the peace, and it would be too prolix to enumerate them in the indictment; and therefore experience hath settled it to be sufficient to charge a man generally as a common barrator, and before the time to give the defendant a note of the particular matters which are intended to be proved against him; for otherwise it will be impossible to prepare a de-

fence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances; and therefore the court generally will not suffer the prosecution to go on in the trial of the indictment, without such note being given to the defendant. 1 *Haw. c. 81. § 13.* 2 *Haw. c. 25. § 59.*

But a note of particulars must be given previous to trial.

As to the kind and manner of punishment, it is said that if the offender be a common person, he shall be fined and imprisoned, and bound to his good behaviour; and if he be of any profession relating to the law, he ought also to be further punished, by being disabled to practise for the future. 1 *Haw. c. 81. § 14.*

Punishment.

And by stat. 12 G. 1. c. 29. § 4., if any person, who hath been convicted of common barratry, shall practise as an attorney or solicitor, he shall be transported for seven years.

12 G. 1. c. 29.

Bastard.

Murder of. See tit. *Homicide*.

IT is to be observed, that 9 G. 4. c. 31. § 13., which makes it highly penal to administer poison or noxious thing or medicine, or to use means with intent to procure the miscarriage of any woman; and § 14., by which it is made an indictable offence, if any woman by the secret disposing of the body of a dead child endeavour to conceal its birth, apply to the case of children generally, and not only to such as were likely to be born, or were actually born, bastards. See tit. *Homicide*.

Procuring miscarriage.

Concealing birth.

Bigamy. See *Polygamy*.

Black Act.

THE stat. so called (9 G. 1. c. 22.) having been repealed, this title is now to be omitted, and the law and cases relating to the species of offences to which it applies will be found under tit. *Malignant Injuries*. See also tit. *Homicide*, § *Murder*.

Black Lead.

[7 & 8 G. 4. c. 29. § 37.] See tit. *Larceny*.

Blasphemy and Profaneness.

[1 Edw. 6. c. 1.—1 Eliz. c. 2.—3 J. 1. c. 21.—9 & 10 W. 3. c. 32.—22 G. 2. c. 33.—53 G. 3. c. 160.]

ALL blasphemies against God, as denying his being or providence, and all contumelious reproaches of Jesus Christ; all profane scoffing at the Holy Scriptures, or exposing any part of

Blasphemy.

them to contempt or ridicule; impostures in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments; and all open lewdness grossly scandalous—are punishable by fine and imprisonment, and also such corporal punishment as to the court shall seem meet, according to the heinousness of the crime. 1 *Haw. c. 5. § 6.* 1 *East's P. C. 3.*

Depraving the
established
religion.

Also seditious words, in derogation of the established religion, are indictable, as tending to a breach of the peace. 1 *Haw. c. 5. § 6.*

By 1 *Ed. 6. c. 1. (a)* persons reviling the Sacrament of the Lord's Supper, by contemptuous words or otherwise, are made subject to imprisonment.

Speaking, &c.
in derogation of
Book of Com-
mon Prayer.

By 1 *Eliz. c. 2.* any minister speaking in derogation of the Book of Common Prayer, is to suffer the punishments there specified, to be increased if he repeats his offence: and if any person whatever shall in plays, songs, or open words, speak in derogation, depraving or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be read in its stead, he is to forfeit, for the first offence, 100 marks; for the second, 400; and for the third, all his goods, and to be imprisoned for life.

3 J. 1. c. 21.
Representing
the Deity in
stage plays.

By stat. 3 *J. 1. c. 21.*, if any person shall, in any stage play, interlude, show, may-game, or pageant, jestingly or profanely speak or use the holy name of God, or of Christ Jesus, or of the Holy Ghost, or of the Trinity, he shall forfeit 10*l.*; half to the king, and half to him that shall sue.

9 & 10 W. 3.
c. 32.
Christians de-
praving the
Christian
religion.

And by stat. 9 & 10 *W. 3. c. 32.*, if any person having been educated in, or at any time having made profession of the Christian religion in this realm, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy Trinity to be God; or shall assert or maintain there are more Gods than one; or shall deny the Christian religion to be true, or the Holy Scriptures to be of divine authority; and shall be convicted thereof, in any of the courts at *Westminster*, or at the assizes, on the oaths of two witnesses, he shall, for the first offence, be incapable to have any office, ecclesiastical, civil, or military (unless he shall renounce such opinion in the court where he was convicted within four months after such conviction); and for the second offence he shall be disabled to be plaintiff, guardian, executor, or administrator, to take any gift or legacy, or to bear any office, and shall be imprisoned for three years.

See *infra*,
53 G. 3. c. 160.
§ 2.

But no person shall be prosecuted for any words spoken unless the information be given to a justice of the peace within four days after the words spoken, and the prosecution of such offence be within three months after such information.

Common law
offence.

The *King v. Richard Carlile*, *M.* 60 G. 3. 3 *B. & A.* 161. The stat. 9 & 10 *W. 3. c. 32.* has not altered the common law as to the offence of blasphemy, but only given a cumulative punishment. It is, therefore, still an offence at the common law to publish a blasphemous libel; and acc. cases cited. 1 *Russ.* 218.

The *King v. Mary Carlile*, *M.* 60 G. 3. 3 *B. & A.* 167. It is

not lawful to publish even a correct account of the proceedings in a court of justice, if such an account contain matter of a scandalous, blasphemous, or indecent nature.

But by stat. 53 G. 3. c. 160., intituled "*An act to relieve persons who impugn the doctrine of the holy Trinity from certain penalties*," reciting, that whereas in the nineteenth year of his present majesty an act was passed, intituled "*An act for the further relief of protestant dissenting ministers and schoolmasters*;" and it is expedient to enact as herein-after provided; it is enacted, "that so much of an act passed in the first year of the reign of king William and queen Mary, intituled '*An act for exempting H. M.'s protestant subjects dissenting from the church of England from the penalties of certain laws*,' as provides that that act or any thing therein contained should not extend or be construed to extend to give any ease, benefit, or advantage to persons denying the Trinity as therein mentioned, be and the same is hereby repealed."

53 G. 3. c. 160.

Act of William and Mary, respecting the denial of the Trinity, repealed.

By § 2. it is enacted, "that the provisions of another act passed in the ninth and tenth years of the reign of king William, intituled '*An act for the more effectual suppressing blasphemy and profaneness*,' so far as the same relate to persons denying as therein mentioned respecting the holy Trinity, be repealed."

Provisions of 9 & 10 W. 3. in part repealed.

§ 4. This a public act.

An information was exhibited by the attorney-general against Edmund Curl, for printing and publishing two obscene books, the one styled *The Nun in her Smock*; the other, *The Art of Flogging*; setting out the several lewd passages, and concluding against the peace. And of this the defendant was found guilty. It was moved in arrest of judgment, that however the defendant may be punishable for this in the spiritual court, as an offence against good manners, yet it cannot be a libel for which he is punishable in the temporal courts. But, after long debate and consideration, the court at last gave it as their unanimous opinion, that this was an offence properly within their jurisdiction; they said, that religion is a part of the common law, and therefore whatever is an offence against that, is evidently an offence against the common law. And the defendant was set in the pillory. *M. 1 G. 2. 2 Stra. 788. 1 Barnard. 29.*

Curl's case. An obscene book is punishable as a libel.

R. v. Woolston, E. 2 G. 2. 2 Stra. 834. Fitzgib. 64. He was convicted on four informations, for his blasphemous discourses on the miracles of our Saviour. And attempting to move in arrest of judgment, the court declared they would not suffer it to be debated, whether to write against Christianity in general was not an offence punishable in the temporal courts at common law: they desired it might be taken notice of, that they laid their stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points. The next term he was brought up and fined 25*l.* for each of his four discourses, to suffer a year's imprisonment, and to enter into a recognizance for his good behaviour during his life, himself in 3000*l.* and 2000*l.* by others.

Woolston's case. To write against Christianity in general, is punishable at common law.

R. v. Waddington, M. 1822. 1 B. & C. 26. A publication stating our Saviour to be an impostor, and a murderer in principle,

Waddington's case. Our Saviour an impostor, &c.

and a fanatic, is a libel at common law: for Christianity is a part of the law of the land. (a)

Denying the
divinity of our
Saviour.

In this case, a juryman asked whether a work denying the divinity of our Saviour was a libel? and *Abbott C. J.* answered, that a work speaking of Jesus Christ in the language here used was a libel; and defendant was found guilty. A new trial was afterwards moved for, on the ground that this was a wrong answer; but the court held that the answer was right, and refused the rule. *Ib.*; see 1 *Russ.* 218.

Christian religion forming
part of the law
of the land.

The doctrine of the Christian religion constituting part of the law of the land, was confirmed by the court of K. B. in passing judgment on defendant for the publication of *Paine's Age of Reason*, a very impious and blasphemous libel; *Ashhurst J.* saying, that such wicked doctrines were to be abhorred, not only as an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society, and that it was upon this ground that the Christian religion constituted part of the law of the land. *R. v. Williams*, 1797. 1 *Russ.* 219. cit. *Holt on Libel*, 69. n. e.

Immaterial
whether the
blasphemy be
oral or written.

In regard to the actual criminality, it seems to be immaterial whether the words published be oral or written, though by committing the mischievous matter to writing, the offence would be aggravated, and the measure of punishment affected. 1 *Russ.* 220. cited *Starkie on Libel*, 493.

Semble, that the stat. 53 G. 3. c. 160. does not alter the common law, but only removes the penalties imposed by 9 & 10 W. 3. c. 32. on persons denying the Trinity, and extends to them the benefits conferred on all other protestant dissenters by stat. 1 W. & M. c. 18. § 1. (a)

Naylor's case.
Personating
our Saviour.

In the year 1656, *James Naylor*, for personating our Saviour, and suffering his followers to worship him, and pay him divine honours, was sentenced to be set in the pillory, and to have his tongue bored through with a red-hot iron, and to be whipped, and stigmatised in the forehead with the letter B.

Annet's case.
Free Inquirer.

Rex v. Annet, 1 *Bla. R.* 395. The defendant was convicted on an information, for writing a most blasphemous libel in weekly papers, called the *Free Inquirer*; to which he pleaded guilty. In consideration of which, and of his poverty, of his having confessed his errors in an affidavit, and of his being seventy years of age, and some symptoms of wildness that appeared on his inspection in court, the court declared they had mitigated their intended sentence to the following; viz. To be imprisoned in Newgate for a month; to stand twice in the pillory with a paper on his forehead, inscribed blasphemy; to be sent to the house of correction, to hard labour, for a year; to pay a fine of 6s. 8d., and to find security, himself in 100*l.* and two sureties in 50*l.* each, for his good behaviour during life.

Navy, profane-
ness in.

By stat. 22 G. 2. c. 33. art. 2. all persons in or belonging to H. M.'s ships or vessels of war, being guilty of profane oaths, cursings, execrations, drunkenness, uncleanness, or other scandalous actions, in derogation of God's honour, and corruption of good

(a) See *Burn's Eccl. Law*, 8th edit. vol. iii. tit. Profaneness, p. 215. n. (3.) and vol. ii. tit. Dissenters, *Tyrwhitt's notes*.

manners, shall incur such punishment as a court-martial shall think fit to impose.

For Profane Cursing and Swearing. See Swearing.

Bodies (Dead), Offences relating to.

TO deprive the dead of funeral rites, or to violate their sepulchral repose, has been held in abhorrence in all ages and countries. Though the man of enlightened understanding is as regardless of the disposal of his corpse, as the anatomist is professionally desirous to advance his practical knowledge of the human structure; the indifference of the former, and unanswerable arguments of the latter, are wholly insufficient to stem the general detestation of stealing dead bodies, even for scientific purposes. The public mangling of the remains of a beloved relation is of itself repugnant to every feeling of human nature; but how is that feeling outraged where that relation is a female, and the atrocity of her unnatural dissection is consummated by professional ribaldry? The philosopher, however regardless of his own worthless clay, shudders at the last dreary triumph of scientific pursuit, when achieved on the corpse of his friend or kinsman.

The following passage from the Tusculan Questions is well quoted by Mr. Christian in his notes to 2 Bla. C. p. 429. *De humatione unum tenendum est, contemnendam in nobis, non negligendam in nostris: ita tamen mortuorum corpora nihil sentire intelligamus. Quantum autem consuetudini famæque dandum sit, id curent vivi.*

No civil action lies against such as violate or disturb the remains of the dead; nor is the stealing a corpse felony: for a corpse is *nullius in bonis* (3 Inst. 203.), and thus the right of property requisite to support either proceeding is wanting. The stealing the grave clothes, coffin, &c. for the same reason, is felony; for the property thereof remains in the executor, or whoever was at the charge of the funeral. But the common law of England views the public indecency of taking up a dead body as a misdemeanor of the most flagrant nature. (a) In *R. v. Lynn*, M. 1788, 2 T. R. 733. 2 Leach, Cr. C. 497. S. C., it was determined, that stealing dead bodies, though for the improvement of the science of anatomy, is an indictable offence as a misdemeanor, it being a practice contrary to common decency, and shocking to the general sentiments and feelings of mankind.

Taking up a dead body a misdemeanor.

In *R. v. Lynn* the indictment was for taking up the dead body from the grave: but in another case, where it did not appear from what burial ground the body had been taken, it was held, that an indictment for *taking away* the dead body of a person unknown, with intent to sell and dispose of the same for gain and profit, was good, and defendant was convicted. *R. v. Gilles*, cor. Bayley J. C. C. R. 366. n.

R. v. Lynn,

So taking away a dead body for sale.

(a) See on this subject 3 Inst. 110. 12 Rep. 113. 1 Hale, P. C. 515. 2 Bla. C. 429. 4 Id. 236. 2 East's P. C. 652.

Refusal or neglect to bury a dead body.

Bodies cast on shore.

Burying without notice to coroner.

Preventing a burial.

Selling body of convict for dissection.
Cundick's case.

A refusal or neglect to bury dead bodies by those whose duty it is to perform the office, has been considered an indictable misdemeanor, where any inconvenience in the way of nuisance arises from the neglect. 1 *Russ.* 415. and the authorities cited n. (b) *ib.*

By 48 G. 3. c. 75. provision is made for the due interment of dead bodies cast on shore from the sea. See *post*.

Where a person has died a violent death, it is a misdemeanor to bury the body without giving due notice to the coroner. 1 *Russ.* 416. and the authorities cited, n. (m) and (n).

A conspiracy to prevent a burial is indictable as a misdemeanor. *Young's case*, 2 T. R. 734., and see *Huber, lib. 2. tit. 2. de Arrests personals*, 6., cited *Burn's E. L.* 8th edit. p. 259. n.

So, to sell the dead body of a capital convict for dissection, where dissection is no part of the sentence, is a misdemeanor indictable at common law. *R. v. Cundick, Kingston Lent Ass.* 1822, cor. *Graham B. 1 D. & R., N. P. Rep.* 13. Indictment stated "That one *E. L.* was publicly executed at, &c., and that one *G. C.* of, &c., undertaker, was retained and employed by *W. W.* the keeper of the gaol in and for the said county, to bury the body of the said person so executed, for certain reward to be therefore paid to the said *G. C.*, by and on behalf of the said county, and in pursuance of the said retainer and employment, the body of the said person so executed was then and there delivered to the said *G. C.* for the purpose of being so by him buried as aforesaid, and it then and there became the duty of the said *G. C.* to bury the same accordingly, but that the said *G. C.* being, &c. and having no regard to his said duty, nor to, &c., did not, nor would bury the said body, but on the contrary thereof, unlawfully, &c. and for the sake of wicked lucre and gain, did take and carry away the said body, and did sell and dispose of the same, for the purpose of being dissected, &c., to the great scandal, &c.:" *Graham B.* held, that the indictment was well framed, though apparently drawn in the language of a declaration in assumpsit: Held, also, that to support the indictment, it was not necessary there should be direct evidence that the defendant had sold the body for lucre and gain, and for the purpose of being dissected. — *Note.* The objections which occasioned the above decision were not renewed when defendant was brought up for judgment.

2 & 3 W. 4. c. 75.

Anatomy schools.

Arresting a dead body, totally unjustifiable.

By 2 & 3 W. 4. c. 75. provision is made for the procuring by legal means of subjects for the anatomy schools in furtherance of the study of surgical science. And see *post*, tit. Murder, in regard to the disposal of the bodies of criminals executed for murder.

A case was cited by *Hyde C. J.* in *Quick v. Copleton*, 1 *Levinz*, 161. 1 *Sid.* 242. 1 *Keb.* 866., that a woman who feared the dead body of her son would be arrested for debt was holden liable on a promise to pay in consideration of forbearance, though she was neither executrix nor administratrix, and of which the other judges are said to have doubted, was thus forcibly repudiated by Lord *Ellenborough* in *Jones v. Ashburnham*, 4 *East*, 460. and 465. "It is impossible to contend that this last forbearance could be a good consideration for an assumpsit: for to seize a dead body upon any such pretence would be *contra bonos mores*, and an extortion on the relatives. It is contrary to every principle of law and moral feeling. Such an act is revolting to humanity, and illegal; and therefore any promise extorted by the fear of it could never

be valid in law. It might as well be said, that a promise in consideration that one would withdraw a pistol from another's breast, could be enforced against the party acting under such unlawful terror." See 1 *Burn's E. L.* 260. *Tyrwhitt's* note.

Bonds, &c. (*Stealing, &c.*) See tit. **Larceny.**

———— (*Receiving, &c.*) tit. **Accessary.**

Breaking Gaol. See **Prison Breaking.**

Breaking open Door. See **Arrest.**

Bribery.

BRIBERY in a strict sense is taken for a great misprision of one in a judicial place taking any thing whatsoever, except meat and drink in small value, of any one who has to do before him any way, for doing his office, or by colour of his office, but of the king only; and is punishable at the common law by fine or imprisonment. 1 *Haw. c.* 67. § 1.

So bribery may be committed by any one in an official situation who corruptly makes use of the interest of his place for rewards or promises. 1 *Russ.* 156.

So it is bribery if any one takes or gives a reward for an office of a public nature. 1 *Hawk. P. C. c.* 67. § 3. *cit.* 1 *Russ. ib.*

Corrupt and illegal practices in giving rewards or making promises to voters at elections, or to persons serving as jurymen, are misdemeanors at common law. 1 *Russ. ib.*

So the attempt to bribe (though it succeed not) is an indictable offence. 1 *Russ. ib.*

As in offering a bribe to a judge in a case pending before him. 1 *Russ. ib.*

Or to a cabinet minister, in order to procure for defendant a place in the colonies. *R. v. Vaughan*, 4 *Burr.* 2494. 1 *Russ. ib.*

Or to a member of a corporation, to influence his vote for the mayor. *Plympton's case*, 2 *Ld. R.* 377. 1 *Russ.* 157.

Or an attempt, by bribery, to influence a jurymen. *Young's case*, *cit.* 1 *Russ. ib.*

Bribery at elections for members of parliament was always an offence at common law, and, in order to enforce the common law, several penal enactments have been provided by 7 & 8 *W. 3. c.* 7. § 4., 2 *G. 2. c.* 24. § 7., and 49 *G. 3. c.* 118., for the purpose of repressing such practices.

Bribery by persons in office.

Reward taken for an office.

Reward given to a voter.

Attempt to bribe.

Bribery at elections of M. P.

See **Parliament.**

Bridges. See tit. **Quisance.**

Buggery.

[9 G. 4. c. 31.]

What it is.

BUGGERY (from the Italian *bugarone*, a buggerer, this vice being said to have been brought into *England* out of *Italy* by the *Lombards*) is a detestable and abominable sin, amongst Christians not to be named, committed by carnal knowledge, against the ordinance of the Creator, and order of nature, by mankind with mankind, or with any animal, or by womankind with any animal. 3 *Inst.* 58.

Punishment, death.

By 9 G. 4. c. 31. § 15. every person convicted of the abominable crime of buggery, committed either with mankind, or with any animal, shall suffer death as a felon.

Evidence.

By § 18. it is provided, that in prosecutions for this offence it shall not be necessary to prove actual emission, but that the carnal knowledge shall be deemed complete upon proof of penetration alone.

It has been held that the act committed in a child's mouth does not constitute the offence. *E. T.* 1817. *R. v. Jacobs*, *C. C. R.* 331.

Solicitation indictable.

It should be observed that the mere soliciting another to the commission of this crime has been treated as an indictable offence. 1 *Russ.* 568.

In cases where it may not be probable that all the circumstances necessary for the completion of the offence will be proved, it may be advisable only to prefer an indictment for an assault with intent to commit an unnatural crime.

Infants.

If the party buggered be within the age of discretion (which is generally reckoned the age of 14), it is no felony in him, but in the agent only. But if buggery be committed upon a man of the age of discretion, it is felony in them both. 3 *Inst.* 59. 1 *Hale*, 670.

22 G. 2. c. 33. Mariners.

By the articles of the navy (22 G. 2. c. 33. § 19.), if any person in the fleet shall commit the unnatural and detestable sin of buggery or sodomy with man or beast, he shall be punished with death by the sentence of a court martial.

The indictment has the words *contra naturæ ordinem rem habuit veneream, et carnaliter cognovit*: but Mr. J. Foster says, this was never thought sufficient without also charging *peccatumq. illud sodomiticum, anglicè dictum buggery, adtunc et ibidem nequiter felonice, &c. commisit, et perpetravit*; and he refers to *Co. Ent.* 351. b. as a precedent settled by great advice. 1 *East's P. C.* 480.

Evidence.

The nature of evidence with respect to the actual commission of this offence, being the same as in case of "Rape," it is sufficient to refer to that head. And in proportion as the crime is most detestable, so ought the proof of guilt to be the clearest and most undoubted. 1 *East's P. C.* 480. 4 *Blac. C.* 215.

In a prosecution for this crime, an admission by the prisoner that he had committed such an offence at another time and with another person, and that his natural inclination was towards such practices, ought not to be received in evidence. *R. v. Cole*, *Buckingham Sum. Ass.* 1810, and by all the Judges, *M. T.* following. *MS. C. C. R. Phill. on Evid.* 143.

Commitment for Bestiality with a Cow.

County of } J. P., esquire, one of his majesty's justices of the peace
to wit. } for the said county of _____ to the constable of
the parish of _____ in the said county, and to the
keeper of the common gaol at _____ in the said
county.

THESE are in his majesty's name to charge and command you the said constable of _____, in his majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said gaol, the body of A. B., this day brought before me J. P. esquire, one of his majesty's justices of the peace in and for the said county, by O. P. constable of _____, and charged on the oath of I. K. with having on the _____ day of _____ last past, at _____ in the parish of _____ in the said county, in a certain cow-house, with a certain cow then and there being, feloniously had a certain venereal and carnal intercourse, and with having then and there carnally known the said cow, and with having then and there committed the abominable crime of buggery with the said cow, against the order of nature, and against the form of the statute in that case made and provided: And you the said keeper of _____ are hereby required to receive him the said A. B. into your custody in the said gaol, and him there safely to keep until he be delivered from your custody by due course of law. Given under my hand and seal the _____ day of _____ A. D. 182—.

J. P.

(L. S.)

Burglary.

Offences against the House of another, which fall short of Burglary, belong to tit. *Larceny*, and are to be found under the head *Larceny from the House*.

§ I. Definition of Burglary.

*Breaking and Entering.**Mansion-House.**Inhabitancy.**Ownership.**Indictment.*

II. Verdict and Judgment.

III. Punishment.

IV. Recompense to Prosecutors, &c.

I. Definition of Burglary.

THE word *burglar* seemeth to have been brought unto us out of Germany by the Saxons, and to be derived of the German *burg*, a house, and *larron*, a thief, probably from the Latin *latro*, *latronis*. Derivation of burglary.

Burglary (*Definition of Burglary*). [Criminal

Definition of
burglary.

Burglary is a felony at common law, in breaking and entering the mansion house of another, in the night, with intent to commit some felony within the same, whether the felonious intent be executed or not. *Hale's Sum.* 79.

Breaking.

To amount to a breaking within this branch of the definition, the entrance must be obtained either by fraud, conspiracy, threat, or force. 2 *Russ.* 2.

Trespass only.

But every entrance into the house by a trespasser is not a breaking in this case; there must be an actual breaking. As, if the door of a mansion house stand open, and the thief enter, this is not breaking. So, if the window of the house be open, and a thief with a hook or other engine draweth out some of the goods of the owner, this is no burglary, because there is no actual breaking of the house. But if the thief breaketh the glass of a window, and with a hook or other engine draweth out some of the goods of the owner, this is burglary, for there was an actual breaking of the house. 3 *Inst.* 64.

Actual break-
ing.

And Lord *Hale* says, these acts amount to an actual breaking; viz. opening the casement or breaking the glass window, picking open the lock of a door, or putting back the lock, or the leaf of a window, or unlatching the door that is only latched. 1 *Hale*, 552.

Entering by a
chimney.

So, if a thief enter by the chimney it is a breaking; for that is as much closed as the nature of things will permit. 1 *Haw. c.* 38. § 4. 4 *Black. Com.* 226.

Getting into a chimney of a house is a sufficient breaking and entering to constitute burglary, though the party does not enter any of the rooms of the house.

Rex v. Brice, *E. T.* 1821. *C. C. R.* 450. The prisoner got in at the top of a chimney, and got down to just above the mantel-piece of a room on the ground floor. Case on question, whether this was a breaking and entering of the dwelling-house. *Holroyd* and *Burrough* Js. thought not, on the ground that he was not in the dwelling-house till he was beyond the chimney. The ten other judges held otherwise: for the chimney was part of the dwelling-house; the getting in at the top was a breaking of the dwelling-house, and the lowering himself an entry into the dwelling-house.

Forcing a win-
dow fastened
with wedges.

Rex v. Hall, *York Sp. Ass.* 1818, reserved per *Bayley* J., *C. C. R.* 355. *H.* was convicted at *York Sp. Ass.* 1818, of burglary. It appeared that the prisoner entered the prosecutor's house by lifting up a large iron grating, which was placed over the cellar (for the admission of light only), and opening a window in a passage leading from that cellar. The cellar opened into a passage, which led into the house, and the window was within the walls of the house; the cellar was beyond the walls. The grating weighed eight stone, and was usually fastened inside by a large iron chain, but it was not so fastened at the time the prisoner entered. The window opened upon hinges, and was fastened by two nails which acted as wedges, but those nails would open by pushing. It was objected by the prisoner's counsel, that the *lifting up the grate was no breaking*, because it was kept down by its own weight only; and that the forcing open the window was no breaking, because it was done by pushing only. — Mr. *J. Bayley* thought the forcing the window was a breaking, but reserved both points for the consideration of the judges, who held the conviction right, and the

prisoner received sentence of death, but was afterwards reprieved, and transported for fourteen years.

Rex v. Haines and Harrison, E. T. 1821. C. C. R. 451. The prisoner entered a house by pushing down the upper sash of a window; it had no fastening, and was kept in its place by the pulley weight only: there was an outer shutter, but it was not put to. Case on question, whether the pushing down the sash was a breaking, and the twelve judges were unanimous that it was; and *Abbott C. J.* observed, without animal force the sash would keep its place. Pulling down a sash.

Brown's case, *Winton Spring Ass.* 1799, cor. *Buller J.* 2 *East's P. C.* 487. On indictment for burglary in the dwelling-house of *G. A.*, it appeared that the place which the prisoner entered was a mill under the same roof, and within the same curtilage as the dwelling-house. Through this mill was an open entrance or gateway capable of admitting waggons, and intended for the purpose of loading them more easily with flour, through a large aperture or hatch over the gateway communicating with the floor above. This aperture was closed by folding doors with hinges, which fell over it, and remained closed by their own weight, but without any interior fastening; so that those without under the gateway could push them open at their pleasure by a moderate exertion of strength: in this manner the prisoner entered the mill in the night, with the evident intention to steal the flour. *Buller J.* held this to be a sufficient breaking to constitute the offence, and the prisoner was accordingly convicted. But this doctrine appears to be extremely doubtful, from *Callan's case*, C. C. R. 157., who was tried before *Lord Ellenborough C. J.* at the *O. B. Nov. Sess.* 1809, on an indictment for stealing three bottles of wine in the dwelling-house of the prosecutor, and afterwards burglariously breaking out of the said house. — The wine was stolen from a bin in the cellar belonging to the dwelling-house of the prosecutor, who kept the *Cock* public-house, in *Tottenham Court*, and had been removed by the prisoner from thence to the flap by which the cellar was closed on its outside next to the street. The flap had bolts belonging to it, by which it might have been bolted within; but whether it was so bolted on the night of the burglary the prosecutor could not say, but he was sure the flap was down. It did not appear whether the prisoner had entered by the flap of the cellar, or not, as a door which communicated with the cellar in another direction, and which the prosecutor had left locked, was broken open. The probability, therefore, was that the prisoner had entered that way; but if he had entered by raising up the flap, it would (unless prevented) have closed after him *by its own weight*, and, in order to get out after it had so closed, it would have required the degree of force necessary to lift up such a flap, to be applied to it. The flap was a large one, being made to cover the opening of a cellar, through which the liquors consumed in the public-house were usually let down into the cellar. The prisoner, when first discovered, had his head and shoulders out of the flap of the cellar, and upon being seized made a spring, got out, and ran away: he was immediately pursued, caught, and brought back, and the flap through which he had got was then found fallen down and closed. Upon this evidence it was doubted, whether there was a sufficient breaking to constitute the crime Opening folding doors.

Whether opening a trap door or flap of a cellar fastened by compression only caused by its natural weight, be a sufficient breaking to constitute burglary?

of burglary, and the prisoner having been convicted, the question was saved for the opinion of the twelve judges, who it is understood entertained great doubts upon the question.—No opinion was ever delivered, but the prisoner was discharged out of custody.

Difference between *Brown's* and *Collins's* cases.

The only difference between this and *Brown's* case appears to be, that in *B.'s* case there were no interior fastenings.—In this, there were, but in neither case were any in fact used, but the compression or fastening, such as it was, was produced by the mere operation of natural weight in both cases.

Lifting up the flap of a cellar usually kept down by its own weight, is a sufficient breaking.

The prisoner got into prosecutor's dwelling-house by raising up the flap of a cellar which was let down, but which the jury found not to have been nailed; and from the cellar there was an internal communication with the house. On *Ca. Res.*, after a verdict of guilty, the judges held that there was a sufficient breaking, and that the conviction was right. *E. T.* 1833. *R. v. G. Russell*, 1 *M.* 377. *Semb.*, that this decision supersedes a contrary ruling on a like point in *R. v. Lawrence & Weaver*, 4 *C. & P.* 231.

Aperture left for admission of light.

Where a cellar window was boarded up, but an aperture left for the admission of light, through which a thief entered in the night, this was held to be no burglary. *R. v. Lewis*, 2 *C. & P.* 628.

Breaking open an external gate not opening into any building, no burglary.

Rex v. Bennett and Turnwell, *O. B. Dec.* 1814. *cor.* Sir *J. Silvester*, Recorder. *W. B.* and *J. T.* were convicted at the *O. B. Dec. Sess.* 1814, of burglariously breaking and entering the dwelling-house of *W. A. Frampton* in the night of the 15th of *November*, with intent to steal his goods and chattels, in the said dwelling-house. It appeared in evidence, that the place broken was an external gate not opening into any building, but only into the yard, through which access might be had without interruption to the dwelling part of the prosecutor's premises. But upon reference to the judges on case reserved, they unanimously held this not to be burglary, the place broken being the outward fence of the curtilage only. *C. C. R.* 289.

Opening an area gate with a skeleton key, and thereby effecting an entrance into the house, adjudged not burglary.

So also in the case of *John Davis* and *James Lemon*, who were convicted of burglary at the *O. B. Jan. Sess.* 1817, before *Abbott J.* A question arose, whether the opening an area gate by means of a skeleton key, and thereby effecting an entrance through the kitchen door, which was open, would constitute the crime of burglary. At *Feb. Sess.* 1817, *Graham B.* stated, that nine judges assembled to consider this case, were unanimously of opinion that, the area gate not being part of the dwelling-house, there was not a sufficient breaking to constitute the crime of burglary. *C. C. R.* 322.

Breaking inner door.

But a burglary may, notwithstanding, be committed by a breaking on the inside: for though a thief enter a dwelling-house in the night-time through the outer door being left open, or by an open window, yet, if when within the house, he turn the key or unlatch a chamber door, with intent to commit felony, this is burglary. 2 *East's P. C.* 488.

Breaking inner door.

A servant lay in one part of the house and his master in another, between them was a door at the foot of the stairs, which was latched; the servant in the night drew the latch, and entered his master's chamber in order to murder him: this was held to be burglary. 2 *East's P. C.* 488.

So where one of the servants in the house opened his lady's chamber door (which was fastened with a brass bolt), with design to commit a rape; it was ruled to be burglary, and the defendant was convicted. *Gray's case*, 1 *Stra.* 481.

Breaking inner door.

At a meeting of the judges upon a special verdict, in *January* 1690, they were divided upon the question, whether breaking open the door of a *cupboard* let into the wall of the house were burglary or no. Concerning which, Mr. J. *Foster* (*Fost.* 108, 109.) thinks, that with regard to cupboards, presses, lockers, and other fixtures of the like kind, in favour of life, a distinction ought to be made between cases relating to mere property, and such wherein life is concerned. He says, "In questions between the heir or devisee, and the executor (see 2 *Vern.* 508. 1 *P. Wms.* 94.), those fixtures may with propriety enough be considered as annexed to, and parts of, the freehold. The law will presume, that it was the intention of the owner, *under whose bounty the executor claimeth*, that they should be so considered; to the end that the house might remain to those who, by operation of law, or by his bequest, should become entitled to it, in the same plight he put it or should leave it, entire and undefaced. But in capital cases, I am of opinion that such fixtures, which merely supply the place of chests and other ordinary utensils of household, should be considered in no other light than as mere moveables, partaking of the nature of those utensils, and adapted to the same use." And Lord *Hale*, in another passage, seems to have inclined to the same opinion. 1 *Hale*, 555. 2 *East's P. C.* 489.

Breaking open door of cupboard let into the wall of a house.

So, if the thief enter by the open door, and in the house break a trunk or box which was locked, this is no breaking, to constitute a burglary; because such things are no part of the house. 2 *East's P. C.* 488.

Breaking trunk locked.

Some doubts having been formerly raised, whether, if a person entered a dwelling-house, without breaking it, with intent to commit a felony, and afterwards broke the house in the night-time to get out, it amounted to burglary, it is declared by 7 & 8 *G. 4. c. 29. § 11.*, that if any person shall enter the dwelling-house of another with intent to commit felony, or being in such dwelling-house shall commit any felony, and shall in either case break out of the said dwelling-house in the night-time, such person shall be deemed guilty of burglary.

Breaking out of a house.

Where it appeared that the sash of a window had been a little opened, but not sufficiently to allow of a person entering through it, and the prisoners threw the sash up and got in, held, that it did not constitute a breaking. *H.* 1828. (*a*) *R. v. Smith, R. & M.* 178.

Opening a sash which was already in part opened.

N. B.— This was not a case of burglary, but of house-breaking, and committing larceny therein.

Part of a pane of glass in a window was broken, and prisoner put his hand through to undo the fastening of the window, but could not reach sufficiently far without breaking the residue of the pane: he did so, unfastened and opened the window, and got in; and whether this was a sufficient breaking was the question. *Thir-*

Glass of window already broken, fastening undone.

(a) The ground of the judges' opinion was, that there was no decision which went the length of holding this a breaking; and they thought they ought not to go beyond what had been decided unless the case were within some settled principle, which this was not. *MS. Bayley B.*

teen judges (abs. Lord *Lyndhurst* B. & *Bolland* B.) were unanimous that it was, not by breaking the residue of the pane, but by unfastening and opening the window. *H. T.* 1832. *R. v. Robinson*, *MS. Bayley* B. S. C. 1 M. 327.

Getting entrance by fraud.

Thieves, having an intent to rob, raised the hue and cry, and brought the constable, to whom the owner opened the door; and when they came in they bound the constable and robbed the owner; held to be burglary. So if admission be gained under pretence of business; or if one take lodgings with a like felonious intent, and afterwards rob the landlord; or get possession of a dwelling-house by false affidavits without any colour of title, and then rifle the house; such entrance being gained by fraud, it will be burglarious. 2 *East's P. C.* 485.

By deluding a boy who had the care of the house.

So in *A. Hawkins's case*, *O. B.* 1704. 2 *East's P. C.* 485. She was indicted for burglary; upon evidence it appeared that she was acquainted with the house, and knew that the family were in the country; and meeting with the boy who kept the key, she prevailed upon him to go with her to the house, by the promise of a pot of ale; the boy accordingly went with her, opened the door, and let her in; whereupon she sent the boy for the pot of ale, robbed the house, and went off; and this being in the night-time, it was adjudged that the prisoner was clearly guilty of burglary.

By threats.

A breaking may be also in law, as where in consequence of violence commenced or threatened, in order to obtain entrance, the owner, either from apprehension of the force or with a view more effectually to repel it, opens the door, through which the robbers enter. — But where no fraud or conspiracy is made use of, or violence commenced or threatened, in order to obtain an entrance, there must be an actual breach of some part of the house, though it need not be accompanied with any violence as to the manner of executing it. 2 *East's P. C.* 486.

Cornwall's case.
By conspiracy.

Joshua Cornwall was indicted with another person for burglary; and it appeared that he was a servant in the house, and in the night-time opened the street door and let in the other prisoner, and shewed him the sideboard, from whence the other prisoner took the plate: after which *Cornwall* opened the door and let him out, but did not go out with him. Upon the trial it was doubted whether this were burglary in the servant, he not going out with the other. But afterwards, at a meeting of all the judges at *Serjeant's Inn*, they were unanimously of opinion that it was burglary in both, and not to be distinguished from the case where one watches at the street end whilst another goes in and commits the burglary, which hath often been ruled to be burglary in both; and accordingly *Cornwall* was executed. 2 *Stra.* 881. 19 *Howell's St. Tri.* 782. (n.) 4 *Blac. Com.* 227.

Breaking of inside door by a servant.

In the case of a servant opening a door of his master's house for a felonious purpose, without any conspiracy with others, it seems that the question whether such act amounts to a breaking must depend upon the point whether the door might have been opened by the servant in the course of his trust and employment. Thus, if a servant unlatch a door or turn a key in a door of his master's house and steal property out of the room, such opening of the door being within his trust, is not a breaking; but if a servant break open a door, either outward or inward (as a closet, study, or counting-house), such opening not being within his trust,

will amount to a breaking of the house. 2 *Hale*, 254, 255. 2 *Russ.* 10.

It is deemed an entry, when the thief breaketh the house, and his body, or any part thereof, as his foot, or his arm, is within any part of the house; or when he putteth a gun into a window which he hath broken (though the hand be not in), or into a hole of the house which he hath made, with intent to murder or kill; this is an entry and breaking of the house: but if he doth barely break the house, without any such entry at all, this is no burglary. 3 *Inst.* 64. 2 *East's P. C.* 490.

Entry.

Rex v. Burr and Loosely, O. B. Feb. Sess. 1821, MS. The prisoners were convicted before Best J. on an indictment charging them with burglariously breaking and entering the dwelling-house of the prosecutor, with intent to steal, and stealing a *flitch of bacon*. The prisoner *Loosely* lodged in the prosecutor's house; the window-shutter was in the night-time opened from the inside of the house, the casement of the window was taken out, and the bacon was most probably put through the window to *Burr*, by whom it was carried away from the prosecutor's premises to *Burr's* house. It did not appear that *Loosely* went out of the house, or that *Burr* ever entered the house. His lordship inclined, at the trial, to think that the charge of burglary in the indictment was not supported by the evidence; but told the jury, that if they believed the facts, he advised them to convict, and that he would save the point for the twelve judges. Afterwards, on conferring with the judges of the court of K. B., he thought that there was no evidence of entering the house; and he, therefore, did not present the case to the twelve judges, but recommended a pardon, on condition of transportation for seven years, as the prisoners were properly convicted of a larceny.

Breaking alone without entering, not sufficient.

Where the house was broken, but not entered, and the owner for fear threw out his money, it was holden to be no burglary, though clearly robbery, if taken in the presence of the owner. 2 *East's P. C.* 490.

In the case of *George Gibbons*, O. B. June, 1752, *Fost.* 107. 2 *East's P. C.* 490., who was indicted for burglary in the dwelling-house of *John Allan*, it appeared in evidence that the prisoner in the night-time cut a hole in the window-shutters of the prosecutor's shop, which was part of his dwelling-house, and putting his hand through the hole took out watches and other things, which hung in the shop within his reach; but no entry was proved, otherwise than by putting his hand through the hole. This was held to be burglary, and the prisoner was convicted.

Breaking a hole and putting hand through.

Where a glass window was broken, and the window opened with the hand, but the shutters in the inside were not broken; this was ruled to be burglary by *Ward C. B.*, *Powis* and *Tracy* justices, and the Recorder; but they thought this the extremity of the law; and on a subsequent conference, *Holt C. J.* and *Powell J.* doubting, and inclining to another opinion, no judgment was given. *Robert's alias Chambers's case*, 2 *East's P. C.* 487.

William Bailey and *Robert Spencer* were tried at the O. B. Jan. Sess. 1818, before *Park J.*, for burglariously breaking and entering the dwelling-house of *Zachariah Boote*, esq. with intent to steal. The case was very clearly and satisfactorily proved, and the jury found the prisoners guilty; but a doubt arose whether the follow-

Hand introduced between broken window and inner shutters.

R. v. Bailey
and Spencer.

ing facts were sufficient to establish such an *entering* as is requisite to constitute the crime of burglary, there being no question as to the breaking, or intent to steal. The window of the kitchen was proved to be fastened in the following manner:—The sash was drawn down, closed and fastened at the point of division by a latch in the inside. The inside shutters were closed and fastened by a bar. The pane in the upper part of the window was broken, in order to put in the hand to remove the latch: then the lower sash was thrown up to enable the prisoners to introduce a centre-bit to cut a hole in the shutters; and while they were engaged in this last operation, and before they had completed it, they were seized. The jury expressly found that the window was latched; and that the hand of one of the prisoners, both being present, was introduced in order to remove the latch, but the shutter never was actually opened. It was submitted to the judges, whether this introduction of the hand for the above purpose was such an *entering* as will constitute burglary, with the other necessary proof? At the *O. B. May Sess. 1818*, *Bayley J.* informed the prisoners, that the judges had considered their case, and were unanimously of opinion that there had been a sufficient entry of the house to constitute the offence of burglary. The hand of one of the prisoners, it appeared, had been introduced beyond the glass window, so as to reach the inward shutter, and the intervening space clearly was within the dwelling-house. Conviction right. *R. v. Bailey and another, C. C. R. 341.*

Breaking window, part of hand within the window.

Where the prisoner broke the glass of a shop window with his hand with intent to steal, and part of his hand went within the shop, held to be a sufficient entry to constitute a burglary. *H. T. 1823. R. v. Davis, C. C. R. 499.*

Crowbar introduced to force inner shutters.

Where the prisoners had thrown up a window, which had been left closed down, and had introduced a crowbar for the purpose of forcing the inside shutters, which were fastened, it was held not to be a sufficient entry, as there was no proof that any part of the prisoners' hand was within the window. *E. T. 1828. R. v. Rust, R. & M. 184.*

Thieves came by night to rob a house; the owner went out and struck one of them; another made a pass with a sword at persons he saw in the entry, and in so doing his hand was over the threshold; this was adjudged burglary by great advice. *2 East's P. C. 490.*

Pistol to kill, or hook to steal, being within the house.

So, putting a hook to steal, or a pistol to kill, within the door or window, though the hand be not in, is an entry. *Id.*

Loaded gun discharged into house.

To discharge a loaded gun into a house is a sufficient entry. (a) *1 Haw. c. 38. § 7.*

Centre-bit put into house.

But where thieves bored a hole through the door with a centre-bit, and part of the chips were found in the inside of the house, by which it was apparent that the end of the centre-bit had penetrated into the house, yet, as the instrument had not been introduced for the purpose of taking the property or committing any other felony, it was decided that this entry was not sufficient to constitute burglary. *R. v. Hughes, 2 East's P. C. 491.*

(a) It appears to have been ruled by Lord *Ellenborough C. J.* that a person discharging a gun from the outside of a field, into it, so as that the shot must have struck the soil, was guilty of breaking and entering the field. *Vide Pickering v. Rudd, 4 Camph. 220, 1 Stark. Rep. 58. S. C.*

If divers come in the night to do a burglary, and one of them break and enter, the rest of them standing to watch, at a distance, this is burglary in all. 3 *Inst.* 64.

And the entry need not be at the same time as the breaking, provided both be in the night; therefore, if thieves break a hole in the house one night, with intent to enter another night and commit felony, which they execute accordingly, it is burglary. 1 *Hale*, 551.

Res v. John Smith, C. C. R. 417. The prisoner was tried before Park J. at the O. B. April Sess. 1820, for burglariously breaking and entering the dwelling-house of Alfred Taylor, with intent to steal (no stealing was alleged, nor was there any in fact); but the learned judge left the fact of the intent fully to the jury, who upon the evidence, found that the burglary was with the intent to steal, and, therefore, returned a verdict of guilty. It appeared that in the night between Friday the 24th and Saturday the 25th March, the side door of the prosecutor's house, opening into a thoroughfare passage, had all the glass of it (nine by ten inches) taken out by the prisoner, with intent to enter, and which the prosecutor never repaired on the Saturday. The whole of Saturday and Sunday elapsed; and nothing more is heard of it. In the night between Sunday the 26th and Monday the 27th March, the prisoner entered at the same hole, but was taken on the premises, before any larceny was actually committed. The jury also found the breaking and entering both to have been *noctanter*, and that the breaking was not accidental (for the window part of the door was just high enough for a drunken man's head to have hit it), but that both breaking and entering were felonious. But a doubt arose whether one single act of felony (such as a burglary) could be made up by what takes place at two different days, at a distance from each other, and not merely separated by the natural accidents of the transaction itself, as if the felon began his operation at ten or eleven one night, and did not complete his entry till one or two o'clock in the morning, which would in law be the next day. *Ld. Hale* (1 P. C. 551.) says, "But if they break a hole in the house one night to the intent to enter another night, and commit felony, and accordingly they come at another night, and commit a felony through the hole they so made the night before, this seems to be burglary, for the breaking and entering were both *noctanter*, though not the same night; and it shall be supposed, that they brake and entered the night when they entered, for the breaking makes not the burglary till the entry." See also 2 *East*, P. C. 491.—This point was submitted for the opinion of the learned judges, who (in E. T. 1820) held this to be burglary, the breaking having been with intent afterwards to enter.

If A., being of full age, break open a house and then send in a young child trained for that purpose, who brings out property and delivers it to A., this will be burglary in A. 1 *Hale*, 555, 556. 2 *Russ.* 12.

It was formerly held that not only the mansion or dwelling-house itself, but also barns, stables, &c. though not under the same roof, or joining contiguous, provided they were parcel thereof and within the curtilage, might be the subject of burglary: but now by 7 & 8 G. 4. c. 29. § 13., no building, although within the same curtilage with the dwelling-house and occupied therewith, shall be

Breaking at one time, entry at another.

The prisoner broke the glass of prosecutor's side door with intent to enter at a future time on the Friday night, and actually entered on the Sunday night. The judges held this burglary, the breaking being with intent afterwards to enter.

Sending in a child to steal after the breaking.

Mansion or dwelling-house.

7 & 8 G. 4. c. 29. § 13.

deemed to be part of such dwelling-house for the purpose of burglary, or for any of the purposes aforesaid, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and inclosed passage leading from the one to the other.

Lower room of a house not communicating with the rest.

On an indictment for burglary it appeared the prosecutor's house consisted of four rooms on the ground floor, one of which was a wash-house; and of three bed-rooms up stairs, one of which was over the wash-house: the wash-house had no internal communication with the rest of the house, but it was under the same roof; the wash-house was the place broken into, and on case the question was, whether since 7 & 8 G. 3. c. 29. the wash-house was part of the dwelling-house: Seven judges held it was, five that it was not. *R. v. Burrowes*, Tr. T. 1830. MS. Bayley B. S. C. 1 M. 274.

Church.

A church is considered a mansion in which burglary may be committed. 2 *East's P. C.* 487. 491.

So every house used for the dwelling and habitation of man. 3 *Inst.* 64.

Chambers. Lodgings.

A chamber in one of the inns of court, wherein a person usually lodges, or a lodging in part of a house, divided from the rest, and having a door of its own to the street, is properly called a mansion-house. 1 *Haw. c.* 38. § 11. See 2 *East's P. C.* 499, 500. 505. *Kel.* 84.

Where all the dwelling-rooms are let to lodgers.

Where the owner of the house let out the whole of it to different lodgers, except a cellar, which he occupied himself, and there was only one common outer door from the street; the prosecutor was one of the lodgers, and rented a shop and parlour: these were broken open in the night; and it was agreed that they were properly laid to be the mansion-house of the prosecutor. *Rogers's case*, 2 *East's P. C.* 506.

Lodging-rooms over coach-house, &c.

Where a lady's coachman rented two lodging-rooms, in which he slept, situate over the coach-house and stables, and which were rated by the parish as appurtenances thereto, and the entrance to which was down a passage out of a public mews, by stairs leading to the doors of the rooms, which were locked at night; it was contended that these were mere hay-lofts, but the judges held they were to be considered the dwelling-house of the prosecutor. *Turner's case*, 2 *East's P. C.* 492.

Edifice must be permanent.

But no burglary can be committed by breaking into any inclosed ground, nor into any booth or tent, though the owner lodge therein, not being a permanent edifice. 2 *East's P. C.* 492. 2 *Russ.* 13.

Dwelling-house divided.

If part of a dwelling-house be let off to a tenant, with a separate entrance and no internal communication, and the tenant never sleeps there, breaking into it in the night will not be burglary. *East's P. C.* 507. 2 *Russ.* 14.

Where there is an internal communication.

But aliter if there be any internal communication: Where a man let part of his house to his son, who used it as a shop, but never slept there, but a passage from the son's part led to the father's cellars, and they were open to the father's part of the house; the shop having been broken open, it was held to be burglary in the dwelling-house of the father, being under the same roof, part of the same house, and communicating internally. *M. T.* 1816. *R. v. Sefton*, C. C. R. 202. 2 *Russ.* 14.

If the lessee or his servant usually, or often, lodge at night in the shop or premises let off from the house, it would then be the dwelling-house of such lessee, in which burglary might be committed. 1 *Hale*, 558. 2 *Russ.* 14. See *R. v. Stock and others*, 2 *Taunt.* 339. *infra*.

But it is not necessary, to make it burglary, that any person be actually in the house at the very time of the offence committed 1 *Haw. c.* 38. § 11.

Nutbrown's case, O. B. Jan. 1750. *Fost.* 76. 2 *East's P. C.* 496. *J.* and *M. Nutbrown* were indicted for burglary in the dwelling-house of one Mr. *Fakney* at *Hackney*, and stealing divers goods. The prosecutor made use of it as a country-house in the summer, his chief residence being in *London*. About the latter end of the summer preceding the offence, he removed with his whole family to his house in the city, and brought away a considerable part of his goods; and in *November* last his house at *Hackney* was broken open, and in part rifled; upon which he removed the remainder of his household furniture, except a clock, and a few old bedsteads, and some lumber of very little value; leaving no bed or kitchen furniture, or any thing else for the accommodation of a family. Mr. *F.* being asked, whether, at the time he so dis-furnished his house, he had any intention of returning to reside there, declared that he had not come to any settled resolution whether to return or not; but was rather inclined totally to quit the house, and to let it for the remainder of his term. The fact the prisoners were charged with was sufficiently proved, and was committed about midnight the 1st of *January* last. The court were of opinion that the prosecutor having left his house, and dis-furnished it in the manner before mentioned, without any settled resolution of returning, but rather inclining to the contrary, it could not, under these circumstances, be deemed his dwelling-house at the time the fact was committed: and accordingly directed the jury to acquit the prisoners of the burglary, which they did, but found them guilty of the stealing. And they were ordered for transportation. — And the distinction is this; where the owner quitteth the house *animo revertendi*, it may still be considered as his mansion-house, though no person be left in it; but there must be an intention of returning, otherwise it will be no burglary. *Fost.* 76, 77.

If *A.* have two dwelling-houses, and live sometimes in one and sometimes in the other, the breach of one of them in the night-time, in the absence of his family, will be burglary. 1 *Hale*, 556. 2 *Russ.* 18.

So if *A.* have chambers in a college, or inn of court, where he resides in term time, and in his absence in the vacation, his chambers be broken open, it will be burglary. *Ibid.*

Therefore, where *John Nicholls*, being possessed of a house in *Westminster*, wherein he dwelt, took a journey into *Cornwall* with intent to return, and sent his wife and family out of town, and left the key with a friend to look after the house: after he had been gone a month, no person being in the house, it was broken open in the night and robbed of divers goods. He returned a month after with his family, and inhabited there. This was adjudged burglary. *Murray and Harris's case*, O. B. 10 *W.* 3. 2 *East's P. C.* 497.

Lessee or his servant using the part of the house, so let off, for sleeping in.

Inhabitaney. House left by the family, who were not decided on returning.

Animus revertendi.

Temporary absence.

Burglary (*Definition of Burglary*). [Criminal

Unoccupied house not slept in by incoming tenant.

Hallard's case, 2 *East's P. C.* 498. The former tenant of a house had quitted it, and the incoming tenant had put in all his furniture, and had been frequently there in the day-time, but had never slept in the house, nor had any of his family. *Buller J.* ruled that burglary could not be committed therein. In a similar case also it was so ruled by *Grose J.*

New unfinished house.

So in *Fuller's case*, 2 *East's P. C.* 498. 1 *Leach*, 196. (n) who was indicted for a burglary in the dwelling-house of Mr. *Holland*, it appeared that the house was a new one, and finished except the painting and glazing; that a workman who was constantly employed by Mr. *H.* slept in it for the purpose of protection, but no part of Mr. *H.*'s domestic family had yet taken possession of it: this was ruled by the recorder not to be the mansion-house of the prosecutor.

House furnished for residence but not inhabited.

Where prosecutor had bought a house, meaning to reside in it, and had moved there some of his furniture and effects, and had put it under the care of a carpenter to repair, but none of his family, or other person, slept in it; held to be no dwelling-house. *R. v. Lyons and Miller*, 2 *Russ.* 16.

Person sleeping in house to protect goods.

Where the prosecutor had lately taken the house, and neither he, nor any of his family had slept there, but he had got two hair-dressers to sleep in it, by way of protecting the goods and furniture; held not to be prosecutor's dwelling-house. *Harris's case*, 2 *East. P. C.* 498.

Prosecutor's house in which he did not reside being untenanted, he placed a servant to sleep in it, to protect the furniture, while he looked out for another tenant; held, that this could not be considered prosecutor's dwelling-house. *R. v. J. Davis*, 2 *East, P. C.* 499.

House used, but not slept in.

Where the prosecutor used a house for business, and for dining, and there was bedding in the house, but neither prosecutor, nor any other person, slept in it, on prosecution for burglary, it was held not to be a dwelling-house. *R. v. Martin*, *C. C. R.* 108.

Residence left, but persons placed in house to look after goods.

The prosecutor quitted a house in which he had formerly resided, but continued to use it as a warehouse and workshop, and made two of his workwomen sleep there, as a security to it; held not to be his dwelling house. *R. v. Flannagan*, *C. C. R.* 187.

Ditto, owner's servants placed to live there.

The prosecutor having ceased to reside in the house where his shop was, placed in it his apprentice, his foreman, and his foreman's wife, who was his servant in keeping the house clean, and they slept there by way of protection to the property, were on weekly wages, paid no rent, and dieted themselves; held, that it might be considered the dwelling-house of prosecutor on a trial for burglary. *E. T.* 1821. *R. v. Gibbons*, *C. C. R.* 442.

N.B. A distinction was taken that the servants were put in, not only to sleep, but to live there. 2 *Russ.* 19.

Executor placing servant in his testator's house.

Where an executor placed servants into his testator's house, who lodged there, and were on board wages; the court inclined to think it might be held the dwelling-house of the executor, because the servants lived there. 2 *East, P. C.* 499., but *Qu.?* see 2 *Russ.* 20.

Casual lodging in a tenement.

Casually lodging in a tenement will not constitute it a dwelling-house. 2 *East, P. C.* 497. 2 *Russ.* 20.

As if a servant sleep in a barn in order to watch for thieves. *Brown's case*, 2 *East, P. C.* 502. 497.

Or if a porter lie in a warehouse to watch goods. *Smith's case*, 2 *East, P. C.* 497.

It is necessary to ascertain to whom the *mansion* belongs, and to state that with accuracy in the indictment. If the rule, observes Mr. *East* (2 *East's P. C.* 499, 500.), by which to ascertain this ownership may be compressed with sufficient discrimination into a small compass, I should say generally, that where the legal title to the whole mansion remains in the same person; there, if he inhabit it either by himself, his family, or servants, or even by his guests, the indictment must lay the offence to be committed against *his mansion*. And so it is, if he let out apartments to inmates who have a separate interest therein, if they have the same outer door or entrance into the mansion in common with himself. But if distinct families be in the exclusive occupation of the house, and have their ordinary residence or domicile there, without any interference on the part of the proper owner; or if they be only in possession of parts of the house as inmates to the owner, and have a distinct and separate entrance; then the offence of breaking, &c. their separate apartments must be laid to be done against the mansion-house of such occupiers respectively.

Of the owner.
In whose mansion.

General rule.

The rule is the same where a house is inhabited by persons who stand in the relation of servants; and thus, apartments in the king's palaces, or in the houses of noblemen, for their stewards and chief servants, can only be laid to be the mansion-house of the king or nobleman. 2 *East, P. C.* 500. 2 *Russ.* 23.

King's mansion, &c.

In the case of breaking into the lodgings of a person in Whitehall palace, it was agreed that the indictment should be for breaking the king's mansion; *R. v. Williams*, 1 *Hale*, 522. 2 *Russ.* 23., and for breaking into a chamber at Somerset House, that it should be laid as the mansion of the queen-mother. *Burges's case*, *Kel.* 27. 2 *Russ.* 24.

Whitehall.

Somerset House.

A. Hawkins was indicted for burglary in the mansion-house of *S. Story*. It appeared that it was the house of the *African Company*, and that *Story* was only an officer of the company, having apartments and inhabiting the house: it was ruled by *Holt C. J.*, *Tracy J.*, and *Bury B.*, that *Story's* apartments could not be said to be his mansion-house, he only occupying them as an officer of the company; for though an aggregate corporate body could not be said to inhabit anywhere, yet they might have a mansion-house for the habitation of their servants; and the jury were discharged of this indictment; and it was afterwards laid as the mansion-house of the company. *O. B.* 1704. *Fost.* 38. 2 *East's P. C.* 501.

House of a corporation.

So *J. Picket* was indicted for burglary in the dwelling-house of the *East India Company*, which is inhabited by their servants; and he was convicted and executed. *O. B.* April, 1765. 2 *East's P. C.* 501.

C. Maynard was indicted (*Cambridge Spring Assizes* 1774) for burglary in the mansion-house of the master, fellows, and scholars of *Bennet college*, in *Cambridge*. It appeared that he broke into the buttery of the college, and there stole some money; and it was agreed by all the judges, upon a reference to them, that it was burglary. *C. Maynard's case*, 2 *East's P. C.* 501.

A college.

G. Brown was indicted for burglary in the dwelling-house of *M. Graydon*, and stealing thereout oats. A second count stated it to be the dwelling-house of *T. Trumball*. *Graydon*, a farmer,

Servant in agriculture living in his master's cottage.

had a dwelling-house, in which he lived, a stable, cow-house, cottage, and barn, all in one range of buildings in the order mentioned, and under one roof; but they were not inclosed by any wall or court yard, nor was there any communication from one to the other within. *Trumball's* family resided in the cottage by agreement with *Graydon*, when he went into his service; but *Trumball* paid no rent; only an abatement was made in his wages on account of his family residing in the cottage. Some corn having been missed out of the barn, *Trumball* and another person put a bed in the barn, and went and slept there, and a few nights after they had so done, the prisoner unlocked the barn door, and took away a quantity of oats. After conviction, judgment was respited upon a doubt whether it could be considered as the dwelling-house either of *Graydon* or *Trumball*. Upon a reference, it was agreed (*Mich. T. 1787.*) by all the judges, that the sleeping in the barn made no difference. But they held (*Buller J.* doubting), that this was no more than a licence to *Trumball* and servant to lodge in the cottage, and not a letting of it to him (a); and that the barn, as well as the rest of the buildings, being under the same roof, continued parts of the mansion-house of *Graydon*. (*MS. Gould J.*) And many of the judges inclined to think, that if there had been a demise of the cottage to *Trumball*, the barn would still have continued part of *Graydon's* dwelling-house in point of law. *G. Brown's case, Newcastle Sum. Ass. 1787, 2 East's P. C. 501.*

Servant having particular rooms over an office.

So also, where the servant of three partners in trade had weekly wages, and particular rooms assigned to him, as lodging for himself and his family, over the bank and brewery office of his employers, with which his lodging communicated by a trap-door and a ladder, it was holden by the judges (*M. T. 1809*), after argument, that a burglary committed in the banking-room was well laid as in the dwelling-house of the three partners. *R. v. Stockton and others, tried at Carlisle Sum. Ass. 1809, cor. Chambre J., 2 Taunt. 339. 2 Leach, 1015.*

Warehouseman occupying and paying rent for a house.

But where a warehouseman occupied a house of his employers, adjoining to their warehouse, and paid a rent for it, it was held that it could not be considered as their mansion, for that they might have distrained for rent, and could not have removed him arbitrarily as he was their tenant. *E. T. 1824, R. v. Jarvis and another, R. & M. 7.*

Workman in a colliery occupying a cottage, rent-free.

So, where a workman in a colliery was allowed by his employer to occupy, with his family, a cottage, rent-free, held, that it might be laid as the dwelling-house of the workman, as it was occupied for the use and benefit of himself only, and not for the use or business of his employer, or the colliery. *R. v. Jobling, M. T. 1823, C. C. R. 525. (b)*

Toll-gate-keeper residing in the gate-house.

It appeared that a toll-gatekeeper, under a contract with the lessee of the tolls, occupied a contiguous house, which had been built for that purpose by the trustees: the judges agreed, on a trial for burglary, that it was properly described as the house of

(a) Vide *Bertie v. Beaumont*, 16 East, 33.

(b) *Hobroyd J.* who tried the case, thought it might be considered as to third persons, either as the master's house or the workman's; even though the workman's occupation might, in law, at the master's election, be considered the occupation of the master, and not of the workman. — 16.

the toll-gatekeeper, he having the exclusive possession, and the lessee having no interest in it. *M. T. 1824, Camfield's case, R. & M. 42.*

Where a person is allowed to reside in a house, under such circumstances that he may be considered, not the owner's servant, but a tenant at will, it may be legally described as his dwelling-house. *H. T. 1823, Collet's case, C. C. R. 498. N. B.* This was a case of breaking open in the day time.

Certain premises in *London*, comprising warehouses and a dwelling-house, having an internal communication, were rented by a company of blanket manufacturers at *Witney*, and their agent resided there rent free, which was considered as being in part a remuneration for his services; in burglary for breaking open the warehouses, it is said to have been held that it was rightly charged as the dwelling-house of the agent. *O. B. 1801, R. v. Margetts, 2 Leach, 930. 2 Russ. 25.*; but see *n. (g.) ib. 26.*

The governor of the *Birmingham* workhouse resided, with his family, in a house which was part of the building, under a contract with the guardians and overseers, who reserved three apartments as warehouses, and another as an office; the governor was paid by a salary, and by his occupation of the house: the office having been broken open, the judges were of opinion that it was not the dwelling-house of the governor. *Tr. T. 1806, Wilson's case, C. C. R. 115.*

Bunyon was secretary to the *Norwich* Fire and Life Assurance Company, and he and his family lived in a house the company hired, and for which they paid rent and taxes, and in the lower part of which their business was transacted: the rooms for their business were not locked from the rest of the house, but were at all times accessible by *Bunyon's* family and servants; prisoner having stolen property out of one of these rooms, he was indicted capitally for stealing in the dwelling-house, and the dwelling-house was stated in the indictment to be *Bunyon's*; and on case upon the question, whether it could properly be described as *Bunyon's* house, the judges held it might; he and his family and servants were the only persons who dwelt there; they, and they only, were the persons liable to be disturbed by a burglary; and though the judges would not say it might not have been described as the company's house, they thought it might with equal propriety be described as *Bunyon's*. Conviction held right. *Hil. T. 1830, R. v. Witt, MS. Bayley B. S. C. R. & M. 248. N. B.* *Bunyon* had the exclusive possession of the whole except in hours of business, and then he had the parts appropriated to the purposes of business, in common with others.

If the chamber of a guest at an inn be broken open, it must be laid in the indictment to be the mansion-house of the innkeeper. *2 MS. Sum. 249.*

As the possession of the servant or guest is the possession of the owner, so is the possession of any one who in law is deemed to be part of the owner's family. In *Farre's case (Kel. 43.)* it was holden, that if the house of a feme covert who lives apart from her husband be broken, though the husband had expressly refused to have any thing to do with the lease, and the landlord had thereupon agreed with the wife alone, yet it must be laid to be the house of the husband.

Tenant at will.

House of a manufacturing company occupied by their agent.

Governor of workhouse, residing in it.

Secretary of an insurance company living in a house where the business was carried on.

Inn.

Wife or family.

Wife living separate.

But in any case where the law would adjudge the separate property of the mansion to be in the wife, and she has also the exclusive possession, the burglary ought to be laid against her mansion-house, and not against that of her husband. 2 *East's P. C.* 504.

Wife separated, and living on her separate means.

Husband and wife were separated, and she subsisted on property which was hers before marriage, and was conveyed to trustees for her separate use; the house was not part of such property, but was hired, and the rent paid by herself, and her husband had never been in it. On indictment for burglary the judges were clear, that it must be laid as the dwelling-house of her husband, because at law the wife could have no property. *M. T.* 1822, *French's case*, *C. C. R.* 491.

Wife living separate and in adultery.

Where a man and his wife agreed to live separate, and he allowed her to occupy a house of his, which he had built, but never resided in, and she and another man lived there in criminal intercourse, as man and wife; held, in burglary, that it was properly described as the dwelling-house of the husband. *Tr. T.* 1823, *Wilford's case*, *C. C. R.* 517.

Partners.

House occupied by one only.

M. Jones was indicted for burglary in the dwelling-house of *T. Smith* and *J. Knowles*. The prosecutors were in partnership, and lived next door to each other. The two houses, which were formerly one, had been divided for the purpose of accommodating their respective families, and were at the time perfectly distinct and separated from each other, without any communication but by the street. The housekeeping was paid by each partner separately for his own house: but the rent and taxes of both houses were paid jointly out of the partnership fund. The offence was committed in the house of *Smith*, to whom the prisoner was servant. It was objected, that though these two houses were the joint property of both the partners, yet they were the several and respective mansions of each; and therefore the offence ought to have been stated to have been committed in the house of *Smith* only: and the court, considering the objection to be well founded, directed the jury to acquit the prisoner of the capital part of the charge; and she was found guilty of the simple larceny only. *M. Jones's case*, *O. B. Sept.* 1790, 2 *East's P. C.* 504. 1 *Leach*, 537.

One partner lodging and boarding in a house rented by the other.

A house, the joint property of partners in trade, in which the business is carried on, and in which the servants in the business sleep, may be described as the dwelling-house of all the partners, though one only resides in it.

A. and *B.* were partners, and *A.* rented the whole of the premises in which the business was carried on, and there resided, but *B.* lodged and boarded with him, and also paid a certain proportion of the rent and taxes for the shop and warehouse. On an indictment for felony committed in the shop, it was held to be properly laid as stealing in the dwelling-house of *A.* *Parminter's case*, 1 *Leach*, 537. n. (a) 2 *Russ.* 31.

Prisoner being indicted for stealing the goods of *H.* and others in their dwelling-house, it appeared that *H.*, *P.*, and *S.* carried on an extensive business in the house as partners; the house was the joint property of the firm, and a number of young men, employed in the business, slept in the house; *P.* and his family lived in it, but *H.* and *S.* resided elsewhere: on *Ca. res.* the question was, whether the dwelling-house was properly laid as that of all the partners, or whether it ought to have been laid as that of the resident partner only. The judges were unanimous that the dwelling-house was properly described, and the conviction right. *E. T.* 1832, *R. v. G. Atha*, 1 *M.* 329.

Where premises consisted of a house and warehouse under the same roof, and with internal communication, and the house was let to *A.* and the warehouse to *A.* and *B.* jointly, burglary having been committed in the warehouse, held, that it could not be laid as the dwelling-house of *A.* *E. T.* 1813, *Jenkins's case*, *C. C. R.* 244.

House let to one of two partners, shop (part of it) to both.

A. and *B.* following different trades, rented between them, but at different rents and tenures, a house and shop, but divided the shop by a partition, so as to make two shops for the separate business of each, and there was an internal communication between the shops and the house, and as to the rest of the premises there was no division except by the several apartments; the shop of *A.* having been broken open in the night, held, that it was rightly described as the dwelling-house of *A.* *E. T.* 1824, *Bailey's case*, *R. & M.* 23.

House occupied by two tradesmen severally; shop divided.

And where inmates have several rooms in a house, of which they keep the keys, and inhabit them severally with their families, yet if they enter at one outer door with the owner, these rooms cannot be said to be the dwelling-houses of the inmates, but the indictment ought to be for breaking the house of the owner.— But if the owner inhabit no part of the house, or even if he occupy a shop or a cellar in it, but do not sleep therein, the apartments of such inmates shall be considered as their respective dwelling-houses. *Carrell's case*, 1 *Leach*, 237. *Trapshaw's case*, 1 *Leach*, 427., and p. 90. *notis.*

Inmates of a house.

See Rogers's *Ca. supra*, p. 96. *Acc.*

If the owner who lets out apartments in his house to other persons, sleep under the same roof, and have but one outer door common to him and his lodgers, such lodgers are only inmates, and all their apartments are parcel of the one dwelling-house of the owner. *Kel.* 84.

Lodgers.

By consequence, if a man let out part of his house to inmates, and continue to inhabit the rest himself, if he break open the apartments of such inmates and steal their goods, it will be felony only, and not burglary; for it cannot be burglary to break open his own house. 2 *East*, *P. C.* 506. 2 *Russ.* 31.

Owner breaking lodger's apartments.

But if the owner do not lodge in the same house, or if he and the lodgers enter by different outer doors, the apartments so let out are the mansion for the time being of each lodger respectively, even though the rooms are let by the year. 2 *East's P. C.* 505.

Separate entrances.

But if *A.* have a shop which is parcel of his house, the indictment must be for breaking the mansion-house of *A.*; but if it be severed by lease, and have no communication with the dwelling-house by having a different entrance, then, unless the lessee or his servant sleep there usually or often, no burglary can be committed in it. (2 *East's P. C.* 507.) For it is not the mansion-house of *A.*, being severed by the lease; nor can it be said to be the mansion-house of the lessee, if neither he nor his family ever dwell there, or if their sleeping there be only casual or temporary.

Shop, parcel of house.

Severed.

To break and enter a shop, not parcel of the mansion-house, in which the shopkeeper never lodges, but only works or trades there in the day-time, is not burglary, but only larceny: but if he or his servants usually or often lodge in the shop at night, it is then a mansion-house, in which burglary may be committed. 1 *Hale*, 557, 558.

It is necessary also to state with accuracy the name of the person whose goods are stolen. Thus, where the indictment was for breaking, &c. the house of *J. Davis*, with intent to steal the

Indictment. Of the name of the person who

claims property
in the goods,

goods of *J. Wakelin*, in the said house being, and there was no such person who had goods in the house; but *J. W.* was, by mistake, inserted for *J. D.*; the prisoner was acquitted. And it was ruled that the words "*J. W.*" could not be rejected as surplusage, they being sensible and material; that it was necessary to state truly the property in the goods, and that without such words the description of the offence would be incomplete; and that it is not like the case of alleging a robbery in the dwelling-house of *A.*, which turns out to be the property of *B.*; because that circumstance is perfectly immaterial in robbery, which is ousted of clergy generally. *Jenks's case*, *O. B. June*, 1796, *2 East's P. C.* 514. *2 Leach*, 774. *M. T.* 1796.

Mansion or
dwelling-house

It is necessary to state in the indictment, that the offence was committed in a mansion-house or dwelling-house; to say only, in a house, will not be sufficient. *2 East*, *P. C.* 512. *2 Russ.* 36.

Parish.

So the parish in which it is situate must be correctly stated. *2 Russ. ib.*

Church.

In case of burglary in a church, it may be laid as committed in the parish church of such a parish. *2 East*, *P. C.* 512. *2 Russ.* 37.

Owner,

The indictment must also state truly the name of the owner of the dwelling-house. *2 East*, *P. C.* 513. *2 Russ.* 37.

Technical
terms.

The terms "feloniously and burglariously" must be used; and also that the prisoner "broke and entered." *2 Russ.* 37.

What shall be
deemed night.

As to what shall be accounted night for this purpose; anciently the day was accounted to begin only from sun-rising, and to end immediately upon sun-set: but it is now generally agreed, that if there be daylight enough begun or left either by the light of the sun or twilight, whereby the countenance of a person may be reasonably discerned, it is no burglary; but that this does not extend to moonlight; for then many midnight burglaries would go unpunished. (*3 Inst.* 63. *1 Hale*, 550. *2 East's P. C.* 509.) And, besides, the malignity of the offence does not so properly arise, as Mr. Justice Blackstone observes (*4 Com.* 224.), from its being done in the dark, as at the dead of night, when all the creation, except beasts of prey, are at rest, when sleep has disarmed the owner, and rendered his castle defenceless.

In the day-time there can be no burglary. *4 Blac. Com.* 224.

Hour must be
alleged.

Rex v. Waddington, *2 East*, *P. C.* 513. At Lancaster Lent assizes, 1771, there was an indictment for burglary, alleging the fact to have been committed in the night, but not expressing about what hour it was done. Mr. J. Gould held the indictment insufficient as for a burglary, and directed the prisoner to be found guilty of a simple felony only. He said that, according to the old doctrine, a burglary might be committed at any time between sun-setting and sun-rising; but that the rule now established is, that it cannot be committed during the *crepusculum*; that therefore it is necessary to specify the hour, in order that the fact may appear upon the face of the indictment to be done between the twilight of the evening and that of the morning.

Evidence.

It is not necessary, however, that the evidence should prove the hour laid in the indictment: it will be sufficient if the offence appear to have been committed in the night. *2 East*, *P. C.* 513. *2 Russ.* 36.

There must be
an intent to
commit felony.

There can be no burglary but where the indictment both expressly alleges, and the verdict also finds an intention to commit

some felony : for if it appear that the offender meant only to commit a trespass, as to beat the party, or the like, he is not guilty of burglary. 1 *Haw. c. 38. § 18.*

J. Dobbs was indicted for burglary in breaking and entering the stable of *J. Bayley*, part of his dwelling-house, in the night, with a felonious intent to kill and destroy a gelding of one *A. B.* there being. It appeared that the gelding was to have run for 40 guineas, and that the prisoner cut the sinews of his fore-leg to prevent his running, in consequence of which he died. *Parker C. J.* ordered him to be acquitted; for his intention was not to commit the felony by killing and destroying the horse, but a trespass only to prevent his running; and therefore no burglary. But the prisoner was again indicted for killing the horse, and capitally convicted. *Dobbs's case, Buckingham Sum. Ass. 1770, 2 East's P. C. 513. Vide 1 Hale, 561.*

Rex v. Knight & Roffey, 2 East's P. C. 510. The prisoners were indicted for a burglary in the dwelling-house of *Mary Snelling*, the intent being laid to steal the goods of one *Leonard Hawkins*. It appeared that *Hawkins*, who was an excise officer, had seized some bags of tea in a shop, entered in the name of *Smith*, as being there without a legal permit, and had removed them to *Mary Snelling's*, where he lodged. The prisoners and many other persons broke open *Mary Snelling's* house in the night, with intent to take this tea. It was not proved that *Smith* was in company with them; but the witness said, that they supposed the tea to belong to *Smith*; and supposed that the fact was committed either in company with him, or by his procurement. The jury, being directed to find as a fact with what intent the prisoners broke and entered the house, found that they intended to take the goods on the behalf of *Smith*; and, upon the point being reserved, all the judges (*E. T. 1782*) were of opinion that the indictment was not supported; as, however outrageous the conduct of the prisoners was, in so endeavouring to get back *Smith's* goods, still there was no intention to steal. But if the indictment had been for breaking the house with intent feloniously to rescue goods seized, &c., which is felony by stat. 19 G. 2. c. 34., some of the judges thought that it would have been burglary. But even in that case, it was agreed that evidence must be given on the part of the prosecutor, to show that the goods were uncustomed, in order to throw the proof upon the prisoners that the duty was paid: but being found in oil-cases, or in great quantities in an unentered place, would have been sufficient for that purpose.

For it seems the better opinion, that an intention to commit a rape, or other such crime, which is made felony by statute, and was a trespass only at common law, will make a man guilty of burglary, as much as if such offence were a felony at common law; because, wherever a statute makes any offence felony, it incidentally gives it all the properties of felony at common law. 1 *Haw. c. 38. § 18. 2 East, P. C. 511. 2 Russ. 34.*

Thus, they are burglars who break any house or church in the night, although they take nothing away. And herein this offence differs from robbery, which requires that something be taken, though it is not material of what value. 2 *East, P. C. 484. 2 Russ. 33.*

But whatever be the felony really intended, the same must be laid in the indictment, and proved agreeably to the fact.

Either at common law, or such as is made felony by statute.

Intent to commit sufficient.

Must be proved as laid.

Burglary (*Definition of Burglary*). [Criminal

On an indictment for burglary and stealing goods, it appeared that no goods were stolen, but a burglary with intent to steal; the latter not being so laid, as it ought to have been, *Holt C.J.* directed the prisoner to be acquitted. 2 *East's P. C.* 514.

So, if it be alleged that the entry was with intent to commit one sort of felony, and the fact appear to be that it was with intent to commit another; that is not sufficient. 2 *East's P. C.* 514.

Though, if the intended felony were actually committed, it is enough to state the breaking and entering to be with intent to do so. *Ibid.*

Different intents in different counts.

Different intents may be stated in different counts of the same indictment. 2 *East, P. C.* 515. 2 *Russ.* 35.

Stealing and intent to steal, distinction.

It has been decided, that an acquittal upon an indictment for burglary in breaking, &c. and stealing, cannot be pleaded in bar to an indictment for the same act of burglary with intent to steal. 2 *East, P. C.* 519. 2 *Russ.* 38. *R. v. Vandercomb & Abbott.*

II. Verdict and Judgment.

The indictment may be so laid as to comprise several offences, arising out of the same transaction, so that the prisoner may be found guilty of part, and acquitted of the rest. Where the indictment is for burglary and stealing, the prisoner may be acquitted of the burglary and found guilty of stealing in the dwelling-house. *R. v. Withall and Overend*, 2 *East, P. C.* 517. acc. *Hungerford's case, ib.* 518. See 2 *Russ.* 43.

Conviction for larceny.

For house-breaking and larceny.

Though one has pleaded guilty to the burglary.

Where three prisoners were indicted for burglary and stealing, and one of them pleaded guilty, and the two others were acquitted of the burglary, but found guilty of stealing in the dwelling-house, it was held by a majority of the judges, that judgment for capital offences might be entered against all three. *Butterworth's case, C. C. R.* 520. See *Hempstead's case, C. C. R.* 344., where it was held, that two being indicted for a joint offence, they could not receive judgment each of a several offence.

III. Punishment.

Punishment.

It is enacted by § 11. of 7 & 8 G. 4. c. 29. "that every person convicted of burglary shall suffer death as a felon."

Accessaries.

In regard to the punishment of principals in the second degree, and also of accessaries both before and after the fact, and concerning the trial of accessaries, see tit. *Accessaries*.

Principal acquitted of the capital charge. Accessary convicted of receiving the goods, and transported for 14 years.

Rex v. Gadsby, Northampton Lent Assizes, 1818, MS. C. C. R. *Joseph Wilmore* was indicted at *Northampton Lent Assizes*, 1818, before *Garrow B.* for a burglary in the dwelling-house of *Charles Hill*, and burglariously stealing his goods: *Joseph Gadsby*, for feloniously and burglariously receiving the same. Upon the trial, the prisoner *Wilmore* was acquitted of the burglary, but found guilty of stealing the goods; and *Gadsby* was found guilty of feloniously receiving. *Denman* objected, that *Wilmore* having been acquitted of the burglary, *Gadsby* could not be convicted. Upon case reserved, the judges held the conviction right, and the prisoner was transported for fourteen years.

5 G. 4. c. 83.

As a means of preventing burglary and house-breaking, by stat.

5 G. 4. c. 83. § 4., it is enacted, "that every person having in his or her custody or possession any picklock key, crow, jack, bit, or other implement, with an intent feloniously to break and enter into any dwelling-house, warehouse, coach-house, stable, or outbuilding; or being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon; or having upon him or her any instrument with intent to commit any felonious act; every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose, shall be deemed a rogue and vagabond within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit such offender, being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witnesses, to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months; and every such picklock, key, crow, jack, bit, and other implement; and every such gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, and every such instrument as aforesaid, shall, by the conviction of the offender, become forfeited to H. M."

Persons having
house-breaking
implements.

Punishment.
Implements,
how disposed
of.

In a case upon stat. 23 G. 4. c. 88. (passed for the like purposes, but repealed by stat. 5 G. 4. c. 83. § 1.), *R. v. Brown*, 8 T. R. 26., a warrant of commitment was holden defective, because it did not state that the defendant was apprehended with implements of house-breaking upon him *at the time of such apprehension*. Lord Kenyon C. J. said, that he yielded with great reluctance to the objection.

IV. Recompense to Prosecutors, &c.

It is enacted by 7 G. 4. c. 64. § 28., that where it shall appear to any court of oyer and terminer, &c. that any person has been active in or towards the apprehension of any person charged with certain offences (of which burglary is one), the court is authorised to order the sheriff to pay such persons such sums of money as to the court shall seem reasonable and sufficient, to compensate such persons for their expenses, exertions, and loss of time, in or towards such apprehension; and the courts of sessions of the peace are also authorised to give similar compensations to persons who have been active in or towards the apprehension of any party charged with knowingly receiving stolen property; and the said courts may also allow to such persons, if prosecutors or witnesses, such costs, compensations, and expenses as by the said act they are empowered to allow.

Recompense
for activity in
the apprehen-
sion.

By § 30., if any person shall happen to be killed in endeavouring to apprehend any person charged with the enumerated offences, the court may order such sum of money as in its discretion shall seem meet to be paid to the widow or family, as in the act is specified. See tit. Rewards and tit. Arrest.

Warrant to apprehend a Burglar.

County of } To the constable of———.

FORASMUCH as A. I. of———, in the county of———,
yeoman, hath this day made information and complaint upon
oath before me J. P. esquire, one of his majesty's justices of the peace

for the said county, that yesterday in the night the dwelling-house of him the said A. I. at ——— aforesaid, in the county aforesaid, was feloniously and burglariously broken open, and one silver tankard of the value of 5l. of the goods and chattels of him the said A. I. feloniously and burglariously stolen, taken, and carried away from thence; and that he hath just cause to suspect and doth suspect that A. O. late of ———, in the county of ———, labourer, the said felony and burglary did commit: These are therefore, in his said majesty's name, to command you, that immediately upon sight hereof you do apprehend the said A. O., and bring him before me to answer the premises, and to be further dealt withal according to law. Herein fail you not. Given under my hand and seal the ——— day of ———, in the year ———.

Indictment for Burglary.

County of } *THE jurors for our lord the king upon their oaths*
 ——— } *present, that A. O., late of the parish of ———, in*
the county of ———, labourer, on the ——— day of ———, in the
——— year of the reign of ———, about the hour of one in the
night of the same day, with force and arms, at the parish afore-
said, in the county of ———, the dwelling-house of A. I. there
situate, feloniously and burglariously did break and enter, with
intent the goods and chattels of the said A. I. in the said dwelling-
house then and there being then and there feloniously and burglariously
to steal, take, and carry away, and then and there with force
and arms one silver tankard of the value of 5l. of the goods and
chattels of the said A. I. in the same dwelling-house then and there
being found, then and there feloniously did steal, take, and carry
away; against the peace of our said lord the king, his crown and
dignity.

Or, That I. S. on such a day, in the night of the same day, with force and arms the dwelling-house of A. B. feloniously and burglariously broke and entered, and then and there such and such things of the goods and chattels of the said A. B. in the said house then being, feloniously and burglariously did steal, take, and carry away.

Burning.

I. Punishable at Common Law.

II. Punishable by Statute.

[22 G. 2. c. 33.—12 G. 3. c. 24.—7 & 8 G. 4. c. 30.]

I. Punishable at Common Law.

Houses, burning at the common law.

MALICIOUSLY and voluntarily burning the house of another by night or by day is felony at the common law. 1 Haw. c. 39. [Maliciously and voluntarily.] For if it be done by mischance or negligence, it is no felony. 3 Inst. 67.

In doing an unlawful act.

As, if an unqualified person happen to set fire to the thatch of a house; or even if a man were shooting at the poultry of another, by which means the house is fired, that is, provided he did not mean to steal the poultry, but merely to commit a trespass; for

otherwise, the first intent being felonious, the party must abide all the consequences. 2 *East's P. C.* 1019.

If a man, maliciously intending only to burn one person's house, happen thereby to burn the house of another, it is certain that he may be indicted as having maliciously burned the house of that other; for where a felonious design against one man misseeth its aim, and takes effect upon another, it shall have the like construction as if it had been levied against him who suffers by it. 1 *Haw. c. 39. § 5.* 1 *Hale*, 569.

Felonious intent.

Burning.] Neither a bare intention to burn a house, nor even an actual attempt to do it by putting fire to part of a house, will amount to felony, if no part of it be burned: but if any part of the house be burned, the offender is guilty of felony, notwithstanding the fire afterwards be put out, or go out of itself. 1 *Haw. c. 39. § 4.* 2 *East's P. C.* 1020.

Bare attempt not sufficient.

The house.] This extendeth not only to the very dwelling-house, but to all outhouses that are parcel thereof, though not contiguous to it, nor under the same roof. 1 *Hale*, 567.

Outhouses belonging to house.

But if the barn or outhouse be not parcel of a dwelling-house, it is not felony unless the barn have hay or corn in it; and then, though it be no parcel of a dwelling-house, it is felony. 3 *Inst.* 67. 2 *Russ.* 487.

Barn with corn.

Of another.] But a person seised in fee, or but possessed for years of a house standing by itself at a distance from all others, cannot commit felony in burning the same. So a man so seised or possessed of a house in a town, who burned his own with an intent to burn his neighbour's, but in the event burned his own only, was not at common law guilty of felony; it was however certainly an offence highly punishable, in regard of the malice thereof, and the great danger to the public which attended it; and the offender was liable to be severely fined, and imprisoned during the king's pleasure, and set on the pillory and bound to his good behaviour. 1 *Haw. c. 39. § 3.*

Must be the house of another.

If a landlord or reversioner sets fire to his own house, of which another is in possession, under a lease from himself or from those whose estate he hath, it shall be accounted arson; for during the lease the property of the house is in the tenant. 2 *Russ.* 488.

Landlord or reversioner burning house in occupation of a tenant.

So, where a widow entitled to dower, but which had not been assigned to her, burned a house which she had let to a tenant, for the benefit of her husband's eldest son, it was arson. 2 *East, P. C.* 1023. 2 *Russ.* 488.

Widow entitled to dower, but before assignment.

If a person wilfully and maliciously sets fire to his own house, and thereby burns the house of another which is contiguous, it is arson. See *Isaac's case*, 2 *East, P. C.* 1031.

Where a parish pauper was put into a house by the parish officers, and had the sole occupation of it by himself and family, paying no rent, it was held that it could not be considered as his house, and that, having burned it, he was guilty of arson. 2 *Russ.* 488.

Parish house occupied by pauper.

II. Punishable by Statute.

A great variety of statutes have at different times been enacted for the punishment of the crime of burning, and setting fire to houses and other buildings, &c.; but the greater part of these have

been repealed, and the description and punishment of the offence have been provided for by the following enactments.

Setting fire to
church, house,
stable, &c. &c.

By 7 & 8 G. 4. c. 30. § 2., if any person shall unlawfully and maliciously set fire to any church or chapel, or to any chapel for the religious worship of persons dissenting from the united church of England and Ireland, duly registered or recorded, or shall unlawfully and maliciously set fire to any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, or granary, or to any building or erection used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, with intent thereby to injure or defraud any person, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

Wife burning
her husband's
house not
within stat.,
though living
separate.

Where a woman, living apart from her husband, maliciously set fire to his house, it was held, on cause reserved, not to fall within this statute; it being essential, to constitute the offence, that there should be an intent to injure or defraud some third person not identified with herself. *E. T. 1828, R. v. Elizabeth March, R. & M. 182.*

Coal-mine.

By § 5., if any person shall unlawfully and maliciously set fire to any mine of coal or cannel coal, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

Ship or vessel.

By § 9., if any person shall unlawfully and maliciously set fire to, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon.

Stack of corn,
grain, &c.

By § 17., if any person shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, straw, hay, or wood, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon; and if any person shall unlawfully and maliciously set fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, where-soever the same may be growing, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

Crop of corn,
grain, &c.
Wood, coppice,
&c.
Heath, gorse,
&c.

The malice need
not be against
the owner of the
property in-
jured.

By § 25., punishments imposed by this act on persons maliciously committing any offence, are equally to apply and be in force whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise.

By 12 G. 3. c. 24. § 1. it is made a capital offence if any person shall, within this realm, or in any of the islands, countries, &c. thereto belonging, wilfully and maliciously set on fire, or burn, or otherwise destroy, or cause to be set on fire, &c., or aid, procure, abet, &c. any of his majesty's ships, whether on float, or building, or repairing, or any of his majesty's arsenals, magazines, dock-yards, &c., or any of the buildings thereto belonging, or any timber, &c. there placed for ship-building, or any naval, military, or victualling stores, or the places where they are deposited: and by § 2. any person charged with committing any of the above-named offences out of the realm, may be tried either in any county in England, or in the island or place where the offence was committed, as the king may deem most expedient.

Burning or destruction of ships, arsenals, stores, &c.

It may be convenient to insert some of the cases decided on statutes now repealed, where the terms used in the enactments resembled those of the statutes which are now in force.

By 9 G. 1. c. 22. (the Black Act) § 1., it was made a capital felony to set fire to any house, barn, or outhouse, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood.

Black Act (now repealed).

On this statute it has been held that a common gaol was a house, within the meaning of it. The entrance to the prison was through the dwelling-house of the gaoler, and the prisoners were sometimes allowed to lie in it. All the judges held that the dwelling-house was to be considered as part of the prison, and the whole prison was the house of the corporation to whom it belonged. One set of the counts laid it to be the house of the corporation, another of the gaoler, and a third of the person whom the gaoler suffered to live in the dwelling-house. *Donovan's case*, *Lanc.* 1770, 2 Bl. Rep. 682. 2 East's P. C. 1020.

A common gaol within the act.

It has been held that this statute did not alter the nature of the common law crime, or create any new offence, and therefore that under the words "set fire to," the putting fire into, or towards a house, however maliciously, does not amount to arson, if in fact no part of it be burned.

Sarah Taylor was indicted for setting fire to an outhouse, commonly called a paper-mill. It appeared that she had set fire to a large quantity of paper which was drying in a loft annexed and belonging to the mill; but no part of the mill itself was consumed; and therefore the judges thought the case not within the statute on that ground; though another doubt was started, whether a mill were an outhouse within the meaning of the act. *Sarah Taylor's case*, 2 East's P. C. 1020. 1 Leach, 49.

Attempt to burn a paper-mill.

Where the prisoner stuck a lighted candle in the thatched roof of a house, with the intention of burning it down, but being observed by a neighbour, the burning candle, and the straw immediately communicating with it, were pulled out of the roof, and the fire was thus stopped, but the straw pulled out was proved to have been black and singed; the prisoner was convicted, under 7 & 8 G. 4. c. 30. § 2, and no objection was raised that the house had not been set fire to: but the conviction was held wrong on another ground. *E. T.* 1828, *R. v. Elizabeth March*, *R. & M.* 182.

North was indicted for feloniously, wilfully, and maliciously setting fire to a certain outhouse of *J. Taylor*, at *Knaresborough*, against the form of the statute (9 G. 1. c. 22.). It appeared that the prisoner had set fire to and burned part of a building of

Outhouse.

Outhouse.

the prosecutor, situated in a yard of his at the back of his dwelling-house, which was in the street of the town of *Knaresborough*. The building was four or five yards distant from the dwelling-house, but not joined to it. The yard was enclosed on all sides, in one part by the dwelling-house, in another part by a wall, and in a third part by a railing, which separated it from a field, and in the remaining part by a hedge. The buildings set fire to and in part burned, consisted of a stable and a chamber over it, which was used by the prosecutor as a shop for keeping and dressing flax. It was objected on behalf of the prisoner that this building was not an outhouse within the stat. 9 G. 1. c. 22., as that must be understood to mean outhouses, which in contemplation of law were not part of the dwelling; which it was insisted this was, and that the indictment should have been for arson at common law. The jury found the prisoner guilty, and the point was reserved. In *November 1795*, all the judges (except *Hotham B.*, who was absent) agreed that the verdict was right. They said, that though for some purposes this might be part of the dwelling-house, yet still in fact it was an outhouse; and that the stat. 9 G. 1. did not alter the nature of the crime, or create any new offence, but only excluded the principal from clergy more clearly than he was before. *North's case*, *York Sum. Ass. 1795*, 2 *East's P. C.* 1021.; see *Elsmore v. St. Briavels*, 8 B. & C. 461. tit. *Hundred*.

See as to outhouse, *post*, 115, 116.

Burning parcel of unthrashed corn.

In the case of *R. v. Judd*, 2 T. R. 255., who was committed for wilfully and maliciously setting fire to a parcel of unthrashed wheat, the court were of opinion, that as the statute had only made it felony to set fire to a cock, mow, or stack of corn, the warrant of commitment did not charge the defendant with a felony; and he was therefore admitted to bail.

22 G. 2. c. 33. art. 25. Setting fire to magazine, &c.

By the articles of the navy, stat. 22 G. 2. c. 33., every person who shall unlawfully burn or set fire to any magazine or store of powder, or ship, boat, ketch, hoy, or vessel, or tackle or furniture thereunto belonging, not appertaining to an enemy or rebel, shall be punished with death by the sentence of a court-martial.

Burning a mill-house not parcel of a dwelling-house is not felony within 9 G. 3. c. 29.

An action was brought against the hundred of *Shrewsbury* for damages sustained by the wilful setting on fire "of a certain outhouse, and certain mill wheels, works, and machinery in the same." The building was a mill-house, and though it was under the same roof with a cottage, where one of the plaintiffs formerly slept, there was no interior communication between them. There was a verdict for the plaintiff, subject to a case, and upon argument in K. B., per Lord *Ellenborough C. J.*, though in an indictment for arson, it need not state the offence to have been committed against the mansion-house, yet in evidence the building burned must be proved to have been in some way connected with the mansion-house, so as to show it parcel thereof. The 9 G. 3. c. 29. (a), was passed to extend to mills, parcel or not of the dwelling-house; but it gives no remedy against the hundred. The action then must bring the case within stat. 9 G. 1. c. 22. (a), the words of which are house, barn, or outhouse: that is, such outhouse of which arson might be committed at common law. These premises are not of any of these descriptions. *Hiles v. Hundred of Shrewsbury*, 3 *East*, 457.

By 43 G. 3. c. 58. (now repealed) (Ld. *Ellenborough's Act*), it is made a capital offence wilfully, maliciously, and unlawfully to set fire to any house, barn, granary, outhouse, &c. with intent thereby to injure or defraud his majesty, or any of his majesty's subjects, or any body corporate.

43 G. 3. c. 58.
Lord Ellenborough's Act.

Jacob Winter was convicted before *Richards B.* at *Reading Lent Assizes*, 1815, upon an indictment, the 1st count of which charged him with feloniously, &c. setting fire to and burning and consuming a certain outhouse of one *Thomas Rogers*, in the parish of *Cheveley*, in the county of *Berks*, against the king's peace. The 2d count charged the same offence to be against the statute: 5th count charged with setting fire to, &c. a certain house of *Rogers*: 6th count charged, that *Winter* set fire to the said house, then being in the possession of said *Rogers*, with intent thereby to injure and defraud him, against the form of the statute. It was proved very clearly, that the prisoner set fire to and burnt the building in question. *Thomas Rogers* lived in the house, very near to which was a school-room, which was burnt. The school-room is separated from the dwelling-house by a narrow passage about a yard wide. The roof is thatched with straw. The roof of the house, which is tile, reaches over part of the school. The dwelling-house, and the school, and a garden, and other things, and the court, which incloses all, were rented by *Rogers* of the parish for *6l. per annum*. There was one continued fence round all the premises. Nobody but *Rogers* and his family had a right to come within the fence. Upon this fact it was urged, in behalf of the prisoner, that the building burnt was not a house or outhouse within the statute. The point was referred to the judges, and judgment given by *Dallas J.* at the following assizes at *Abingdon*, that the building was correctly described in the indictment, either as an outhouse or part of the dwelling-house. *Winter's case*, *Reading Lent Ass.* 1815, *C. C. R.* 295.

A school-room holden to be well described either as an outhouse, or part of the dwelling-house.

It has been held under this statute, that where a party wilfully does the act, he necessarily intends that which must be the consequence of the act, viz. injury to the owner of the building burned.

William Farrington was tried before *Le Blanc J.* at *Staffordshire Summer Ass.* 1811, on an indictment, charging, that he, on the 10th October 1808, feloniously, maliciously, and unlawfully did set fire to a certain mill at *Alrewas*, in the county of *Stafford*, the same mill then being in the possession of *Thomas Dicken*, *Francis Dicken*, and four other persons (partners), with intent to injure and defraud the said several persons (naming them), then being liege subjects of the king, against the form of the statute. — The fact of the prisoner's setting fire to the mill was clear from his own confession. But it was stated by the witnesses for the prosecution, the clerks of Messrs. *Dicken* and Co., that the prisoner was a harmless inoffensive man, that there never had been any quarrel or disagreement between him and his masters, or between him and any of the clerks, and that they were not aware of any motive which could induce him to do the act. The jury found the prisoner guilty; but sentence was respited, upon a doubt, whether, under the particular words of the statute 43 G. 3. c. 58., an intent to injure or defraud some person or body corporate was not necessary to be proved, or at least some fact from which such intent could be

As to the intent to injure.

inferred, beyond the mere act of setting the mill on fire. The statute 9 G. 3. c. 29. (which makes it felony, without benefit of clergy, wilfully or maliciously to burn or set fire to any mill) limits the prosecution for such offence to eighteen months after the offence committed, and the offence which was the subject of the present indictment having been committed near three years before any prosecution commenced, the indictment could only be supported, if at all, on stat. 43 G. 3. c. 58. At *Lent Ass.* 1812, *Graham B.* delivered the opinion of the judges, that burning a mill under circumstances such as appeared in this case, must necessarily have been done with intention to injure, though the principal object of Lord *Ellenborough's* Act was to comprise the cases of a person's burning the house, &c. or mill of which he was tenant or owner, to the injury of his landlord or neighbour, or to defraud insurers. Sentence of death was accordingly passed upon the prisoner, but he afterwards received a pardon, on condition of being imprisoned one year, and kept to hard labour, in the house of correction. *Farrington's case*, *Staff. Sum. Ass.* 1811, *C. C. R.* 207.

Indictment —
house.

The indictment need not charge the burning of a *dwelling-house*, it will be sufficient to state it to be a house. *2 Russ.* 494.

Must state
whose house.

An indictment stating that the prisoner set fire to a house at *A.*, without stating whose house it was, or alleging anything to excuse making that statement, will not be sufficient. *2 Russ.* 494.

Pauper occu-
pying a parish
house.

Where a house belonged to a parish, who permitted a person to live in it, who was merely their servant, and it was unknown who the trustees were, and in whom the legal estate was vested, the indictment having charged barely that the prisoner feloniously set fire to a house situate in the parish of *E.*, it was holden bad; and it appears to have been holden by the judges, that it might have been laid to be the property of the overseers, or of persons unknown. *Rickman's case*, 1789, *2 East*, *P. C.* 1034. *cit.* *2 Russ.* 494.

Insolvent tenant
having made a
provisional as-
signment.

Where the tenant of a house had become insolvent, and had made a provisional assignment of the term, but the provisional assignee had not taken possession, and the tenant resided in the house, letting out rooms to lodgers, of one of which the prisoner was the occupier; the possession of the house was laid in different persons. After conviction, the judges held that the house was rightly described as in the possession of the insolvent tenant, the possession by his tenants being his possession; but if not, the prisoner's own room might be described as his house. *M. T.* 1824, *Ball's case*, *R. & M.* 30.

N.B. This was a prosecution under 43 G. 3. c. 58.

Actual, but
wrongful, oc-
cupation.

A house may be described as in the possession of the actual occupier, though his possession is wrongful. Indictment for setting fire to a house in possession of *James Wallis*: he was the actual occupier, but he never had any occupation but as servant; his service had ceased, and he was wrongfully holding after the time allowed him for quitting had expired. *Parke J.* thought, at the trial, he could not be said to be in possession; but, on case, the judges (thirteen) held that, as he had the actual occupation, the statement was proper, and the conviction right. *E. T.* 1832. *R. v. Wallis*, *MS. Bayley B. S. C.* 1 *M.* 344.

The indictment must state correctly in whose possession the house, &c. was when the offence was committed.

Where the farming outhouses which were burned were the property of *B. S.* a widow, but were used only by her son, who had the sole management of the farm, on his own account, though without any particular agreement between him and his mother, and the indictment laid them to be in the occupation of the mother, it was held by *Heath J.* to be wrong; but on a second indictment, laying the occupation in the son, the prisoner was convicted. *Glandfield's case*, 1791, 2 *East*, P. C. 1034. 2 *Russ.* 495.

See the provisions of 7 G. 4. c. 64. as to the statement generally of the ownership of partners, &c., and as to the ownership of property belonging to counties, parishes, &c. § 14. and seq.

In an indictment for arson, with intent to defraud an insurance company, it appeared that the policy, which was on goods, was properly stamped, but the memorandum thereon, authorising the removal of the goods to the house which was burned, not having a stamp, was totally unavailable. The prisoner was found guilty, but, on case reserved, a majority of the judges held the conviction wrong, on the ground that there was no legal effective contract of insurance. 1807, *Gilson's case*, C. C. R. 138.

In an indictment under 7 & 8 G. 4. c. 30. it will be proper to charge that the prisoner "set fire," &c. *unlawfully*: where the indictment laid it to have been done *feloniously, voluntarily, and maliciously*, the judges thought it not sufficient, and directed a fresh indictment to be preferred. *M. T.* 1829, *R. v. Turner*, R. & M. 239.

On an indictment for setting fire to a stack of pulse, a mistake as to the place where the offence was committed is immaterial. The charge is transitory, not local. One count in an indictment stated that the prisoner, at the parish of *Normanton-in-the-Woulds*, in the county of *N.*, maliciously, &c. did set fire to a certain stack of beans of *J. S.* On Not guilty pleaded, it appeared that there was no such parish; and two points saved: one, whether the offence was local; the other, whether there being no such parish was an objection on Not guilty; and the judges (*Lord Lyndhurst* and *Bolland B.* absent) were unanimous that the offence had nothing of locality in it, and that there being no such place in the county can only be taken advantage of upon a plea in abatement, and conviction right. *H. T.* 1832, *R. v. Woodward*, MS. *Bayley B.* S. C. 1 M. 323.

Upon a statute which makes it capital to set fire to a stack of pulse, it is sufficient to state that the prisoner set fire to a stack of beans: the judges will take notice that beans are pulse. *H. T.* 1832.

An indictment on 7 & 8 G. 4. c. 30. § 17. charged the prisoner with setting fire to a stack of beans; the statute does not mention beans, and the only word it contains in which beans could be included was pulse. The judges thought themselves bound to consider beans as a species of pulse, and the conviction was held right. *R. v. Woodward*, MS. *Bayley B.* S. C. 1 M. 323.

Prisoner was indicted for setting fire to an outhouse: it was in an inclosed field, about a furlong from the house, and not in sight of it; it was thatched and boarded round, and had had stalls in it for beasts, but they had been removed; there were no windows nor door, and it had an opening, sixteen feet wide, for cattle to go

Son using farming buildings which were the property of his mother.

Ownership of partners, &c.

Fraud alleged against insurance company. Policy void for want of stamp.

Indictment must state the setting fire to have been done unlawfully.

Setting fire to a bean stack, a transitory offence. If the name of the place is mistaken, it is immaterial on Not guilty.

Indictment for setting fire to a stack of beans, held to come within the term "pulse."

An open building in a field, at a distance from and out of sight, though boarded round

and covered in, is not an outhouse within 7 & 8 G. 4. c. 30. s. 2.

Kind of hovel in a farmyard, used for keeping a cart and cattle in, held to be an outhouse.

Smoke and sparks in the straw roof, sufficient setting fire to the building.

Servants carelessly firing houses, &c.

D.

Threatening to burn a house.

in and out; there was a lock-up place inside, where boards were locked up. On case, seven judges against six thought it not an outhouse within the statute; and pardon. *E. T. 1832, R. v. Ellison*, and another. *MS. Bayley B. S. C. 1 M. 336*.

Prisoner was tried for arson, in setting fire to an outhouse, before *Littledale J.* The building in question stood in a farmyard, but not adjoining to the house, there being a barn, gateway, pigstye, &c. intervening; it was supported by six posts, and in front was open to the yard; and on the back and on one of the sides, which adjoined a field and a road, there were paling and rails: pieces of wood were laid on the top from side to side, over which straw was closely packed by way of roof, and it was used by the prosecutor for the standing of his cart, and for keeping his cows in at night. One of the witnesses, a farmer, said, he should call it "an outhouse." It appeared that in the afternoon of a certain day, smoke was seen issuing from the straw, and when some hand-fuls were pulled out, sparks were seen in the straw; but there was no flame; and afterwards the ends of some of the straws were found burnt and reduced to ashes; a linen ball with sparks in it was also pulled out of the roof. On three questions reserved, the judges held, first, that it was an outhouse within 7 & 8 G. 4. c. 30. § 2., diss. *Tindal C. J.*; second, they all held that the straw was part of the building; and also, third, that there was a setting on fire. *M. T. 1833, R. v. John Stallion, Cambr. Sum. Ass. 1833. MS.* The prisoner was executed.

By stats. 6 Ann. c. 31. § 3., 14 G. 3. c. 78. § 84., if any menial, or other servant or servants, through negligence or carelessness, shall fire or cause to be fired any dwelling-house, or outhouse or houses, or other buildings, and such servant or servants being thereof convicted on the oath of one witness before two justices, shall forfeit 100*l.* to the churchwardens or overseers of the parish where the fire shall happen, to be distributed by them amongst the sufferers, in such proportions as to the said churchwardens shall seem just; and in case of default or refusal to pay the same immediately on demand by the said churchwardens, such servant or servants shall by warrant of two justices be committed (D.) to the common gaol, or to some workhouse or house of correction, as the justices shall think fit, for eighteen months, there to be kept to hard labour. And see stat. 5 G. 4. c. 18. tit. *Distress*.

By the commission of the peace, any justice may cause to come before him all those who to any of the people concerning the firing of their houses have used threats, to find sufficient security for the peace or their good behaviour towards the king and his people; and if they shall refuse to find such security, may cause them to be safely kept in the king's prisons, until they shall find security.

- A. A. Information for setting fire to and burning a Dwelling-House; on stat. 7 & 8 G. 4. c. 30. § 2.

County of } *BE it remembered, that on the ——— day of ———,*
 } *in the ——— year of the reign, &c. at ———,*
 to wit. } *in the said county, A. B. of ———, yeoman, cometh*
 } *before me J. P. esquire, one of his majesty's justices of the peace in*

and for the said county of ———, and. complaineth and maketh oath, that on the ——— day of ———, in the year of our Lord one thousand eight hundred and ———, his dwelling-house [or, barn, &c. according to the fact], situate at the parish of ———, in the said county, was, as he verily believes, wilfully, maliciously, and unlawfully set fire to [and burnt, according to the fact], and that he the said A. B. hath just cause to suspect and doth suspect that one C. D., of ———, in the said county, labourer, did unlawfully, maliciously, and feloniously set fire to [and burn, according to the fact] the said dwelling-house; and thereupon the said A. B. prayeth the judgment of me in the premises, that my warrant may issue against the said C. D. to answer the premises. A. B.

Sworn and exhibited before me, the day
and year first above mentioned.

J. P.

B. Warrant thereon.

B.

County of }
to wit. } To the constable of the parish of ———, in the
said county.

WHEREAS A. B., of ———, yeoman, hath this day made complaint on oath before me J. P. esquire, one of his majesty's justices of the peace in and for the said county, that [state the offence as in the information]. These are therefore to command you forthwith to apprehend and bring before me, or some other of his majesty's justices of the peace, acting in and for the said county, the body of the said C. D. to answer the said complaint, and to be further dealt with according to law. Given under my hand and seal, &c.

J. P. (L. S.)

C. Commitment thereon.

C.

County of {
to wit. { J. P. esquire, one of his majesty's justices of the
peace for the said county of ———, to the con-
stable of the parish of ———, in the said county,
and to the keeper of the common gaol at ——— in
the said county.

THESE are in his majesty's name to charge and command you the said constable of ———, forthwith to convey and deliver into the custody of the said keeper of the said gaol the body of C. D. this day brought before me, J. P. esquire, one of his majesty's justices of the peace in and for the said county, by O. P. constable of ———, and charged on the oath of A. B. of ———, yeoman, with having on the ——— day of ——— last past, at ———, in the parish of ———, in the said county, wilfully, maliciously, and feloniously set fire to [and burnt, as in information] the dwelling-house, [barn, &c. as in information] of the said A. B.; and you the said keeper of ——— are hereby required to receive him the said C. D. into your custody in the said gaol, and him there safely to keep until he be delivered from your custody by due course of law. Given under my hand and seal, the ——— day of ———, A.D. 18—.

J. P. (L. S.)

- D. Commitment of a Servant for negligently setting Fire to a Dwelling-House, under stats. 6 Ann. c. 31. § 3. and 14 G. 3. c. 78. § 84. p. 116.

County of } To the constable of ———, and to the keeper of the
 ——— } house of correction at ———, in the ———.

WHEREAS A. B., servant of C. D., of, &c. was on the day of the date hereof lawfully convicted before us, W. S. and S. P. esquires, two of his majesty's justices of the peace for the said county, upon the oath of E. F. of, &c. That he the said A. B. did, on the ——— day of ——— last, through negligence, set fire to or cause to be fired the dwelling-house of the said C. D., situate at ———, in the parish of ———, in the said county, by reason whereof, and by force of the statutes in that case made and provided, he the said A. B. hath forfeited the sum of one hundred pounds: And whereas the churchwardens of the parish of ———, where the said fire did happen, have made appear unto us upon oath, that immediately upon the said conviction, they did duly demand of the said A. B. the sum of one hundred pounds, to be distributed by them as the law directs, but the said A. B. did refuse and neglect to pay the same: These are therefore to command you, in his majesty's name, to convey the said A. B. to the house of correction at ——— aforesaid, and deliver him to the keeper thereof, together with this precept; and you the said keeper are hereby commanded to receive the said A. B. into your custody, and him detain and keep in the said house of correction to hard labour, for the space of eighteen months next ensuing. Given under our hands and seals, &c.

Cattle.

I. Stealing, killing, or maiming Cattle.

[7 & 8 G. 4. c. 29. & c. 30. — 2 & 3 W. 4. c. 62. — 3 & 4 W. 4. c. 44.]

II. Ill-treatment of Cattle.

[3 G. 4. c. 71.]

I. Stealing, killing, or maiming of Cattle.

7 & 8 G. 4. c. 29.
 Stealing of
 cattle, &c.

By 7 & 8 G. 4. c. 29. § 25. if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any of such cattle with intent to steal the carcase or skin or any part of the cattle so killed, he shall be guilty of felony, and suffer death as a felon.

By indictment under this statute the prisoner was charged with stealing a sheep, but it appeared in evidence that the animal stolen was an ewe. After verdict of guilty, the judges held the conviction wrong, on the ground that the statute had specified both sheep and ewe, and therefore, that it ought to have been stated accordingly. *R. v. Puddifoot, R. & M.* 247.

2 & 3 W. 4. c. 62.
 Capital punish-

By 2 & 3 W. 4. c. 62. § 1., reciting § 25. of 7 & 8 G. 4. c. 29., it is enacted, that so much of the said section as inflicts the punishment

of death upon persons convicted of the felonies therein specified shall be repealed, and that every person convicted of any of the felonies there specified, or of counselling, aiding, or abetting the commission thereof, shall be transported beyond the seas for life. And by 3 & 4 W. 4. c. 44. § 3. all persons punishable by transportation for life under 2 & 3 W. 4. c. 62., shall be liable, previously to their being transported, in case the court shall think fit, to be imprisoned, with or without hard labour, in the gaol or house of correction, or to be confined in the penitentiary, for any term not exceeding four years nor less than one year.

Mr. *Dickenson* mentions the following extraordinary attempt to convert an open and forcible taking of a horse into a felonious taking, in a case which occurred at the *Essex Summer Assizes*, 1817. *Israel Alexander* and *Thomas Davis* were tried before Lord *Ellenborough* C. J., for horse-stealing. The facts were these:—One *Carter*, a servant to the proprietors of the *Cannon Brewery*, rode on a horse borrowed by his employers as far as *Stratford*, in the road to *Woodford*, on business of the said proprietors. When he arrived opposite the *King's Head Inn*, at *Stratford*, the horse turned restive, and would go no further. *Carter* got off to lead him into the inn-yard, intending to pursue the short remainder of his journey on foot, when the two prisoners opened the sash of a window in the inn, and called out, "What will you take for the restive horse?" *Carter* answered, "He is not worth more than 5*l*." This, on the trial of the prisoners, he declared he only said in a passion, meaning to apply it to the restiveness of the animal, for he added "that the horse was a borrowed one, and not his to dispose of;" and that in fact it was worth at least 20*l*. He led it into the stable, and went himself into the house.—*Alexander* went into the yard, soon after returned, said he would have the horse, and tendered a note of 20*l*. or 25*l*. value to *Carter*, and asked him to return the difference; *Carter* in reply repeated, "that it was a borrowed horse, and that he had no authority to sell it, and what he had said about the value of him was merely a joke." *Alexander* repeatedly tendered the money, and afterwards took the horse away with him by force, went to another inn, and locked him up in the stable there. This all passed at mid-day in the open yard of the inn, in the presence of several persons. *Carter* pursued his journey on foot, and on his return demanded his horse, but could not obtain him. The jury were disposed to find the prisoner guilty of a fraud, but Lord *Ellenborough* C. J. said, "The prisoners are indicted for horse-stealing, and they must either be found guilty of that specific offence, or wholly acquitted. Under the circumstances of the case, there is no pretence to say that this public and open taking of the horse was a stealing, which supposes something of privacy and secrecy. It is very material to justice, not to confound cause of action with felony; claim of civil redress with public crime. Even if they had been indicted for a fraud, I do not think the circumstances of the case would have supported the indictment; but there is no pretence to say that this wanton, and even forcible taking of the horse, can come under the denomination of horse-stealing." See title *Larceny*.

ment repealed.
Transportation
for life enacted.

3 & 4 W. 4. c. 44.

Persons so
liable to trans-
portation for life
may be pre-
viously im-
prisoned.

Case of horse
taken wantonly
and openly.

The stat. 14 G. 2. c. 6. (now repealed) contained a similar provision in regard to killing with intent to steal the whole, or any part of the carcase, and on an indictment thereon the following

Giving a sheep a mortal wound with intent to steal part of the carcase will by relation be a killing from the time the wound is given, though the animal does not die till after the larceny of part of the carcase is accomplished.

7 & 8 G. 4. c. 30. Malicious killing or maiming of cattle.

Punishment.

Malice against the owner not essential.

Wounding a horse, out of malice to the owner, by driving a nail into the frog of his hoof, is within 9 G. 1. c. 22., though the wound was not a permanent injury.

Cattle: Horses, &c. comprehended in the term.

decision was made:—*Thomas Clay* was convicted before *Bayley J.*, at *Chelmsford Lent Assizes* 1819, of killing a lamb with intent to steal part of the carcase. It appeared in evidence, that the prisoner cut the leg from the animal whilst it was living, and carried the leg away before the animal died, so that the lamb was not completely killed at the time of the larceny. The learned judge passed sentence upon the prisoner, but a doubt arising whether, as the death wound was given before the theft, the offence was made out, his lordship submitted the point to the consideration of the judges, eleven of whom were unanimous, that as the wound, which would necessarily produce death, was given before the larceny, the lamb was to be considered as killed from the time such wound was given, and that the conviction was right. *Thomas Clay's case, Essex Lent Assizes, 1819, C. C. R. 387.*

By 7 & 8 G. 4. c. 30. § 16., if any person shall unlawfully and maliciously kill, maim, or wound any cattle, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

By § 25. the punishments imposed by this act on any person maliciously committing any offence shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise.

By 9 G. 1. c. 22. (now repealed), it was made a capital offence unlawfully and maliciously to kill, maim, or wound any cattle: Under which statute the following decisions have taken place.

J. Haywood was tried on an indictment on the Black Act, containing two counts; one for maliciously maiming, the other for maliciously wounding, a gelding, against the statute, &c. It appeared that the prisoner had maliciously and with an intent to injure the prosecutor driven a nail into the frog of the horse's foot, which had at the time rendered the horse useless to the owner; but at the trial the prosecutor said that the horse was likely to do well, and to be perfectly sound again in a short time. After conviction, judgment was respited upon a doubt, whether, as the horse was likely to recover, and as the wound was not a permanent injury, the offence were within the statute? In *Mich. term* 1801, all the judges held the conviction right. The words of the statute 9 G. 1. c. 22. are "shall unlawfully and maliciously kill, maim, or wound any cattle," &c.; which word "wound" appears to be used as contradistinguished from a permanent injury, such as maiming. *J. Haywood's case, Coventry Summer Assizes, 1801, cor. Rooke J. C. C. R. 16. 2 East's P. C. 1076. S. C.*

At *Abingdon Summer Assizes, 1770, John Paty* was capitally convicted on an indictment for feloniously, unlawfully, knowingly, wilfully, and maliciously shooting at and killing one mare and one colt. It was moved, in arrest of judgment, that the mare and colt are not averred in the indictment to be cattle within this statute, and that the word "cattle" doth not by law necessarily include horses, mares, and colts; that the statutes for regulating the sale of cattle have thought it necessary to mention the several

species of beasts to which the provisions of the said acts shall extend; that the book of rates distinguishes between the subsidy on *great cattle* imported, viz. 50s., and that on *horses and mares*, viz. 10l.; that the stat. 22 Car. 2. c. 13. distinguishes between the encouragement given for breeding *cattle of all sorts* and that for breeding *horses*; that when the stat. 14 G. 2. c. 6. made it felony without clergy to steal *sheep or other cattle*, it was found necessary to specify by 15 G. 2. c. 34. what cattle were intended by the former act. Upon these objections the judge respited the sentence, and laid the case before the judges, who unanimously agreed, that as the statute 22 & 23 Car. 2. c. 7. had made the offence of killing horses by night a single felony, this statute was only to be considered as an extension of that statute. And judgment of death was given at the next assizes. After which, the prisoner was reprieved for transportation; and afterwards, upon strong applications from the country, he received a free pardon. *Paty's case, Abingdon Summer Assizes, 1770, cor. Blackstone J. 2 Black. Rep. 721. 2 East's P. C. 1074.*

Joseph Dobbs was indicted for burglary in breaking and entering the stable of *James Bayley*, part of his dwelling-house, in the night, with a felonious intent to kill and destroy a gelding of one *A. B.* there being. It appeared that the gelding was to have run for 40 guineas, and that the prisoner cut the sinews of his fore-leg to prevent his running, in consequence of which he died. *Parker C. B.* ordered him to be acquitted: for his intention was not to commit the felony by killing and destroying the horse, but a trespass only to prevent his running; and therefore no burglary. But the prisoner was again indicted for killing the horse, and capitally convicted. *Dobb's case, Buckingham Summer Assizes, 1770, 2 East's P. C. 513. 2 Russ. 943.* See also an indictment against *Daniel Dawson*, in 3 *Chit. Crim. Law, 1088.*, for poisoning a mare in order to prevent her from running the race, the prisoner having betted against her, and upon which indictment he was convicted and executed.

It is plain that the legislature must have intended to include *horses* in the word "*cattle*," when in the stat. of 22 & 23 C. 2. c. 7. they speak of "*horses, sheep, or other cattle*:" and by the statute of G. 1. they exclude from clergy such as kill, &c. *any cattle*; which latter statute was evidently intended to enlarge and not to restrain the description of the felony; for it extends to such as "*maim or wound*" any cattle, though not destroyed, which by the prior act was left a misdemeanor at most, punishable only by action to recover treble damages. 2 *East's P. C. 1076.*

Sarah Chappel was tried before *Thomson B.* at the *Devon Sum. Ass. 1804*, on an indictment which set forth, that she being an ill-designing and disorderly person, and of a wicked and malicious mind, on the 6th March, 44 G. 3. with force and arms, at the parish of *Islington*, three pigs, being swine and cattle of the value of 6l., of the goods and chattels of *William Osmond junior*, then and there being, feloniously, unlawfully, wilfully, and maliciously, with and by means of poison then and there did kill and destroy, against the form of the statute, &c. The prisoner was found guilty; but judgment was respited, and the question, whether pigs are cattle, within the meaning of the Black Act, 9 G. 1. c. 22., was submitted to all the judges. The

Destroying horses, to prevent their running in a race.

Horses within the statute.

Pigs are cattle within the meaning of the Black Act.

following statutes were referred to:—18 *Car. 2. c. 2. § 1.*—20 *Car. 2. c. 7. §§ 1, 2, 3, 4, 5, and 6.*—22 *Car. 2. c. 13. §§ 4, 6, and 7.*—22 & 23 *Car. 2. c. 19.*—3 *W. & M. c. 8.*—14 *G. 2. c. 6.*—15 *G. 2. c. 34.*—31 *G. 2. c. 40. § 11.* The judges confirmed the conviction, and at the ensuing assizes the prisoner received sentence of death, which sentence was afterwards commuted to three months' imprisonment in *Exeter gaol. R. v. Chapple, Exeter Sum. Ass. 1804, C. C. R. 77.*

Accord.

Three men were committed for trial at *Staffordshire Lent Ass. 1807*, upon a charge of having feloniously shot at and killed two pigs, the property of *James Mason*.—*Lawrence J.*, upon reading the depositions, and finding that the injury done to the pigs was in consequence of their having trespassed upon the prisoners, and not from any malicious motive towards the prosecutor, said there was no pretence for the prosecution, and no bill was preferred. His lordship also observed, that pigs were deemed cattle within the meaning of the Black Act, and referred to the case of *R. v. Sarah Chapple, R. v. Witcherley and others, MS.*

Asses.

So asses were held to be cattle within the meaning of 9 *G. 1. c. 22. R. v. Whitney, 1 R. & M. 3.*

Pouring nitrous acid into ear and eye of a mare.

Where it appeared that the prisoner had poured nitrous acid into the ear and eye of a mare, thereby occasioning blindness, and also such a state of pain and misery that the animal was killed by the owner: held, after conviction, that this evidence was sufficient to support a count on 7 & 8 *G. 4. c. 90. § 16.* for maiming the mare. *E. T. 1828, R. v. Owens, R. & M. 205.*

Setting a dog at sheep.

Where, in a prosecution on 4 *G. 4. c. 54. § 2.* (now repealed), making it felony if any person unlawfully and designedly kill, maim, or wound any cattle, it appeared that the prisoner set a dog at a sheep, and in consequence several severe wounds were inflicted on the animal, this was held per *Park J.* not to be a maiming or wounding within the meaning of the statute. *R. v. Hughes, 2 C. & P. 420.*

Particular species of cattle must be stated in indictment.

An indictment under 9 *G. 1. c. 22.* (now repealed, see *supra*) charged the prisoner with killing certain cattle; viz., one mare, and it appeared in evidence that the animal killed was a colt, but without proof of its sex: held, on *Ca. Res.* after conviction, that it was necessary to specify in the indictment the particular species of cattle maimed or killed, and, consequently, that the conviction could not be supported by rejecting, as surplusage, the words after the viz. 1813, *R. v. Chalkley, C. C. R. 258.*

II. Ill-treatment of Cattle.

[3 *G. 4. c. 71.*]

3 *G. 4. c. 71.* Magistrates empowered to inflict a penalty on persons convicted of cruel treatment of cattle.

By stat. 3 *G. 4. c. 71.*, intituled "*An act to prevent the cruel and improper treatment of cattle*" (a), [passed 22d July 1822] sec. 1., after reciting that whereas it is expedient to prevent the cruel and improper treatment of horses, mares, geldings, mules, asses, cows, heifers, steers, oxen, sheep, and other cattle, it is enacted, "that if any person or persons shall wantonly and cruelly beat, abuse, or ill-treat any horse, mare, gelding, mule, ass, ox, cow,

(a). See also stat. 21 *G. 3. c. 67.* for preventing the mischiefs that arise from driving cattle within the cities of *London* and *Westminster*, and bills of mortality.

heifer, steer, sheep, or other cattle, and complaint (A) on oath thereof be made to any justice of the peace or other magistrate within whose jurisdiction such offence shall be committed, it shall be lawful for such justice of the peace or other magistrate to issue his summons or warrant (B), at his discretion, to bring the party or parties so complained of before him, or any other justice of the peace or other magistrate of the county, city, or place within which such justice of the peace or other magistrate has jurisdiction, who shall examine upon oath any witness or witnesses who shall appear or be produced to give information touching such offence (which oath the said justice of the peace or other magistrate is hereby authorised and required to administer); and if the party or parties accused shall be convicted of any such offence, either by his, her, or their own confession, or upon such information as aforesaid, he, she, or they so convicted shall forfeit and pay any sum not exceeding 5*l.* nor less than 10*s.* to H. M., his heirs and successors; and if the person or persons so convicted shall refuse or not be able forthwith to pay the sum forfeited, every such offender shall, by warrant under the hand and seal of some justice or justices of the peace, or other magistrate within whose jurisdiction the person offending shall be convicted, be committed (C) to the house of correction or some other prison within the jurisdiction within which the offence shall have been committed, there to be kept without bail or mainprize for any time not exceeding three months."

3 G. 4. c. 71.

(A)

(B)

(C)

Bull not included, but Qu.?

Where the defendant had been convicted and committed to prison, under the provisions of this act, for bull-baiting, on motion for bringing him up by habeas corpus in order that he might be discharged, it was held, by *Bayley J.*, with the concurrence of *Littledale J.*, that a bull is (a) not included within the provisions of the stat. *Dec. 1827, Exp. Hill, 3 C. & P. 225.*

No person to be punished, unless complaint made within ten days after the offence.

Proceedings not to be quashed for want of form.

§ 2. provides and enacts, "that no person shall suffer any punishment for any offence committed against this act, unless the prosecution for the same be commenced *within ten days* after the offence shall be committed; and that when any person shall suffer imprisonment pursuant to this act, for any offence contrary thereto, in default of payment of any penalty hereby imposed, such person shall not be liable afterwards to any such penalty."

§ 3. provides also, and enacts, "that no order or proceedings to be made or had by or before any justice of the peace or other magistrate by virtue of this act shall be quashed or vacated for want of form, and that the order of such justice or other magistrate shall be final; and that no proceedings of any such justice or other magistrate in pursuance of this act shall be removeable by *certiorari* or otherwise."

§ 4. And for the more easy and speedy conviction of offenders under this act, it is enacted, "that all and every the justice and justices of the peace, or other magistrate or magistrates, before whom any person or persons shall be convicted of any offence against this act, shall and may cause the conviction to be

(a) This was decided on the same principle which ruled, that where a statute mentioned "colleges, deans, and chapters, parsons, vicars, and others having spiritual promotions," it did not include *bishops*. 2 Rep. 46 b.

Notwithstanding the above decision, it may reasonably be doubted whether it was not the intention of 3 G. 4. c. 71. to protect every animal of the ox kind.

3 G. 4. c. 71.

drawn up in the following form of words, or in any other form of words to the same effect, as the case shall happen; (*videlicet*,)

Form of conviction.

BE it remembered, that on the ——— day of ———, in the year of our Lord ———, A. B. is convicted before me, one of his majesty's justices of the peace for ——— or mayor or other magistrate of ——— [as the case may be], either by his own confession, or on the oath of one or more credible witness or witnesses [as the case may be], by virtue of an act made in the third year of the reign of his majesty king George the fourth, intituled "An act to prevent the cruel and improper treatment of cattle" [specifying the offence, and time and place where the same was committed, as the case may be]. Given under my hand and seal, the day and year above written.

Justices to order compensation to persons vexatiously complained against.

§ 5. enacts, "that if on hearing any such complaint as is herein-before mentioned, the justice of the peace or other magistrate who shall hear the same shall be of opinion that such complaint was frivolous or vexatious, then and in every such case it shall be lawful for such justice of the peace or other magistrate to order, adjudge, and direct the person or persons making such complaint to pay to the party complained of any sum of money not exceeding the sum of 20s., as compensation for the trouble and expense to which such party may have been put by such complaint; such order or adjudgment to be final between the said parties; and the sum thereby ordered or adjudged to be paid and levied in manner as is herein-before provided for enforcing payment of the sums of money to be forfeited by the persons convicted of the offence herein-before mentioned."

Limitation of actions.

§ 6. enacts, "that if any action or suit shall be brought or commenced against any person or persons for anything done in pursuance of this act, it shall be brought or commenced within six calendar months next after every such cause of action shall have accrued, and not afterwards, and shall be brought, laid, and tried in the county, city, or place in which such offence shall have been committed, and not elsewhere; and the defendant or defendants in such action or suit may plead the general issue, and give this act and the special matter in evidence at any trial or trials to be had thereon, and that the same was done in pursuance and by authority of this act; and if the same shall appear to have been so done, or if any such action or suit shall not be commenced within the time before limited, or shall be laid or brought in any other county, city, or place than where the offence shall have been committed, then and in any such case the jury or juries shall find for the defendant or defendants; or, if the plaintiff or plaintiffs shall become nonsuit, or shall discontinue his action or actions, or if judgment shall be given for the defendant or defendants therein, then and in any of the cases aforesaid such defendant or defendants shall have treble costs, and shall have such remedy for recovering the same as any defendant or defendants hath or may have for his, her, or their costs in any other cases by law."

(A.) Information against a person for Cruel and Improper Treatment of Cattle, under stat. 3 G. 4. c. 71.

(A.)

County of } *THE* information and complaint of A. I. of ———, in the county of ———, yeoman, made on oath before J. P. esq. one of his majesty's justices of the peace in and for the said county, the ——— day of ———, in the year of our Lord one thousand eight hundred and ———: Who says that A. O., of ———, in the said county, labourer, within ten days next before the date of this information, to wit, on the ——— day of ———, at ———, in the parish of ———, in the said county, did wantonly and cruelly beat [abuse or ill-treat, as the case may be] a horse [mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle, as the case may be], the property of ———, contrary to the statute made in the third year of the reign of king George the fourth, intituled "An act to prevent the cruel and improper treatment of cattle," whereby he the said A. O. has forfeited the sum of ——— pounds [the sum not to exceed five pounds, nor be less than ten shillings] to his majesty. Whereupon he the said A. I. prays the judgment of me, the justice aforesaid, in the premises.

A. I.

Before me,
J. P.

(B.) Warrant to apprehend thereupon.

(B.)

County of } To the constable of ———, in the said county.

WHEREAS information and complaint upon oath have been made before me J. P. esq., one of his majesty's justices of the peace in and for the said county, by A. I. of ———, in the county aforesaid, yeoman, that within ten days next before the date of the said information, to wit, on the ——— day of ———, at ———, in the parish of ———, in the said county, A. O. of ———, in the county aforesaid, labourer, did wantonly and cruelly beat [abuse or ill-treat, as the case may be] a horse [mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle, as the case may be] the property of ———, contrary to the statute made in the third year of the reign of king George the fourth, intituled "An act to prevent the cruel and improper treatment of cattle," whereby he the said A. O. has forfeited for his said offence the sum of ——— pounds [the sum not to exceed five pounds, nor to be less than ten shillings] to his majesty. These are therefore to require you to apprehend (a) the said A. O., and bring him before me at ———, in the said county, on ———, the ——— day of ——— instant, at the hour of ———, in the ——— noon, to answer unto the said information and complaint, and to be further dealt with according to law. Herein fail not. Given under my hand and seal the ——— day of ———, in the year of our Lord one thousand eight hundred and ———.

J. P. (L. S.)

See form of Conviction, stat. 3 G. 4. c. 71. § 4., ante, p. 124.

(a) A summons may be granted, in the discretion of the magistrate.

(C.)

(C.) Commitment thereupon.

County of } To the constable of ———, in the said county, and to
 ———. } the keeper of the house of correction at ——— in
 the said county.

WHEREAS A. O. of ———, in the said county, labourer, is convicted before me J. P. esquire, one of his majesty's justices of the peace in and for the said county, upon the oath of A. W. of ———, in the county aforesaid, carpenter, a credible witness [or upon his own confession, as the case may be], for that the said A. O., on the ——— day of ———, at ———, in the parish of ———, in the said county, did wantonly and cruelly beat [abuse, or ill-treat, as the case may be] a horse, [mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle, as the case may be], the property of ———, contrary to the statute made in the third year of the reign of king George the fourth, intituled "An act to prevent the cruel and improper treatment of cattle," whereby he the said A. O. has forfeited for his said offence the sum of five pounds to his majesty, but which I have mitigated to ——— [not less than ten shillings], and which sum he the said A. O. has refused to pay: These are therefore to require you the said constable to convey the said A. O. to the said house of correction at ——— aforesaid, and deliver him to the said keeper thereof, together with this precept. And you the said keeper are hereby commanded to receive the said A. O. into your custody in the said house of correction, there to be kept without bail or mainprize for ——— [for any time not exceeding three months], unless the said sum so due to his majesty shall be sooner paid. And for so doing this shall be your sufficient warrant. Given under my hand and seal the ——— day of ———, in the year of our Lord one thousand eight hundred and ———.

J. P.

Form of Commitment under the 7 & 8 G. 4. c. 30. § 16. for maiming Cattle.

County of } J. P. Esq., one of the justices of our lord the king,
 Stafford, } assigned to keep the peace within the said county
 to wit. } of Stafford, to the constable of ———, in the said
 county, and to the keeper of the common gaol at
 Stafford, in the said county.

THESE are to command you the said constable, in his said majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said common gaol the body of A. O. sent herewith, charged this ——— day of ———, one thousand eight hundred and ———, on the oath of A. I. before me the said justice, with having, on or about the ——— day of ——— instant, maliciously, unlawfully, and feloniously cut and maimed ———, the property of the said A. I., at the parish of ———, in the county aforesaid, by cutting [as the case may be] and otherwise wounding them. And you the said keeper are hereby required to receive the said A. O. into your custody in the said common gaol, and him there safely keep, until he be delivered from your custody by due course of law. Hereof fail not. Given under my hand and seal the ——— day of ———, in the year of our Lord one thousand eight hundred and ———.

J. P. (L. S.)

Cheat.

OF cheats punishable by public prosecution, there are two kinds: —

I. *By the Common Law.*

II. *By Statute.*

[7 & 8 G. 4. c. 29.]

I. By the Common Law.

Cheats, which are punishable by the common law, may in general be described to be deceitful practices, in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment; or by suppressing a will; and such like. 1 *Haw. c. 71. § 1.*

It has been observed, however, that the definition of an indictable cheat at common law would have been more distinct and accurate if it had been stated to consist in the fraudulent obtaining the property of another by any deceitful and illegal practice or token (short of felony), which affects, or may affect, the public. 2 *East, P. C. 818.* 2 *Russ. 290, 291.*

It seemeth to be the better opinion that the deceitful receiving of money from one man to the use of another, upon a false pretence of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance, but only depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which common prudence and caution may be a sufficient security. 1 *Haw. c. 71. § 2.* 2 *East's P. C. 818.*

Therefore, where *Jones* obtained money of another, by pretending to come by the command of a third person to demand a debt or the like in his name, showing no voucher or token for his authority; it was holden not indictable, for it was the party's own fault to trust him. — *Et per cur.* We are not to indict one man for making a fool of another: let him bring his action. *Jones's case*, 1 *Salk. 379.* 2 *Ld. Raym. 1019.* 6 *Mod. 105.*

Where defendants were indicted for a conspiracy to cheat and defraud prosecutor by selling him an unsound horse, and the evidence did not substantiate a conspiracy: it was held by Lord *Ellenborough C. J.*, that in such a case a prosecution for a cheat at common law could not be substituted for an action on the warranty. *R. v. Pywell and others, cit. 2 Russ. 297.*

A person for a counterfeit pass was adjudged to the pillory, and fined. *Dalt. c. 32.*

From *R. v. Wood*, 1 *Sess. Ca. 217.*, it appears that changing corn by a miller, and returning bad corn instead of it, is punishable by indictment; for, being in the way of trade, it is deemed an offence against the public.

Cheats by the common law described.

Semb. that it must be a fraud affecting the public.

False message not indictable as a cheat.

Cheat by selling an unsound horse, not indictable.

Counterfeit pass.

Miller changing corn. Qu.? See next case.

Delivering flour not the produce of the corn sent, not indictable.

Aliter, furnishing unwholesome food.

Selling bread made unwholesome with alum, indictable.

False accounts with government.

Frauds by parish officers.

Falsely pretending to discharge soldiers.

A minor pretending to be of age.

Cheating race.

But in a more modern case (*R. v. Haynes*, 4 M. & S. 214.) it was held not indictable for a miller receiving good barley to grind at his mill, to deliver a musty and unwholesome mixture of oat and barley meal, different from the produce of the barley. In this case, *Ld. Ellenborough C. J.* said, — “The allegation that the quantity (of meal) delivered was musty and unwholesome, if it had alleged that the defendant delivered it as an article for the food of man, might possibly have sustained the indictment: but I cannot say that its being musty and unwholesome necessarily and *ex vi termini* imports that it was for the food of man, and it is not stated that it was to be used for the sustentation of man, only that it was a mixture of oat and barley meal. As to the other point, that this is not an indictable offence, because it respects a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit, if the case had been that this miller was owner of a soke mill, to which the inhabitants of the vicinage were bound to resort in order to get their corn ground, and that the miller, abusing the confidence of this his situation, had made it a colour for practising a fraud, this might have presented a different aspect; but as it is, it does seem no more than the case of a common tradesman who is guilty of a fraud in a matter of trade or dealing.”

Defendant, being a baker, was indicted for having supplied the *Chelsea Military Asylum* with loaves, in which alum was so inserted as to be noxious, and it was proved that lumps were found in the loaves sufficient to injure the health of those who eat them. It was held by *Ld. Ellenborough C. J.*, and afterwards by *B. R.*, that it was clearly an indictable offence at common law, and that it was no defence, that his intention was to have mixed the alum so carefully that it would only have improved the colour of the bread, without injuring its quality. *R. v. Dixon*, 4 *Campb.* 12. 3 M. & S. 11. *cit.* 2 *Russ.* 287.

It has been held indictable to enable persons to pass their accounts with the pay-office, so as to defraud the government. 2 *Russ.* 288., and case there cited.

So it appears that prosecutions may be maintained against overseers for refusing to account, or for rendering false accounts; also, for a fraud committed by a parish officer, in procuring the marriage of a pauper in order to burthen another parish. *Ibid.*

So, for other similar fraudulent practices. *Ibid.*

A person, falsely pretending that he had power to discharge soldiers, took money of a soldier to discharge him; and being indicted for the same, the court held the indictment to be good. *Serlestead's case*, 1 *Latch.* 202.

As there are frauds which may be relieved civilly, and not punished criminally (with the complaints whereof the courts of equity do generally abound); so there are other frauds, which in a special case may not be helped civilly, and yet shall be punished criminally: thus if a minor go about the town, and, pretending to be of age, defraud many persons by taking credit for considerable quantities of goods, and then insist on his nonage, the persons injured cannot recover the value of their goods, but they may indict and punish him for a common cheat. *Barl.* 100. *Qu. de hoc.*

And in the case of *Q. v. Orbell* it was holden to be an indictable offence to get a person to lay money on a race, and to prevail

with the party to run booty; for though the cheat was private in this particular, yet it was public in its consequences. 6 *Mod.* 42. This is considered to have been a case of conspiracy. 2 *Russ.* 291.

So where two effected a cheat, by means of the one pretending to be a merchant and the other a broker, and, as such, bartering pretended wine for hats, they were convicted. *R. v. Macarthy & Fordenborough*, 2 *Ld. Raym.* 1179. But the ground of that judgment was that it was a conspiracy. 2 *East's P. C.* 824.

Finally, the distinction which, as it seemeth, will solve almost all cases of this kind, was taken in the case of *R. v. Wheatley*, 9 *Barr.* 1125. 1 *Blac. Rep.* 273. S. C. The defendant was indicted and convicted for selling beer short of the due and just measure, to wit, sixteen gallons as and for eighteen. Upon a motion in arrest of judgment, it was said by the court, This is only an inconvenience and injury to a private person, arising from that private person's own negligence and carelessness in not measuring the liquor, upon receiving it, to see whether it held the just measure or not. "Offences that are indictable must be such as affect the public, as if a man use false weights and measures, and sell by them to all or to many of his customers, or use them in the general course of his dealing: so, if there be any conspiracy to cheat; for these are deceptions that common care and prudence are not sufficient to guard against. These are much more than private injuries; they are public offences." But in the present case it is a mere private imposition or deception. No false weights or measures are used; no conspiracy; only an imposition upon the person he was dealing with, in delivering him a less quantity instead of a greater, which the other carelessly accepted. It is only a non-performance of his contract; for which non-performance the other may bring his action. So the selling an unsound horse for a sound one is not indictable. The buyer should be more upon his guard; and the distinction which was laid down, as proper to be attended to in all cases of this kind is this: that in such impositions or deceits where common prudence may guard persons against their suffering from them, the offence is not indictable; but where false weights and measures are used, or false tokens produced, or such methods taken to cheat and deceive as people cannot by any ordinary care or prudence be guarded against, there it is an offence indictable.

The distinction, therefore, is this; if a person sell by false weights, though only to one person, it is an indictable offence; but if without false weights he sell to many persons a less quantity than he pretend to sell, it is not indictable. 3 *T. R.* 104.

R. v. Lara, 6 *T. R.* 565. This was an indictment at common law, charging the defendant with deceitfully intending, by divers crafty means and subtle devices, to obtain possession of certain lottery tickets, the property of *A.*, pretending that he wanted to purchase them, and delivered to *A.* a fictitious order for the payment of money, purporting to be a draft upon a banker for the amount, which he knew he had no authority to draw, and would not be paid; by which he obtained the tickets, and defrauded the prosecutor of the value. Judgment was arrested, on the ground that the defendant was not charged with having used any false token to accomplish the deceit; for the banker's cheque drawn by the defendant himself, entitled him to no more credit than his bare assertion that the money would be paid.

Selling short measure.

A mere imposition is not indictable as a cheat.

The general rule.

Distinction.

False weights.

Bad measure.

Drawing false cheques.

Held indictable.

But in *R. v. Jackson*, at Gloucester spring assizes, 1813, 3 *Campb.* 370., on an indictment on stat. 30 *G. 2. c. 24.*, where it appeared that the prisoner had obtained property by giving a draft on his banker, and pretending he had cash there to pay it, *Bayley J.* (before whom the prisoner was tried) said, that this point had been recently before the judges, and that they were all of opinion that it is an indictable offence fraudulently to obtain goods by giving in payment a cheque upon a banker with whom the party keeps no cash, and which he knows will not be paid.

A false affirmation is not enough.

So in *R. v. Gibbs*, 1 *East*, 185., *Ld. Kenyon* again held that an indictment for a cheat at common law cannot be maintained unless some false token be made use of: a mere false affirmation is not sufficient.

Frauds affecting the crown and the public.

All frauds affecting the crown and the public at large are indictable, though arising out of a particular transaction or contract with the party. 2 *East's P. C.* 821.

Unwholesome food.

Therefore, an indictment lies for wilfully, deceitfully, and maliciously supplying prisoners of war with unwholesome food, not fit to be eaten by man. *Treve's case*, 2 *East's P. C.* 821.

Enlistment by an apprentice.

So, obtaining the king's bounty for enlisting as a soldier by an apprentice reclaimable by his master is an indictable offence at common law. In such case, the indenture of apprenticeship must be proved by one of the two subscribing witnesses, in order to warrant the conviction. *R. v. Jones*, *Coventry Lent Ass.* 1777, 2 *East's P. C.* 822. 1 *Leach*, 174.

Indictment must state the false pretences, &c.

It is not sufficient for the indictment to allege generally that the cheat was effected by certain false tokens or false pretences, but it must specify and set forth what they were; but it does not seem necessary to describe them more particularly than they were described to the party at the time the fraud was effected. 2 *Russ.* 297.

Punishment.

Some of the above offences are punishable not only by fine and imprisonment, but further with other infamous punishment; (as in *Leeson's case*, who was three times set on the pillory (a) for cheating with false dice. *Cro. Jac.* 497.) Others are punishable by fine and imprisonment only, at the discretion of the judges, which is regulated by the circumstances of each particular case. 1 *Haw. c.* 71. § 3.

II. By Statute.

The statutes 33 *H. 8. c. 1.*, 30 *G. 2. c. 24. § 1.*, and 52 *G. 3. c. 64.*, relating to cheats by false tokens and false pretences, are now repealed.

7 & 8 *G. 4. c. 29.*

Obtaining money, chattels, &c., by false pretence, a misdemeanor.

By 7 & 8 *G. 4. c. 29. § 53.*, reciting that a failure of justice frequently arises from the subtle distinction between larceny and fraud, enacts that if any person shall, by any false pretence, obtain from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor; and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment, by fine or imprisonment, or by both, as the court shall award: provided always, that if, upon the trial of any

Punishment.

Not to be ac-

(a) Abolished by stat. 56 *G. 3. c. 138.*, except in cases of perjury, or subornation of perjury. See title *Pillory*, &c.

person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount, in law, to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no such indictment shall be removable by certiorari; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts.

Some of the cases decided upon 30 G. 2. c. 24. (now repealed) may assist in the construction of the above sect. in 7 & 8 G. 4. 30 G. 2. c. 24. (repealed).

By 30 G. 2. c. 24. § 1., all persons who, knowingly and designedly, by false pretences, should obtain from any persons money, goods, &c. with intent to cheat or defraud any persons, should be deemed offenders, &c.

R. v. Mason, 2 T. R. 581. The defendant was indicted for obtaining money by false pretences; and on his trial at the sessions at Worcester he was convicted, and received sentence of transportation for seven years. The defendant brought a writ of error, and assigned for error that it did not appear by the indictment what the particular and specific false pretences were, by which he obtained the money.—*Buller J.* The question is not a new one: I remember a case when I was at the bar, and I argued it on the analogy to the case in *Strange* for obtaining a note by false tokens, which entirely governs this. That was a case on the statute 33 H. 8. c. 1., which makes it an offence to obtain money or goods by false tokens. The statute 30 G. 2. c. 24. only enlarges the description of the offence in the statute of H. 8. Both statutes are made *in pari materia*; and whatever has been determined in the construction of one of them is a sound rule of construction for the other. The judgment was arrested in the case in *Strange*, because the indictment did not specify the false tokens: then, by the same reason, an indictment on stat. 30 G. 2. c. 24., which speaks of false pretences, must state what the false pretences are; otherwise the indictment is bad: there is no distinction between the two cases; the same objection which held in the one must also prevail in the other. I am of opinion that the objection is fatal.—*Gross J.* of the same opinion; observing, that this is a charge for a precise crime, and therefore it must be alleged.—Judgment reversed, and the defendant discharged.

The false pretences must be set forth in the indictment.

An indictment for obtaining money by false pretences, charged that the defendant did falsely pretend to one Mr. Blome, the servant and clerk of R. M. &c. that he had paid a sum of money into the Bank of England; whereas in truth and in fact he had not, &c., by means of which said false pretence defendant obtained 106*l.* of the monies of R. M., &c. with intent to defraud them of the same. Mr. Blome proved that the defendant said to him on the occasion referred to, that the money had been paid at the bank, not that he had paid it.—Lord Ellenborough C. J. held this to be a fatal variance: and observed, that “in an indictment for obtaining money by false pretences, the pretences must be distinctly set out (*R. v. Mason*, *antè*), and at the trial they must be proved as laid. An assertion that money had been paid into the bank, is very different from an assertion that it had been paid into the bank by a particular individual.” The defendant was acquitted. *R. v. Pleslow*, *Sittings at Westminster after M. T.* 49 G. 3. 1 Camp. 494.

And must be proved as laid.

The indictment must negative by special averment the truth of the pretences.

An indictment on stat. 30 G. 2. c. 24. for obtaining money by false pretences, must negative by *special averment* the truth of the pretences. It is not enough to charge that the defendant *falsely pretended*, &c. (setting forth the pretences), *by means of which said false pretences he obtained the money*, &c.; therefore, for want of such averment in the indictment, the court of K. B. reversed the judgment. *R. v. Perrot*, H. T. 54 G. 3. 2 M. & S. 379. All that is necessary is to show the false pretences used, and that by means of those false pretences the defendant knowingly and designedly obtained the goods in question, negating also the pretences.

Knowingly and designedly. *N.B.* These words are not in 7 & 8 G. 4. c. 29. s. 53.

Thus in *R. v. Howarth*, *York Spring Ass.* 1821, 3 *Stark. Rep.* 26., which was an indictment on stat. 30 G. 2. c. 24. §1. for obtaining goods by false pretences, *Bayley* and *Best* Js. held it unnecessary to aver that defendant did *knowingly and designedly pretend*, &c., and that it was sufficient to aver that defendant knowingly and designedly did *obtain* the goods by means of the false pretences.

Obtaining money under the false pretence of sharing a supposed bet said to have been laid with another.

R. v. Young, Randall, Mullins, and Osmer, 3 *T. R.* 98. The defendants were indicted on stat. 30 G. 2. c. 24., for obtaining money by false pretences. The first count stated that the defendants, fraudulently intending to obtain the money of the king's subjects, &c. on the 23d December, in the 28th year, &c. at &c. unlawfully, knowingly, wilfully, and designedly, did falsely pretend to one *Thomas* that *Young* had made a bet of 500 guineas on each side with a colonel in the army then at Bath, that one *W. Lewis* would on the next day run on the high road leading from Gloucester to Bristol ten miles in one hour, and that *Young* and *Mullins* did go 200 guineas each of and in the said bet, and *Randall* the other 100 guineas, and that under colour and pretence of such bet, &c.; they obtained from *Thomas*, as a part of such pretended bet, 20 guineas of the 500 guineas, with intent to cheat and defraud him thereof; whereas, in fact, no such bet had been made, &c. against the form of the statute. The indictment contained several other counts to the same purport. It was objected in arrest of judgment, first, that the transaction itself was not the subject matter of a criminal prosecution: for that it did not affect the public, and being the representation of a future transaction, the party had an opportunity of inquiring into the truth of it, and, therefore, it was his own fault if he were deceived. Secondly, that the offence was not charged with sufficient certainty, inasmuch as the colonel's name was not mentioned.—*Ld. Kenyon* C. J. said, that the stat. of 30 G. 2. c. 24. was considered to extend to every case where a party had obtained money by falsely representing himself to be in a situation in which he was not, or any occurrence that had not happened, to which persons of ordinary caution might give credit. The 33 *Hen. 8. c. 1.* requires a false seal or token to be used, in order to bring the person imposing into the confidence of the person imposed upon; but that being found to be insufficient, the 30 G. 2. c. 24. introduced another offence, describing it in terms extremely general. That when the criminal law happens to be auxiliary to the law of morality, he did not feel any inclination to explain it away. Now this offence was within the words of the act; for the defendants have, by false pretences, fraudulently contrived to

The name of such other person not being stated in the indictment, held not necessary.

Pretence of a future transaction.

obtain money from the prosecutor, who, perhaps, too credulously gave confidence to them. As to the second objection, the indictment holds out to the defendants sufficient intelligence of the offence imputed to them. Perhaps the colonel's name with whom the wager was stated to have been made was not mentioned, so that he could not have been described with greater accuracy. But, if such a wager had been actually depending, it was competent to the defendants to have proved it in their defence. — *Ashurst, Buller, and Grose Js.* delivered their opinions to the same effect. And *Buller J.* said, the statute clearly extends to cases which were not the subject of an indictment at common law. The ingredients of this offence are obtaining money by false pretences and with intent to defraud. Barely asking another for a sum of money is not sufficient; but some pretence must be used, and that pretence false, and the intent is necessary to constitute the crime. He then mentioned a case (*R. v. Count Vilenueve*, 1778) which was tried before *Morton C. J.* of *Chester* and himself, at *Chester*. The defendant applied to *Sir T. Broughton*, telling him that he was instructed by the Duke de *Lauzun* to take some horses from *Ireland* to *London*, and that he had been detained so long by contrary winds that his money was spent. *Sir T. Broughton* was thereupon induced to advance some money to him. But it afterwards appearing that the whole story was a fiction, the defendant was tried for a cheat on the stat. 30 G. 2., and convicted. Judgment affirmed.

Rex v. Airey, 2 East, 30. This was an indictment for obtaining money under false pretences. The first count stated, that one *I. B.* delivered to the defendant, a common carrier, certain goods, to be carried by him from *K.* to one *J. L.* at *L.*, there to be delivered, &c.: that the defendant received the same goods, under pretence of carrying and delivering the same, and undertook so to do: but that, intending to cheat *I. B.* of his money, he afterwards unlawfully, &c. pretended to the said *I. B.* that he had carried the said goods from *K.* to *L.* for the purpose of delivering them to *J. L.*, and had there delivered them to *J. L.*, and that *J. L.* had given him, the defendant, a receipt expressing such delivery of the goods to him, but that he had lost or mislaid the same, or had left it at home; and that the defendant thereupon demanded of the said *I. B.* 16s. for the carriage of the said goods; by means of which said false pretences he obtained from the said *I. B.* 16s., with intent to cheat him of the same. And the indictment then proceeded to negative the truth of the pretences used. After conviction and judgment of transportation for seven years, the defendant brought a writ of error; but the indictment was holden to be sufficient, without alleging in express terms that the pretences were false. *Ld. Kenyon C. J.* said, no technical form of words was necessary in this case. It is objected, that it is not alleged with sufficient certainty that he obtained the money by false pretences. But, unless there must be some particular arrangement of words in such an indictment, I cannot see how the matter can be rendered more certain. Take the whole of the indictment together, and the charge appears plain and intelligible. *Grose and Lawrence Js.* agreed; and *Le Blanc J.* observed, that there was a positive allegation that the pretences made were false;

Rule.

Pretending to have been entrusted to take horses from *Ireland* to *London*, and to have been detained by contrary winds, till his money was expended.

A carrier obtains the money agreed for by pretending to have delivered the goods, and to have lost the bailee's receipt.

Truth of pretences negatived, but no precise averment that defendant did falsely pretend, held not necessary.

which was all that the statute required, in that respect, to bring the case within it.

A workman employed by clothiers was to keep an account of the number of shearmen employed and the amount of their earnings and wages, which he was weekly to deliver in in writing to a clerk, who paid him the amount. He delivered in a false account, charging for more work and of other men than done, by which he obtained a larger sum than was due. This is obtaining money by a false pretence, within the 30 G. 2. c. 24.; because without the false pretence he would not have obtained the credit; and is not like a case of money paid generally on account.

John Witchell was indicted before *Laurence J.* on the stat. 30 G. 2. c. 24. for obtaining money from *A. and H. Austia*, by false pretences. It appeared in evidence that the *Austias* were clothiers at *Wooton-under-Edge*: that the prisoner was a shearmen in their service, and employed to superintend the other shearmen, and to take an account of the persons employed, and of the amount of their wages and earnings; that at the end of each week he was supplied with money to pay the different shearmen by the clerk of the prosecutors, who advanced to him such sum as, according to a written account or note delivered to him by the prisoner, was necessary to pay them. The prisoner was not authorised to draw from the clerk for money generally on account, but merely for the sums actually earned by the shearmen; and the clerk was not authorised to pay him any sums except what he carried in his account or note as the amount of what was due to the shearmen for the work they had done. It appeared that the prisoner, on the 9th September, 1796, delivered to the prosecutor's clerk a note in writing in this form:—"9th September, 1796, shearmen, 44l. 11s. Od.," which was the common form in which he made out his account of the amount of their week's wages. And it appeared further by a book in his hand-writing (which it was his business to keep of the men employed, of the work they had done, and their earnings), that there were in it the names of several men who had not been employed, who were entered as having earned different sums of money, and false accounts of the work done by those who were employed; so as to make out the sum stated in the note to be due to the shearmen. The jury found the prisoner guilty; but sentence was respited in order to take the opinion of the judges, whether this case were within the stat. 30 G. 2.; the prisoner's counsel contending that no cases were within the statute but those where the original credit was obtained by means of the false pretence; and that it did not extend to cases where there was a previous confidence, as he said was the case here.—The judges first conferred on the case in *Easter* term 1798, when there was some diversity of opinion on the true construction of the statute in this respect: but finally they all agreed in *Trinity* term following, on this principle, that if the false pretence created the credit, the case was within the statute: and they considered that in this case the defendant would not have obtained the credit but for the false account which he had delivered in, and therefore that he was properly convicted. The defendant, as was observed by one of the judges, was not to have any sum that he thought fit on account, but only so much as was worked out. *Witchell's case, Gloucester Spring Ass. 1798, 2 East's P. C. 830.*

Pretence of being sent by a neighbour to borrow money. Not felony, but obtaining by a false pretence.

Where the prisoner went to a tradesman's house, and said she came from a *Mrs. Cook*, a neighbour, who would be much obliged if he would let her have half-a-guinea's worth of silver, and that she would send the half-guinea presently; upon which she obtained the silver, went away with it, and never returned; the case was holden not to amount to felony. In truth, this was a loan of the silver, upon the faith that the amount would be repaid at another time; it was money obtained by a false pretence; and the same determination has been made in similar cases at the O. B.

Coleman's case, O. B. 1785, 2 East's P. C. 672, 673. 1 Leach, 303. note (a.) 2 Russ. 1395.

Benjamin Rushworth was tried before *Bayley J.* at *York Sum. Ass.* 1816, for presenting a forged order to *William Lee*, the treasurer for the West Riding, pretending it was genuine, and obtaining from Mr. *Lee* under it 4*l.* 10*s.* 6*d.* The order imported to be signed by *J. Taylor*, who was a magistrate, was addressed to the treasurer of the West Riding, and directed him to pay to the constable of *Horberry* on his order 4*l.* 10*s.*, for apprehending and conveying certain vagrants (whom it named), and sixpence for that order. The prisoner was known not to be the constable of *Horberry*, nor did he pretend to have any order from him, but the treasurer paid him merely because he was the bearer of that order. The indictment charged that the prisoner, with intent to cheat and defraud the treasurer, presented the order, and that he knowingly and designedly falsely pretended it was a genuine order. It then proceeded: "And the jurors aforesaid, upon their oath aforesaid, further say, that the prisoner, on the day and year aforesaid, at," &c. obtained the 4*l.* 10*s.* 6*d.* from Mr. *Lee*; but in this part of the indictment the intent to cheat and defraud Mr. *Lee* was not stated, nor was the obtaining charged to have been effected knowingly and designedly. A motion was made in arrest of judgment; upon reference to the judges, the indictment was holden *bad*. *R. v. Rushworth*, *York Sum. Ass.* 1816, *C. C. R.* 317.

Joseph Cartwright was tried before *Sutton B.* at the *Lent Assizes* for the county of the city of *Worcester*, 1806, and found guilty upon an indictment which charged that he, having in his possession a paper writing purporting to be an order for 100*l.*, on which there was an indorsement, and designing to obtain money by false pretences of and from *Thomas Hughes*, with intent to defraud Messrs. *Lechmere* and Co., bankers at *Worcester*, did, on the 14th of *August*, 1805, cause and procure such paper to be delivered to the said *Thomas Hughes*, who had the custody of the money of the said bankers, with a view to get 100*l.* in exchange for such paper, and represented to *Hughes* that the said paper was actually signed by *Joseph Ellis*, the drawer, and that he the said *Joseph Cartwright* was the servant of *Philip Gresley*, esquire, and all with a view to cheat the said bankers. There was a second count to the same effect, but charging the intent to be to cheat the said *Thomas Hughes*. The case was very clearly proved; and the deceit was discovered before any money was paid. The instrument being imperfect either as a draft or bill of exchange, not being addressed to nor drawn on any person, the prisoner could not be indicted for forgery. And stat. 30 G. 2. c. 24., which makes it an offence against the law to obtain money by false pretences, &c. not extending to the attempt to obtain money by such pretences; it was submitted to the judges, whether the circumstances of the above case amounted to an indictable offence. The prisoner was admitted to bail, but never has been called upon to receive judgment; the judges, as it is understood, being of opinion that the paper stated as an order was not really an order.—*Le Blanc J.* thought that an attempt to commit a statutable misdemeanor was as much a misdemeanor as an attempt to commit a common law misdemeanor, but the judges did not go into the point. *C. C. R.* 106. See *R. v. Philipps*, 6 East, 464. 2 Stra. 866.

Obtaining money from the county treasurer by a forged order, purporting to be signed by a magistrate for payment of expenses of conveying vagrants; money not stated to be obtained "knowingly and designedly," nor "with intent to cheat," indictment *bad*.

R. v. Cartwright.

Semb. that an attempt to obtain money by false pretences is indictable.

Promise for future performance, not a false pretence within stat.

A pretence by the prisoner that he would do an act which he did not mean to do (as a pretence to pay for goods on delivery), is not a false pretence within 30 G. 2., as where prisoner came to prosecutor, who was a butcher, and bespoke two sheep and some joints of veal, promising to send back the money by the bearer when they were delivered, instead of which he merely wrote prosecutor a note, and the jury found that he never intended to return the money, but by that means to obtain the meat, and cheat the prosecutor, the judges held that this was not a pretence within the meaning of 30 G. 2., being merely a promise for future conduct, against the breach of which common prudence would provide. *M. T. 1821, R. v. Goodall, C. C. R. 461.*

Pauper pretending to want clothes, not an indictable false pretence.

So, where prisoner being a parish pauper pretended to the overseer that he could not go to work, because he had no shoes, though in truth he then had two pair, and in consequence the overseer supplied him with other shoes, this was held not to fall within 30 G. 2., being rather a false excuse for not working, than a false pretence to obtain goods. *H. T. 1823, R. v. Wakeling, C. C. R. 504.*

Money obtained by falsely personating another, indictable.

Where the prisoner obtained money at a post office by presenting himself as the person named in a money order, and signing his name as such, it was held to be a false pretence within 30 G. 2., though he made no express assertion to that effect. *E. T. 1805, R. v. Story, C. C. R. 81.*

Obtaining money on a forged note, illegal on the face of it.

So, where the prisoner obtained money in change for a forged promissory note for 10s. 6d., which is on the face of it illegal and void, it was held by a majority of the judges that he was properly convicted for obtaining by a false pretence.—*N.B.* the prisoner had said nothing about the note, but merely produced and tendered it in payment, but this was thought tantamount to asserting that it was genuine. *M. T. 1807, R. v. Freeth, C. C. R. 127.*

Prisoner giving a check on a bank where he had no assets.

So, it was held to be an indictable offence under 30 G. 2. where the prisoner defrauded a tradesman of goods, by giving in payment a check on a banker with whom he kept no cash, and which he knew would not be paid. *R. v. Jackson and another, see ante, p. 131. 2 Russ. 307.*

Money obtained by fraudulent demand of money for carriage of a parcel.

Where prisoner was charged with demanding an illegal sum on the delivery of a parcel to the servant of Lady *Ilchester*, and obtaining from the servant 3s. 4d. of the monies of Lady *Ilchester*, with intent to cheat Lady *Ilchester*; it appeared that the parcel was a basket, and it was held to be sufficiently described as a parcel: 2. the money having been paid by the servant, it was considered by Lord *Ellenborough*, that this could not properly have been averred to be the money of Lady *Ilchester*, unless the servant had then had in his hands some of his mistress's money: 3. that though this offence fell specially within 39 G. 3. c. 58. (the portage act), the remedy given by that statute was cumulative, and that it did not bar a prosecution under 30 G. 2. *R. v. Douglass, Campb. 212. cit. 2 Russ. 308. and see n. x. ib.*

Person obtaining by false pretence a check illegal for want of a stamp, does not fall within 7 & 8 G. 4.

Prisoner was indicted for obtaining, by false pretences, "an order for the payment of 2l., and of the value of 2l." It appeared that prisoner, by means of a false letter purporting to be written by one *D. F. J.*, obtained from prosecutor a check on his banker payable to *D. F. J.*, but not to order or to bearer, and this check

was found upon the prisoner: After conviction on ca. res., the judges were of opinion, that the order was not a valuable security within 7 & 8 G. 4., as it ought to have been stamped, and the banker would have been liable to a penalty if he had paid it. *H. T.* 1828. *R. v. Yates*, 1 *R. & M.* 170.

Prisoner having overdrawn his bankers, and wishing to induce them to answer other checks drawn by him, placed in their hands a bill drawn by himself on *J. G.*, which he assured them was a good one, and on the faith of which they paid several checks of his in the hands of other persons: the prisoner was convicted on the ground, that the bill was altogether a false pretence: on case reserved, however, the judges held the conviction wrong, as the prisoner could not be said to have received any specific sum on the bill; all that he obtained was credit in account, the money having been received by other persons. *E. T.* 1829. *R. v. Wavell*, 1 *R. & M.* 224.

It is necessary that the indictment should set out what the pretences are, in order that the court may see whether they come within the statute. 2 *Russ.* 309.

Also, a special averment that the pretences or some of them are false, cannot be dispensed with. 2 *Russ.* *ib.*

Where the false pretence embraces several propositions, the indictment ought to specify what part of the pretence it charges to be false. 2 *Russ.* 309. citing *R. v. Perrot*, 2 *M. & S.* 379. 386.

It is not necessary that the whole of what is stated in order to obtain the property should be false; it is sufficient if so much of it is false, as has had a material effect in inducing the party defrauded to give up his property. 2 *Russ.* 310. and acc. *R. v. Hill*, *C. C. R.* 190.

It appears from the statutes which have been noticed, and from the cases cited,

1st. That every cheat effected by means of *any false token* claiming public confidence, and thereby calculated to deceive people in general, or in any manner touching the public interest, or in any other manner, by conspiracy or forgery, is indictable at common law.

2d. And every species of cheat by *false pretences* of any kind is also indictable under stat. 7 & 8 G. 4. c. 29. § 53.

Formerly, where goods, &c. had been obtained from another by fraud, the court had no power of awarding restitution on conviction of the offender. *Parker v. Patrick*, 5 *T. R.* 175.

But now, by 7 & 8 G. 4. c. 29. § 57., if any person guilty of any such felony or misdemeanor as aforesaid, in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the court before whom any such person shall be so convicted, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided always, that if it shall appear before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or

So where the false pretence procures prisoner credit with his bankers, whereby his checks in the hands of other persons are paid, it is not indictable.

Pretences to be described.

So, their falsehood to be averred.

And in what particular it is false.

If a material part of the pretence is false, it will be sufficient.

Result of statutes and cases.

7 & 8 G. 4. c. 29.

After conviction, court to give restitution.

Except valuable security discharged by

some party
liable.

Or negotiable
instrument that
has passed for a
valuable con-
sideration with-
out notice.

body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award, or order the restitution of such security.

For Embezzlement, see tit. **Larceny.**

- B. B. Warrant on stat. 7 & 8 G. 4. c. 29., to apprehend an Offender for a Cheat.

To the constable of _____ in the county of _____.

County of } *WHEREAS* complaint hath been made unto me
to wit. } _____, one of his majesty's justices of the
_____ peace for the said county, upon the oath of A. I., of
_____, that on the _____ day of _____, A. O. did by false
pretences, that is to say, by _____, obtain and get into his hands
and possession _____ from the said A. I., with intent to cheat
and defraud the said A. I. of the same, contrary to the statute in
that case made. These are, therefore, in his majesty's name, to
command you, upon sight hereof, forthwith to apprehend and bring
the said A. O. before me, to answer the said complaint, and further
to be dealt with according to law. Given under my hand and seal
this _____ day of _____, A. D. 18—.

C.

C. Commitment thereon.

County of } _____, esquire, one of his majesty's justices of the
to wit. } _____ peace for the said county of _____, to the
_____ keeper of the common gaol at _____, in the
_____ said county, or to his deputy there.

THESE are, in his majesty's name, to charge and command you,
that you receive into your said gaol the body of A. O., appre-
hended by _____, constable of _____, in the said county, and
by him brought before me, charged upon the oath of _____, for that
he the said A. O., on the _____ day of _____, at the parish
of _____, in the said county, did by false pretences, that is to
say, by _____, obtain and get into his hands and possession
_____ from the said A. I., with intent to cheat and defraud the
said A. I. of the same, contrary to the statute in that case made
_____, &c., and that you safely keep the said A. O. until he
shall thence be delivered by due course of law. Hereof fail not.
Given under my hand and seal, this _____ day of _____, in
the year of our Lord one thousand eight hundred and _____.

Child Stealing.

[9 G. 4. c. 31.]

BY 9 G. 4. c. 31. (which repeals 54 G. 3. c. 101.) § 21., if any person shall maliciously, either by force or fraud, lead or take away, or decoy or entice away, or detain any child under the age of ten years, with intent to deprive the parent or parents, or any other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong; or if any person shall with any such intent as aforesaid receive or harbour such child, knowing the same to have been by force or fraud led, taken, decoyed, enticed away, or detained as herein-before mentioned; every such offender and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and liable to be transported for seven years, or to be imprisoned, with or without hard labour, for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment; provided always that no person who shall have claimed to be the father of an illegitimate child, or to have any right to the possession of such child, shall be liable to be prosecuted by virtue hereof, on account of his getting possession of such child, or taking such child out of the possession of the mother, or any other person having the lawful charge thereof.

Taking away a child under 10 years of age.

Receiving or harbouring such child.

Counselling, aiding, or abetting.

Proviso as to father of illegitimate child.

Warrant to apprehend for Child Stealing.

To the constable of the parish of _____, in the county of _____, and to all other constables and peace officers in and for the said county.

County of } *WHEREAS* information and complaint have been
_____ } made before me, J. P. esq., one of his majesty's
justices of the peace for the said county, upon the oath of A. F. of
_____ in the said county, _____, that A. O. of _____ in the
said county _____, did, on the _____ day of _____, at _____
aforesaid, unlawfully and maliciously by force [or, by fraud, as the
case may be] lead, take, [or, carry away, or, decoy, or, entice away,
as the fact may be] a certain male [or, female] child called C. F.,
then and there being the son [or, daughter] of the said A. F., [or,
then and there being in the lawful care and charge of the said A. F.]
and then and there being under the age of ten years, to wit, of the
age of _____ years and upwards, with intent then and there to de-
prive the said A. F., so then and there being the father of the said
C. F., [or, so then and there having the lawful care or charge of the
said C. F.] of the possession of the said C. F. [or, with intent to steal
some article of apparel, or ornament, or other thing of value or use,
upon or about the person of the said C. F., or as the case may be].

These are therefore to command you in his majesty's name forth-
with to apprehend him the said A. O., and to bring him before me
to answer unto the said information and complaint, and to be further
dealt with according to law. Herein fail you not. Given under
my hand and seal the _____ day of _____, one thousand eight
hundred and _____.

Coin.

I. *Of the Coin in general. — Weight, and of receiving or paying for the current Coin more or less than its lawful Value.*

[14 G. 3. c. 92.]

II. *Of counterfeiting, colouring, clipping, and impairing the Coin, bringing light Money into the Kingdom, and having Coining Tools in Possession.*

[14 G. 3. c. 42. — 39 G. 3. c. 75. — 43 G. 3. c. 139. — 56 G. 3. c. 68. — 2 W. 4. c. 34.]

III. *Of procuring, uttering, or tendering in Payment counterfeit Coin, and having such Coin in Possession. Evidence, &c. &c.*

[9 G. 3. c. 37. — 37 G. 3. c. 126.]

IV. *Of Bullion.*

[6 & 7 W. 3. c. 17. — 8 & 9 W. 3. c. 26. — 37 G. 3. c. 126. — 1 & 2 G. 4. c. 26. — 59 G. 3. c. 49.]

V. *Of Tokens.*

[51 G. 3. c. 110. — c. 157. — 53 G. 3. c. 19. — c. 114. — 57 G. 3. c. 46. — c. 113. — 58 G. 3. c. 14.]

For matters common to this with other Treasons, see title *Treason*.

I. Of the Coin in general, &c.

Original of the word.

COIN, in *French*, signifieth a corner, and from thence hath its name, because in ancient times money was square, with corners, as it is in some countries to this day. 1 *Inst.* 207.

The word doth properly signify a wedge, as the Latin *cuneus*; and hath a verb belonging to it in the several languages; and is translated to lawful money; either from the form of a wedge, ingot, or lingot (*linguetta*), in which bullion was transported from all antiquity; or else from the instrument, a wedge or chisel, with which, in trade, these lingots were occasionally cut to the weight required, as they are at this day in the *East Indies* with shears.

14 G. 3. c. 92.
Weights for coin.

By stat. 14 G. 3. c. 92. § 4, 5., no other weight than such as shall be stamped or marked by the officer appointed by H. M. for that purpose shall be sufficient in law for determining the weight of the gold and silver coin of this realm. And if any person shall counterfeit such stamp or mark, or knowingly sell any weight with the impression of such counterfeit stamp thereon; or shall wilfully increase and diminish any such weight after it has been so stamped or marked; or use any such weight in weighing the gold and silver coin of this realm, knowing the same to be so increased or diminished; he shall, on conviction before two justices, forfeit any sum not exceeding 50*l.*, half to the king and half to him that shall inform or sue; and in default of payment he shall be committed

to the common gaol or house of correction for any time not exceeding three months.

The weight, alloy, impression, and denomination of money made in this kingdom are generally settled by indenture between the king and the master of the mint; but the recent statute 56 G. 3. c. 68. § 4. has provided, with respect to the new silver coinage, that the bullion shall be coined into silver coins of a standard and fineness of eleven ounces two pennyweights of fine silver, and eighteen pennyweights of alloy in the pound troy, and in weight after the rate of sixty-six shillings to every pound troy, whether the same be coined in crowns, half-crowns, shillings, or sixpences, or pieces of a lower denomination.

The coining and legitimisation of money, and the giving it its current value, are the unquestionable prerogatives of the crown. 1 Hale, 188. 1 Blac. Com. 278. 1 East's P. C. 148.

Denominating the value of coin.

In two recent cases it was decided, that the exchanging guineas for bank notes, taking the guineas in such exchange at a higher value than they were current for by the king's proclamation, was not an offence within stat. 5 & 6 Edw. 6. c. 19. (now repealed), or at common law. *R. v. De Young*, 14 East, 402. *R. v. Wright*, cited 14 East, 404.

No person can be enforced to take in payment any money but of lawful metal, that is, of silver or gold, except for sums under sixpence. 2 Inst. 5. 7. 1 Hale, 195.

Silver and gold the only legal tender.

II. Of Counterfeiting.

The greater part of the statutes constituting offences against the coin in *England, Scotland, and Ireland*, were repealed by 2 W. 4. c. 34., being an act for consolidating and amending the laws against offences relating to the coin, from May 1. 1832, except so far as any of the said acts may repeal the whole or any part of any other acts, or may be in force in any part of his majesty's dominions out of the united kingdom, and except as to offences and other matters committed or done before or on the last day of April 1832, which are to be dealt with and punished as if the act had not been passed: it provides also, that if any person, shall, after the commencement of the act (May 1. 1832), be convicted of any offence committed before such commencement, and punishable with death, the offender shall be liable, in lieu of capital punishment, to be transported for life, or for any term not less than seven years, or to be imprisoned with or without hard labour for any term not exceeding four years.

Former acts repealed by 2 W. 4. c. 34.

§ 3. "If any person shall falsely make or counterfeit any coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, every such offender shall, in *England and Ireland*, be guilty of felony, and in *Scotland* of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and every such offence shall be deemed to be complete although the coin so made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected."

§ 1. & 2.

Counterfeiting the gold or silver coin, transportation for life.

Offence when deemed complete.

2 W. 4. c. 34.

Colouring counterfeit coin or any pieces of metal with intent to make them pass for gold or silver coin;

colouring or altering genuine coin, with intent to make it pass for a higher coin; transportation for life, &c.

Impairing the gold or silver coin, with intent, &c.; transportation for 14 years, &c.

Buying or selling, &c. counterfeit gold or silver coin for lower value than its denomination; importing counterfeit coin from beyond seas; transportation for life, &c.

Uttering counterfeit gold or silver coin; imprisonment.

§ 4. "If any person shall gild or silver, or shall with any wash or materials capable of producing the colour of gold or of silver, wash, colour, or case over any coin whatsoever, resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin, or if any person shall gild or silver, or shall with any wash or materials capable of producing the colour of gold or of silver, wash, colour, or case over any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin, resembling or apparently intended to resemble or pass for any of the king's current gold or silver coin; or if any person shall gild, or shall with any wash or materials capable of producing the colour of gold, wash, colour, or case over any of the king's current silver coin, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any of the king's current gold coin; or if any person shall gild or silver, or shall, with any wash, or materials capable of producing the colour of gold or of silver, wash, colour, or case over any of the king's current copper coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the king's current gold or silver coin; every such offender shall, in *England* and *Ireland*, be guilty of felony, and in *Scotland* of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

§ 5. "If any person shall impair, diminish, or lighten any of the king's current gold or silver coin, with intent to make the coin so impaired, diminished, or lightened pass for the king's current gold or silver coin, every such offender shall, in *England* and *Ireland*, be guilty of felony, and in *Scotland* of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years."

§ 6. "If any person shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for; or if any person shall import into the united kingdom from beyond the seas any false or counterfeit coin resembling, or apparently intended to resemble, or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit; every such offender shall, in *England* and *Ireland*, be guilty of felony, and in *Scotland* of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

§ 7. "If any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in

England and Ireland, be guilty of a misdemeanor, and in *Scotland* of a crime and offence, and being convicted thereof, shall be imprisoned for any term not exceeding one year; and if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit, and such person shall, at the time of such tendering, uttering, or putting off, have in his possession, besides the false or counterfeit coin so tendered, uttered, or put off, one or more piece or pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any more or other false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit, every such offender shall, in *England and Ireland*, be guilty of a misdemeanor, and in *Scotland* of a crime and offence, and being convicted thereof, shall be imprisoned for any term not exceeding two years; and if any person who shall have been convicted of any of the misdemeanors, or crimes and offences, herein-before mentioned, shall afterwards commit any of the said misdemeanors, or crimes and offences, such person shall, in *England and Ireland*, be deemed guilty of felony, and in *Scotland* of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

§ 8. "If any person shall have in his custody or possession three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in *England and Ireland*, be guilty of a misdemeanor, and in *Scotland* of a crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three years; and if any person so convicted shall afterwards commit the like misdemeanor, or crime and offence, such person shall, in *England and Ireland*, be deemed guilty of felony, and in *Scotland* of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

§ 9. "Where any person shall have been convicted of any offence against this act, shall afterwards be indicted for any offence against this act committed subsequent to such conviction, a copy of the previous indictment and conviction, purporting to be signed and certified as a true copy by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall, upon proof of the identity of the person of the offender, be sufficient evidence of the previous indictment and conviction, without proof of the signature, or official character of the person

2 W. 4. c. 34.

Uttering, accompanied by possession of other counterfeit coin, or followed by a second uttering; imprisonment.

Every second offence of uttering, after a previous conviction, shall be felony; transportation for life, &c.

Having three or more pieces of counterfeit gold or silver coin in possession, &c. with intent, &c.; imprisonment.

Second offence, felony and transportation.

What shall be sufficient evidence of a conviction for a previous offence against this act.

2 W. 4. c. 34.

appearing to have signed and certified the same; and for every such copy a fee of 6s. 8d., and no more, shall be demanded or taken; and if any such clerk, officer, or deputy shall certify or utter as true any false copy of any indictment or conviction for any offence against this act, knowing the same to be false, or if any person other than such clerk, officer, or deputy shall sign or certify any copy of any such indictment or conviction, as such clerk, officer, or deputy, or shall utter any copy thereof with a false or counterfeit signature thereto, knowing the same to be false or counterfeit, every such offender shall, in *England* and *Ireland*, be guilty of felony, and in *Scotland* of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding two years."

Making, mending, or having possession of any coining tools, felony; transportation for life, &c.

§ 10. "If any person shall knowingly, and without lawful authority (the proof of which authority shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly, and without lawful excuse (the proof of which excuse shall lie on the party accused), have in his custody or possession, any puncheon, counter-puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the king's current gold or silver coin, or any part or parts of both or either of such sides; or if any person shall, without lawful authority (the proof whereof shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall, without lawful excuse (the proof whereof shall lie on the party accused), have in his custody or possession any edger, edging tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any of the king's current gold or silver coin, such person knowing the same to be so adapted and intended as aforesaid; or if any person shall, without lawful authority, to be proved as aforesaid, make or mend, or begin or proceed to make or mend, or buy or sell, or shall, without lawful excuse, to be proved as aforesaid, have in his custody or possession any press for coinage, or any cutting engine for cutting by force of a screw or of any other contrivance round blanks out of gold, silver, or other metal, such person knowing such press to be a press for coinage, or knowing such engine to have been used or to be intended to be used for or in order to the counterfeiting of any of the king's current gold or silver coin; every such offender shall, in *England* and *Ireland*, be guilty of felony, and in *Scotland* of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

Conveying tools or monies out of the mint without autho-

§ 11. "If any person shall, without lawful authority, the proof whereof shall lie upon the party accused, knowingly convey out of any of his majesty's mints any puncheon, counter-puncheon,

matrix, stamp, die, pattern, mould, edger, edging tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal or mixture of metals, every such offender shall, in *England* and *Ireland*, be guilty of felony, and in *Scotland* of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years."

§ 12. "If any person shall falsely make or counterfeit any coin resembling, or apparently intended to resemble or pass for any of the king's current copper coin; or if any person shall knowingly, and without lawful authority (the proof of which authority shall lie on the party accused), make or mend, or begin or proceed to make or mend, or buy or sell, or shall knowingly and without lawful excuse (the proof of which excuse shall lie on the party accused), have in his custody or possession any instrument, tool, or engine adapted and intended for the counterfeiting any of the king's current copper coin; or if any person shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current copper coin, at or for a lower rate or value than the same by its denomination imports or was coined or counterfeited for; every such offender shall, in *England* and *Ireland*, be guilty of felony, and in *Scotland* of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding seven years, or to be imprisoned for any term not exceeding two years; and if any person shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same, every such offender shall, in *England* and *Ireland*, be guilty of a misdemeanor, and in *Scotland* of a crime and offence, and being convicted thereof, shall be liable to be imprisoned for any term not exceeding one year."

§ 13. "Where any gold or silver coin shall be tendered to any person, who shall suspect any piece or pieces thereof to be diminished otherwise than by reasonable wearing, or to be counterfeit, it shall be lawful for such person to cut, break, or deface such piece or pieces; and if any piece so cut, broken, or defaced shall appear to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same shall bear the loss thereof; but if the same shall be of due weight, and appear to be lawful coin, the person cutting, breaking, or defacing the same is hereby required to receive the same at the rate it was coined for; and if any dispute shall arise, whether the piece so cut, broken, or defaced, be diminished in manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary

2 W. 4. c. 24.

rity, felony; transportation for life, &c.

Various offences relating to the copper coin.

Coin suspected to be diminished or counterfeit may be cut by any person to whom it is tendered.

Who shall bear the loss.

2 W. 4. c. 34.

manner by any justice of the peace, who is hereby empowered to examine upon oath as well the parties as any other person, in order to the decision of such dispute; and the tellers at the receipt of his majesty's exchequer, and their deputies and clerks, and the receivers general of every branch of his majesty's revenue, are hereby required to cut, break, or deface, or cause to be cut, broken, or defaced, every piece of counterfeit or unlawfully-diminished gold or silver coin which shall be tendered to them in payment of any part of his majesty's revenue."

Provision for the discovery and seizure of counterfeit coin and coining tools, for securing them as evidence, and for ultimately disposing of them.

§ 14. "If any person shall find or discover in any place whatever, or in the possession of any person having the same without lawful excuse, any false or counterfeit coin, resembling, or apparently intended to resemble or pass for any of the king's current gold, silver, or copper coin, or any instrument, tool, or engine whatsoever adapted and intended for the counterfeiting of any such coin, it shall be lawful for the person so finding or discovering, and he is hereby required to seize the same, and to carry the same forthwith before some justice of the peace; and where it shall be proved, on the oath of a credible witness before any justice of the peace, that there is reasonable cause to suspect that any person has been concerned in counterfeiting the king's current gold, silver, or copper coin, or has in his custody or possession any such counterfeit coin, or any instrument, tool, or engine whatsoever adapted and intended for the counterfeiting of any such coin, it shall be lawful for such justice, by warrant under his hand, to cause any place whatsoever belonging to or in the occupation or under the control of such suspected person to be searched, either in the day or in the night, and if any such counterfeit coin, or any such instrument, tool, or engine, shall be found in any place so searched, to cause the same to be seized and carried forthwith before the said justice, or some other justice of the peace; and wherever any such counterfeit coin, or any such instrument, tool, or engine, as aforesaid, shall in any case whatever be seized and carried before a justice of the peace, he shall cause the same to be secured, for the purpose of being produced in evidence against any person who may be prosecuted for any offence against this act; and all counterfeit coin, and all instruments, tools, and engines adapted and intended for the counterfeiting of coin, after they shall have been produced in evidence, or where they shall have been seized, and shall not be required to be produced in evidence, shall forthwith be delivered up to the officers of his majesty's mint, or to their solicitor, or to any person authorised by them or him to receive the same."

Venue.

§ 15. "Where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this act, all or any of the said offenders may be dealt with, indicted, tried, and punished, and their offence laid and charged to have been committed in any one of the said counties or jurisdictions, in the same manner as if the offence had been actually and wholly committed within such one county or jurisdiction: provided always, that crimes and offences against this act committed in *Scotland* shall be proceeded against and tried in *Scotland* in such manner and form as crimes and offences generally have been heretofore tried in that country."

§ 16. "No person against whom any bill of indictment shall be found at any assizes or sessions of the peace, for any misdemeanor against this act, shall be entitled to traverse the same to any subsequent assizes or sessions, but the court before which the bill of indictment shall be returned as found shall forthwith proceed to try the person against whom the same is found, unless such person or the prosecutor shall show good cause, to be allowed by the court, for the postponement of the trial: provided always, that the rights and liabilities of persons indicted under this act in *Scotland*, so far as relates to the postponement or time of trial, shall remain and be dealt with in the same manner as in the cases of all other persons indicted for crime in that country."

2 W. 4. c. 34.

Indictments not to be traversed except for cause shown.

§ 17. "Where upon the trial of any person charged with any offence against this act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of his majesty's mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness."

What shall be sufficient proof of coin being counterfeit.

§ 18. "In the case of every felony punishable under this act, every principal in the second degree and every accessary before the fact shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessary after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and in so far as relates to *Scotland*, every person who shall become accessary after the fact to any of the offences to which the punishment of transportation is by this act attached, shall on conviction be liable to be imprisoned for any term not exceeding two years; the general law of *Scotland* as to accession, or art and part, being in all other respects to regulate the punishments to be awarded under this act."

As to accessaries.

§ 19. "Where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, as to the court in its discretion shall seem meet."

The court may order hard labour or solitary confinement.

§ 20. "Where any offence punishable under this act shall be committed within the jurisdiction of the admiralty, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other offence committed within that jurisdiction."

As to offences committed at sea.

§ 21. "Where 'the king's current gold or silver coin,' or 'the king's current copper coin,' shall be mentioned in any part of this act, the same shall be deemed to include and denote any gold or silver coin or any copper coin respectively coined in any of his majesty's mints, and lawfully current in any part of his majesty's dominions, whether within the United Kingdom, or otherwise; and that any of the king's current coin which shall have been gilt, silvered, washed, coloured, or cased over, or in any manner altered so as to resemble, or be apparently intended to resemble or pass

Rules of interpretation as to current coin, counterfeit coin, and criminal possession.

2 W. 4. c. 34.

for any of the king's current coin of a higher denomination, shall be deemed and taken to be counterfeit coin within the intent and meaning of those parts of this act wherein mention is made of 'false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the king's current gold or silver coin;' and where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act."

Venue in proceedings against persons acting under this act.

Notice of action.

General issue.

Tender of amends, &c.

Legitimizing foreign coin.

§ 22. "And, for the protection of persons acting in the execution of this act, all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act shall, in *England* or *Ireland*, be laid and tried in the county where the fact was committed, and shall, in *England*, *Ireland*, or *Scotland*, be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant or defender one calendar month at least before the commencement of the action; and in any such action, brought in *England* or *Ireland*, the defendant may plead the general issue, and give this act and the special matter in evidence, at any trial to be had thereupon; and in *Scotland* the defender may insist on all relevant defences; and no plaintiff or pursuer shall recover in any such action, if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant or defender; and if, in *England* or *Ireland*, a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or, if upon demurrer or otherwise, judgment shall be given against the plaintiff, or if, in *Scotland*, the verdict shall be for the defender, or if the pursuer shall abandon the action, or the court shall dismiss it as irrelevant or improperly laid, in every such case the defendant or defender shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant or defender hath by law in other cases; and though a verdict shall be given for the plaintiff or pursuer in any such action, such plaintiff or pursuer shall not have costs against the defendant or defender, unless the judge before whom the trial shall be shall certify his approbation of the action and of the verdict obtained thereupon."

The king may by his proclamation legitimate foreign coin, and make it current money of this kingdom, according to the value imposed by such proclamation. 1 *Hale*, 192.

Therefore both *English* money coined by the king's authority, and foreign coin made current by proclamation, are within the denomination of lawful money of *England*. 1 *Inst.* 207.

Under the repealed statutes against counterfeiting the king's money, the following decisions have taken place.

The monies charged to be counterfeited must *resemble the true and lawful coin*, but this resemblance is a matter of fact of which the jury are to judge upon the evidence before them; the rule being, that the resemblance need not be perfect, but such as may in circulation ordinarily impose upon the world. Thus a counterfeiting with some little variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it; and so is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin. 1 *Haw. c. 17. § 81.* 1 *Russ. 80.* 1 *Hale, 178. 184. 211. 215.* 1 *East's P. C. 163.*

What is a sufficient counterfeiting.

In *Wilson's case, O. B. Oct. Sess. 1783, 1 Leach, 285.*, the shillings produced in evidence against the prisoner were quite smooth, without the smallest vestige of either head or tail, and without any resemblance of the shillings in circulation, except their colour, size, and shape; and the master of the mint proved that they were bad, but that they were very like those shillings the impression on which had been worn away by time, and might very probably be taken by persons having less skill than himself for good shillings. And the *court* were of opinion that a blank that is smoothed, and made like a piece of legal coin, the impression of which is worn out, and yet suffered to remain in circulation, is sufficiently counterfeited to the similitude of the current coin of this realm to bring the counterfeiters and coiners of such blanks within the statute; these blanks having some reasonable likeness to that coin, which has been defaced by time, and yet passes in circulation.

Round blanks without any impression are sufficient counterfeits, if they resemble the coin in circulation.

And in the case of *Patrick & John Welsh, Hertford Lent Ass. 1785, 1 East's P. C. 164. 1 Leach, 364.*, the point received the more solemn consideration of the twelve judges; the counsel for the prisoners having objected, upon the fact of no impression of any sort or kind being discernible upon the shillings produced in evidence, that they were not counterfeited to the likeness and similitude of the good and legal coin of this realm. But the judges were of opinion, that it was a question of fact whether the counterfeit monies were of the likeness and similitude of the lawful current silver coin called a shilling. And the jury having so found it, the want of an impression was immaterial; because, from the impression being generally worn out or defaced, it was notorious that the currency of the genuine coin of that denomination was not thereby affected; the counterfeit, therefore, was perfect for circulation, and possibly might deceive the more readily from having no appearance of an impression: and in the deception the offence consists.

It is not necessary that there should be an impression on the counterfeit, if it resemble the common worn coin.

But when the impression of money was forged on an irregular piece of metal, not rounded, without finishing it, so as not to be in a state to pass current, the offence was holden to be incomplete, although the prisoner had actually attempted to pass it in that condition. *Varley's case, 1771, 2 Black. R. 632. 1 MS. Sum. 46.*

What a counterfeiting.

And when two prisoners were convicted upon a count upon stat. 25 *Ed. 3. c. 2*, and it appeared upon the evidence, that no one piece of the base metal found upon the prisoners was in such a state as to make it passable, the conviction was held to be wrong. *R. v. Harris & Minion, 1 Leach, 135.*

By 37 *G. 3. c. 126. § 2.*, if any person shall make, coin, or counterfeit any kind of coin not the proper coin of this realm, nor permitted to be current within the same, but resembling or made

37 *G. 3. c. 126.* Making, coining, or counterfeiting foreign coin.

37 G. 3. c. 126. with intent to resemble or look like any gold or silver coin of any foreign state, &c. or to pass as such foreign coin, such person offending therein shall be deemed guilty of felony, and may be transported for any term of years, not exceeding seven. By the words "not permitted to be current within the realm" must be understood not permitted to be current by proclamation under the great seal.

Importing counterfeit gold or silver foreign coin, not current.

And by § 3. it is enacted, "that if any person or persons shall bring into this realm any such false or counterfeit coin as aforesaid, (*i. e.* by § 2. "any kind of coin, not the proper coin of this realm, nor permitted to be current within the same,") resembling or made with intent to resemble or look like any gold or silver coin of any foreign prince, state, or country, or to pass as such foreign coin, knowing the same to be false or counterfeit, to the intent to utter the same within this realm, or within any dominions of the same; every such person shall be deemed guilty of felony, and may be transported for any term of years not exceeding seven." See 1 *East's P. C.* 176.

An importation *with intent to utter* is sufficient, without any actual uttering; which intent must be collected from circumstances. But though an actual uttering may be the best evidence of such intent, yet it seems safest that the indictment should follow the words of the statute. 1 *East's P. C.* 176.

Having more than five pieces of false foreign coin in possession.

By stat. 37 G. 3. c. 126. § 6., if any person shall have in his custody, without lawful excuse, more than five pieces of any false or counterfeit coin of any kind, resembling or made with intent to resemble any gold or silver coin of any foreign country, or to pass as such foreign coin; he shall on conviction, upon the oath of one witness, before one justice, forfeit the same, which shall be cut in pieces and destroyed by order of such justice; and shall also forfeit not exceeding 5*l.* nor less than 40*s.* for every piece found in his custody, half to the informer, and half to the poor; and if not forthwith paid, such offender may be committed to the gaol or house of correction, to hard labour, for three calendar months, or until such penalty shall be paid.

What a colouring within stat. 8 & 9 W. 3. c. 26.

N.B. The 8 & 9 W. 3. c. 26. is now repealed, but see § 4. of 2 W. 4. c. 34. *ante*, p. 143.

R. v. W. Case, Lancaster Sp. As. 1795, *cor. Heath J.* 1 *East's P. C.* 165. *William Case* was found guilty on an indictment for traitorously colouring, with materials producing the colour of silver, a piece of base coin resembling a shilling. The round blanks were found, some steeped in aqua fortis, and some already taken out of it. They had the appearance of lead, and by rubbing they would resemble silver coin, but as they were, none would pass current. The judges, except two, thought the conviction right. They considered that the offence was complete when the piece was coloured; for it was then coloured with materials which produce the colour of silver; and that it was not necessary that the piece so coloured should be current, for the colouring of blanks was an offence within the clause.

See § 4. of 2 W. 4. c. 34. *ante*, p. 143.

A case under the like circumstances had been before expressly decided by the unanimous opinion of the judges to come within the statute. But there the doubt was, whether the legislature did not intend such a colouring only as is altogether produced by some outward application. But they all thought that this process of extracting the latent silver, by the power of the wash, from the body to the surface of the blank, was a colouring within the words of the act. They thought, besides, that it might be charged as

a colouring with silver; for the effect of the aqua fortis is to corrode the base metal, and leave the silver only on the superficies, and so the copper is coloured or cased with silver. *R. v. Lavey and Parker, O. B. Dec. 1776. 1 East's P. C. 166. 1 Leach, 153.*

Stat. 56 G. 3. c. 68. § 17., relating to the new silver coinage, enacts, that all and every act and acts in force immediately before the passing of that act, respecting the coin of this realm, or the dipping, diminishing, or counterfeiting of the same, or respecting any other matters relating thereto, and all provisions, proceedings, penalties, forfeitures, and punishments therein contained or directed, not expressly repealed by that act, and not repugnant or contradictory to the enactments and provisions of that act, shall be and continue in full force and effect, and shall be applied and put in execution with respect to the silver coin to be coined in pursuance of the directions of that act, as fully and effectually to all intents and purposes whatsoever, as if the same were repeated and re-enacted in that act.

The having tools for coining in possession, with intent to use them, has been held to be a misdemeanor at common law. *R. v. Sutton, Cas. temp. Hardw. 370. 1 East's P. C. 172.*

56 G. 3. c. 68. Clipping, diminishing, or counterfeiting new silver coin.

And see § 14. of 2 W. 4. c. 34. *antè*, p. 147.

III. Of receiving, uttering, or tendering counterfeit Coin.

These may amount to different degrees of offence, according to the circumstances. If *A.* counterfeit the gold or silver coin current, and by agreement before such counterfeiting *B.* is to receive and vent the money, he is an aider and abettor to the act itself of counterfeiting; and consequently a principal traitor within the law. (*a*) In the case of the copper coin, he would be an accessory before the fact to the felony within the stat. 11 G. 3. c. 40. (*b*) And if *B.* had done this afterwards for *A.*'s benefit, without any such agreement precedent to the counterfeiting, but yet knowing the fact; this seems to be the same as a receiving of the principal, because he maintains him. But if he had merely vented the money for his own benefit, knowing it to be false, in fraud of any person, he was only liable to be punished as for a cheat and misdemeanor before stat. 15 G. 2. c. 28.

The stat. 15 G. 2. c. 28. is now repealed, but by s. 7. of 2 W. 4. c. 34. the tendering, uttering, or putting off of counterfeit gold or silver coin, knowing, &c. is made a misdemeanor; and the punishment is increased if this be done with other counterfeit coin in the party's possession, or if he shall repeat the offence within ten days. And a second conviction is made felony liable to transportation for life. See *antè*, p. 143.

So by § 8. the having knowingly in the party's possession three or more pieces of counterfeit gold or silver coin, with intent to utter or put off, is made a misdemeanor, and a second conviction is a felony liable to transportation for life. See *antè*, p. 144.

By § 6., the buying, selling, receiving, paying, or putting off, or offering to buy, &c. any counterfeit gold or silver coin at a

Tendering or uttering counterfeit coin. 2 W. 4. c. 34. § 7.

Having counterfeit coin in possession, with intent to utter, &c. § 8.

Buying, selling, &c. counterfeit coin at an under price. Gold or silver. § 6.

(a) The offence is no longer treason.

(b) Repealed, but see s. 12. of 2 W. 4. c. 34.

less value than its denomination, or knowingly importing gold or silver counterfeit coin, is made a felony, subject to transportation for life. See *antè*, p. 143.

Copper. § 12.

By § 12. the buying, selling, receiving, paying, or putting off, or offering to buy, &c. any counterfeit copper coin at a less value than its denomination, is a felony subject to transportation for seven years; and the knowingly tendering, uttering, or putting off any counterfeit copper coin, or knowingly having in the party's possession three pieces of counterfeit copper coin, with intent to utter, &c. is a misdemeanor liable to one year's imprisonment. See *antè*, p. 146.

If one person counterfeits, and another person knows that he did so, and doth neither receive, maintain, or abet him, but conceals his knowledge; this is misprision of felony.

A statute mentioning counterfeit money generally, must be confined to the gold and silver coin of the realm. 1 *Hale*, 211.

Cirwan's case.
Uttering counterfeit copper coin not indictable at common law.

Francis Cirwan was indicted (*Oxford Sum. Ass.* 1794, 1 *East's P. C.* 182.) for "unlawfully uttering and tendering in payment to *J. H.* ten counterfeit halfpence, knowing them to be counterfeit;" and this was laid in the one count against the form of the statute, and in another generally. The defendant was convicted on the general count, it being admitted at the trial that there was no statute applicable to the fact. But upon reference to all the judges (*Hill. T.* 1795.), they held the conviction wrong, it not being an indictable offence.

By 15 G. 2. c. 28. (now repealed) § 2., the offence was made to consist in "uttering or tendering in payment" any counterfeit money, knowing, &c.

Under this enactment the following decision was made.

Counterfeit money passed by the trick of ringing the changes, is within an enactment against uttering or tendering in payment.

Frank's case, 2 *Leach*, 644. The words of the statute "utter or tender in payment" are in the disjunctive, and will therefore apply to an uttering of counterfeit money, though it be not tendered in payment, but passed by the common trick called *ringing the changes*, as in the following case:—The prosecutor having bargained with the prisoner, a Jew, who was selling fruit about the streets, to have five apricots for sixpence, gave him a good shilling to change. The prisoner put the shilling into his mouth as if to bite it in order to try its goodness; and returning a shilling to the prosecutor, told him it was a bad one. The prosecutor gave him another good shilling, which he also affected to bite, and then returned another shilling, saying it was not a good one. The prosecutor gave him another good shilling, with which he practised this trick a third time; the shillings returned by him being in every instance bad. The court held that the words of the statute were sufficient to include this case; and that *uttering and tendering in payment* were two distinct and independent acts. 1 *Russ.* 82.

By § 3. of the said repealed act (15 G. 2.), a second uttering of counterfeit money on the same day or within ten days is made liable to a severer punishment. On this section of the stat. the following cases have occurred.

Eliz. Tandy's case.
Charging two utterings on the same day, each

An indictment on this act charged the prisoner in the first count with having on the 15th of *December*, 39 G. 3., uttered to one G. S. a counterfeit half-crown, knowing it to be so; and a second count charged her with having on the said 15th of *Decem-*

ber, &c. uttered another counterfeit half-crown to the same person. The prisoner having been convicted on both counts, it was referred to the judges to consider what judgment was proper to be passed on this record; in *Hilary* term, 1799, the judges held, that this indictment was not sufficient to subject the prisoner to the larger penalty, as for uttering two pieces of counterfeit coin on the same day; *there being no distinct averment of that fact.* And judgment of imprisonment for six months only was given. 1 *East's P. C.* 182. 2 *Leach*, 833.

But where two utterings are charged in one count of the indictment on a certain day therein named, the day will be held to be material, and the fact of an uttering twice on the same day to be sufficiently averred. Thus in *Martin's case*, *Derby Lent Ass.* 1801, 1 *East's P. C. Add.* xviii. 2 *Leach*, 923. *MS. C. C. R.*, the indictment charged that the prisoner on the 14th of February, &c. uttered base coin to *W. C.*; and that on the said 14th of February, &c. he uttered to *J. L.* other base coin, it was held sufficient to warrant the higher punishment of the 3d section of the statute; the utterings on the face of the indictment appearing to be on the same day. And the judges held, at a conference upon this case, that though, when the day is not material, the fact may be proved on a day different from the day laid, yet where the day is not indifferent, the precise time laid must be proved; and that in this case it must be taken that it was proved that the defendant uttered counterfeit coin at two different times of the same day.

On a prosecution for uttering counterfeit money, the fact of the prisoner having other counterfeit money upon him, or of his having uttered other pieces of money of the same kind, is evidence of his having known that the money which he uttered was counterfeit. 1 *Phill. Ev.* 168. 1 *N. R.* 95.

By 37 G. 3. c. 126. § 4., if any person shall utter or tender in payment, or give in exchange, or pay or put off any such false or counterfeit gold or silver coin (foreign coin, see § 2. *ante*, p. 150.), knowing, &c., he shall suffer, on conviction, six months' imprisonment; and, on a second conviction, two years' imprisonment; and, on third conviction, it shall be felony without benefit of clergy.

By § 5. the certificate of clerk of assize is made evidence of a former conviction.

If false or clipt money be found in a man's hands, if he be suspicious, he may be arrested till he have found his warrant. 3 *Inst.* 18. 1 *Haw. c.* 17. § 68. *Hale's Sum.* 21.

The bare possession of counterfeit coin, without some intended use, is not an indictable offence; but the unlawful procuring of counterfeit coin with intent to circulate it, though no act of uttering be proved, is a *misdemeanor* at common law; and where a person is in possession of a large quantity of counterfeit coin, all newly finished, never having been in circulation, and of the same denomination, such possession, unaccounted for, is evidence to go to a jury of the person having procured and acquired such counterfeit coin with intent to circulate the same. *R. v. Robinson and Fuller*, *Launceston Lent Ass.* 1816, *cor. Graham B.*, *C. C. R.* 308.; and *R. v. Heath*, *Warwick Lent Ass.* 1810, *cor. Bayley J.* *C. C. R.* 184. *R. v. Stewart*, *Bodmin Sum. Ass.* 1814, *cor. Gibbs C. J.* *C. C. R.* 288.

in a different count, will not warrant a judgment on stat. 15 G. 2. c. 28. § 3. for a second uttering on same day.

But aliter where the two utterings on the same day were charged in one count.

The precise time must be proved, where important.

Evidence of knowing money to be counterfeit.

Uttering, &c. counterfeit gold or silver foreign coin.

Having counterfeit coin in possession.

Procuring it for the purpose of circulation.

9 G. 3. c. 37.
Paying the poor
in base coin.
Church-
wardens, over-
seers, or others,
intrusted to
make payments
to or for the use
of the poor,
making the
same in any
other than law-
ful money,
forfeit not less
than 10s. nor
more than 20s.

In order to prevent the parish poor being paid in base or counterfeit coin, by stat. 9 G. 3. c. 37. § 7., if any churchwarden or overseer of any parish, township, or place, or other person authorised by them to make payments to or for the use of the poor within such parish, township, or place respectively, shall wilfully and knowingly make any such payments in any base or counterfeit money, or in any other than lawful money of *G. B.*; one justice may, and he is thereby required, on complaint, to summon the churchwarden, overseer, or other person charged, and in a summary way, upon his or their non-appearance or confession, or proof upon oath of one witness, adjudge the party so offending to forfeit for each offence a sum not less than 10s. nor more than 20s.; and to levy the same by distress and sale of the goods and chattels of such offender, and to be applied to the use of any poor person or persons of the parish or place respectively, as the justice shall appoint.

IV. Bullion.

Bullion.

Bullion signifies properly either gold or silver in the mass; but is here intended to denote those metals in any state other than that of authenticated coin; comprising in this latter sense gold and silver wares and manufactures. The legislature, for the prevention of frauds with respect to such bullion, have made several provisions. See the statutes collected in 1 *East's P. C.* pp. 188—194. 1 *Russ.* 69.

59 G. 3. c. 49.

See also stat. 59 G. 3. c. 49. § 11., by which various provisions in divers ancient statutes against melting and exporting of gold and silver coins are repealed.

And by § 12. certain provisions respecting bullion or molten silver in stats. 6 & 7 *W. 3. c. 17.* §§ 5. and 7., and 7 & 8 *W. 3. c. 19.* § 6. are also repealed.

See also stat. 1 & 2 *G. 4. c. 26.* § 4.

By stat. 6 & 7 *W. 3. c. 17.* § 3., if any shall cast ingots or bars of silver, in imitation of *Spanish* bars or ingots, or stamp them in likeness of the *Spanish* stamp, he shall forfeit the same, and also 500*l.*, half to the king and half to the informer.

V. Of Tokens.

Bank Tokens.

44 G. 3. c. 71.

By stat. 44 G. 3. c. 71., the governor and company of the Bank of *England*, for the convenience of the public, were empowered to issue certain silver dollars, and provision was made against the counterfeiting and uttering counterfeits; and by stat. 51 G. 3. c. 110.

51 G. 3. c. 110.

the said governor and company, for the further convenience of the public, were authorised to issue certain silver pieces called tokens, for 3*s.* and 1*s. 6d.* each; and by 52 G. 3. c. 138.

52 G. 3. c. 138.

persons uttering or vending counterfeits were subject to certain punishments imposed by the said acts; but in consequence of the late circulation of the new current silver coin, it became unnecessary any longer to continue the said dollars and tokens in circulation, and the further circulation was accordingly prohibited by stat.

57 G. 3. c. 113. after the 25th of *March* 1818, but extended (by stat. 58 G. 3. c. 14.) to the 5th of *July* 1818, and further to the 5th of *April* 1819, in payment of taxes, rates, postage, and for stamps, rent, &c.; but by 57 G. 3. c. 113. § 1., if any person shall hereafter utter, offer, or tender in payment, or give in exchange, or pass, circulate, or put off any such dollars or tokens, whether the value thereof shall be paid or given in money or goods, or in any other manner whatsoever, every person so offending and being thereof convicted, upon the oath of one witness, before one or more of *H. M.'s* justices of the peace acting for the county, riding, city, or place within which such offence shall be committed, shall, for every such dollar or token so uttered, offered, tendered in payment, given in exchange, or passed, circulated, or put off, contrary to the prohibition herein-before contained, forfeit and pay any sum not exceeding 5*l.* nor less than 40*s.*, at the discretion of the justice or justices who shall hear such offence: provided that nothing in this act contained shall extend to prevent any person from presenting any such dollars or tokens for payment to the governor and company of the Bank of *England*, or at any time before the 25th of *March* 1820, or to discharge or excuse the said governor and company from their liability to pay the same before the said 25th of *March* 1820, nor to prevent any person, after the 25th of *March* 1818, from selling or disposing of any such dollars or tokens as aforesaid as old silver, according to the weight thereof, &c.

§ 2. Justices are empowered to hear and determine offences in a summary way, and to levy penalties by distress. § 3. Witnesses not attending on summons to forfeit 20*l.*, to be levied in like manner; one moiety of penalties to go to the informer, and the other to the poor of the parish. § 8. If no distress, offender to be committed to the gaol or house of correction for three calendar months, unless the penalty be sooner paid, or offender gives notice of appeal to the next general quarter sessions, and enters into recognizance to prosecute such appeal. Determination of the sessions to be final.

Local Tokens.

By stat. 52 G. 3. c. 157. the circulation of local tokens of gold, silver, or mixed metal was prohibited after the 25th of *March* 1813, but extended by stat. 53 G. 3. c. 19. to the 5th of *July* 1813, and by stat. 53 G. 3. c. 114., after reciting, "that it is expedient that the period limited in the said last-mentioned act for the circulation of tokens should be further extended, it is enacted by § 2. that from and after six weeks from the commencement of the next session of parliament no piece of gold or silver, or of any mixed metal composed partly of gold or silver, of whatever name the same may be, shall pass or circulate as a token for money, or as purporting that the bearer or holder thereof is entitled to demand any value denoted thereon, either by letters, words, figures, mark or otherwise, whether such value is to be paid or given in money or goods, or other value, or in any manner whatsoever; and every person who shall, after six weeks from the commencement of the next session of parliament, circulate or pass as for any nominal value in money or goods any such token,

57 G. 3. c. 113.
58 G. 3. c. 14.

57 G. 3. c. 113.
Penalty for
afterwards cir-
culating them.

But they may
be presented at
the Bank till
25 March 1820.

May be sold as
old silver.

52 G. 3. c. 157.
Tokens not to
be circulated
after a certain
time.

53 G. 3. c. 114.

shall for every such token so circulated or passed, whether such person shall be or have been concerned in the original issuing or circulation of any such token, or only the bearer or holder thereof for the time being, forfeit any sum not less than 5*l.* nor more than 10*l.*, at the discretion of such justice or justices of the peace who shall hear and determine such offence; provided that nothing in this act contained shall extend to prevent any person from presenting any such token for payment to the original issuer thereof, or to discharge or excuse any such original issuer from his liability to pay the same.

Act not to authorise issue of promissory notes under 20*s.*

By § 4. nothing in this act contained shall extend to authorise or make legal the issuing of any promissory note, not being a token composed of gold or silver, or of mixed metal composed partly of gold or silver, which cannot now be issued by law, nor (by § 5.) to extend to any tokens issued by the Bank of *England* or *Ireland*.

§ 4. Justices of the peace are empowered to hear and determine offences in a summary way. — § 5. Witnesses not attending on summons to forfeit 20*l.* to be levied (as other penalties under these acts) by distress. — § 9. Justices are empowered to detain offenders in custody until return can be had of any warrant of distress. — § 10. In default of distress offenders may be committed to the common gaol or house of correction for three calendar months, unless the penalty be sooner paid, or the offender give notice of appeal to the next general quarter sessions, and enter into recognisance to try such appeal. Determination of sessions to be final.

57 G. 3. c. 46.
Copper tokens.

And by stat. 57 G. 3. c. 46. § 1. [*Mr. Littleton's Act*], after reciting that "whereas various pieces of copper, and mixed metals composed in part of copper, usually denominated tokens, have lately been and are issued and circulated, by persons residing in various parts of the U. K., in great quantities, as money, and for a nominal value of the metals of which they are composed; and whereas it is expedient that the further making and issuing of such tokens should be prohibited, and that the circulation of those already made or issued should also be prohibited after a limited period;" it is enacted, that from and after the passing of this act no piece of copper, or mixed metal composed in part of copper, of whatever value the same may be, shall be made or manufactured or originally issued as a token for money, or as purporting that the bearer or holder thereof is entitled to demand any value denoted thereon, either by letters, words, figures, marks, or otherwise, whether such value is to be paid or given in money or goods, or in any manner whatsoever; and every person who shall, after the passing of this act, make or manufacture or originally issue, or cause or procure to be made, manufactured, or originally issued, or permit or suffer to be so issued, on his or her behalf, as for nominal value in money or goods, any such token, shall, for every token so made, manufactured, or issued, or procured or permitted to be so made, manufactured, or issued as aforesaid, forfeit any sum not less than 1*l.* nor more than 5*l.*, at the discretion of the justice or justices of the peace who shall hear and determine such offence.

No copper tokens to be made,

or issued,

or circulated.

§ 2. And from and after the 1st of *January* 1818, no piece of copper, or of any mixed metal composed partly of copper, of

whatever value the same may be, shall pass or circulate as a token for money, or as purporting that the bearer or holder thereof is entitled to demand any value denoted thereon, either by letters, words, figures, marks, or otherwise, whether such value is to be paid or given in money or goods or other value, or in any manner whatsoever; and every person who shall, after the said 1st of *January* 1818, circulate or pass, as for any nominal value in money or goods, any such token, shall, for every such token so circulated or passed, whether such person shall be or have been concerned in the original issuing or circulation of any such token, or only the bearer or holder thereof for the time being, forfeit any sum not less than 2s. nor more than 10s., at the discretion of the justice or justices of the peace who shall hear and determine such offence; provided that nothing in this act contained shall extend or be construed to extend to prevent any person from presenting any such token for payment to the original issuer thereof, or to discharge or excuse any such original issuer from his liability to pay the same: provided always, that nothing in this act contained shall be construed as affecting any tokens which have been or may be issued by the Bank of *England*.

57 G. 3. c. 46.

Penalty.

Issuer to be liable for payment.

Not to affect Bank of *England* tokens.

§§ 3, 4, 5, 6, 7, & 8. relate exclusively to particular tokens issued at *Sheffield* and *Birmingham*.

By § 9. one or more justices acting for the county, riding, city, &c. may hear and determine offences against this act in a summary way, and after summoning the party accused, and also the witnesses on either side, shall examine into the matter of fact, and upon due proof, either by confession or oath of one witness, shall convict the offender and adjudge the penalty.

Justices to determine offences.

§ 10. If any person summoned as a witness to give evidence before such justice or justices shall neglect or refuse to appear at the time or place appointed, without a reasonable excuse, to be allowed by such justice or justices, such person shall forfeit 50l.

Witnesses not attending to forfeit 50l.

§ 11. Conviction to be made out in the form following; (that is to say,)

Conviction.

BE it remembered, that on the ——— day of ———, in the year of our Lord ———, A. B., having appeared before me [or, us], one [or, more] of his majesty's justices of the peace [as the case may be] for the county, riding, city, or place [as the case may be], and due proof having been made upon oath by one or more credible witness or witnesses, or by confession of the party [as the case may be], is convicted of [specifying the offence], in the sum of ———. Given under my hand and seal [or, our hands and seals], the day and year aforesaid.

Which conviction shall be returned to the then next general quarter sessions of the peace of the county, city, riding, or place where such conviction was made, to be filed and kept among the records of such county, &c.

§ 12. It shall be lawful for any clerk of the peace for any county, &c., and he is hereby required, upon application made to him, to cause a copy or copies of any conviction or convictions filed by him under this act, to be delivered to such person or persons, upon payment of 1s. for every such copy.

Clerk of the peace to deliver a copy thereof on payment of 1s.

§ 13. The pecuniary penalties and forfeitures hereby incurred

Recovery and

57 G. S. c. 46.

distribution of
penalties.

and made payable upon any conviction, shall be forthwith paid by the person convicted, as follows; one moiety of the forfeiture to the informer, and the other moiety to the poor of the parish or place where the offence shall be committed; and in case such person shall refuse or neglect to pay the same, or to give sufficient security to the satisfaction of such justice or justices to prosecute any appeal against such conviction, such justice or justices shall by warrant under his or their hand and seal, or hands and seals, cause the same to be levied by distress and sale of the offender's goods and chattels, together with all costs and charges attending such distress and sale, returning the overplus (if any) to the owner; and which said warrant of distress the said justice or justices shall cause to be made out in the manner and form following; (that is to say,)

To the constable, headborough, or tithingman of ———.

Warrant of
Distress.

WHEREAS A. B. of ———, in the county of ———, is this day convicted before me [or, us], one [or, more] of his majesty's justices of the peace [as the case may be] for the county of ——— [or, for the ——— riding of the county of ———, or, for the town, liberty, or district of ———, as the case may be], upon the oath of ——— [or, ———, a credible witness or witnesses] [or, by confession of the party, as the case may be], for that the said A. B. hath [here set forth the offence], contrary to the statute in that case made and provided, by reason whereof the said A. B. hath forfeited the sum of ———, to be distributed as herein is mentioned, which he hath refused to pay: These are, therefore, in his majesty's name to command you to levy the said sum of ——— by distress of the goods and chattels of him the said A. B.; and if within the space of ——— days next after such distress by you taken, the said sum, together with reasonable charges of taking the same, shall not be paid, then that you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale, that you do pay one half of the said sum of ——— to ——— of ——— who informed me [or, us, as the case may be] of the said offence, and the other half of the said sum of ——— to the overseer of the poor of the parish [township or place] where the offence was committed, to be employed for the benefit of such poor, returning the overplus (if any) upon demand to the said A. B., the reasonable charges of taking, keeping, and selling the said distress being first deducted; and if sufficient distress cannot be found of the goods and chattels of the said A. B. whereon to levy the said sum of ———, that then you certify the same to me [or, us, as the case shall be], together with this warrant. Given under my hand and seal [or, our hands and seals], the ——— day of ———, in the year of our Lord ———.

For detaining
offenders till re-
turn of warrant.

§ 14. It shall be lawful for such justice to order such offender to be detained in safe custody until return may conveniently be made to such warrant of distress, unless the party so convicted shall give sufficient security for his appearance before the said justice, on such day as shall be appointed for the return of the said warrant of distress (such day not exceeding five days from the taking of such security), which security the said justice is empowered to take, by way of recognisance or otherwise.

§ 15. If upon such return no sufficient distress can be had, the said justice shall commit such offender to the common gaol or house of correction of the county, &c. where the offence shall be committed, for one calendar month, unless the penalty shall be sooner paid, or unless such offender shall give notice to the informer that he intends to appeal to the next general quarter sessions of the peace to be holden for the county, &c., and shall enter into recognisance before some justice, with two sufficient sureties, conditioned to try such appeal, and to abide the order of and pay such costs as shall be awarded at such quarter sessions; which notice of appeal, being not less than eight days before such quarter sessions, such person so aggrieved is empowered to give; and the said justices at such sessions, upon due proof of such notice being given, and of the entering into such recognisance, shall hear and finally determine the causes and matters of such appeal in a summary way, and award such costs to the parties appealing or appealed against, as they the said justices shall think proper; and the determination of such quarter sessions shall be final.

57 G.3. c. 46.

Committal of defaulters.

§ 16. Parishioners may be witnesses, and no conviction shall be quashed for want of form, or be removed by writ of *certiorari*, &c.

Competency of witnesses.

§ 17. All actions shall be commenced within three calendar months after the fact was committed. The defendant may plead the general issue, and if judgment be given against the plaintiff, the defendant shall recover treble costs.

Proceedings not to be removed by *certiorari*.

Limitation of actions.

§ 18. Provided that nothing in this act contained shall extend to any copper monies of the realm now current, or to be current by virtue of any proclamation that shall have been or may be issued by H. M.

Not to extend to copper monies of the realm.

A. Information against a Person for Coining.

A.

County of } *THE information of A. I. of ———, in the said*
 } *county of ———, labourer, taken upon oath*
 to wit. } *before me J. P. esquire, one of his majesty's justices of*
the peace for the county aforesaid, the ——— day of ———
one thousand eight hundred and ———.

This informant, on his oath, deposeth and saith, that on the ——— day of ——— last past, in the dwelling-house of B. C., situate at ——— in the county aforesaid, A. O., of the parish of ——— aforesaid, silversmith, had in his possession divers moulds and tools made use of in the clipping and coining of money; and that he, this informant, saw the said A. O. coin several silver shillings and silver sixpences, in imitation of the lawful coin of this realm; and farther, that he saw the said A. O. offer ——— shillings thereof in payment to D. E., of ———, in the said county of ———, at ——— aforesaid, who refused the same, as justly suspecting that they were counterfeited.

A. I.

Sworn the day and year aforesaid,
 before me,

J. P.

B

B. Warrant on the above Information.

County of }
 to wit. } To the constable of — in the said county of —.

WHEREAS A. I., of — in the county aforesaid, —, hath this day made oath before me J. P., esquire, one of his majesty's justices of the peace for the county aforesaid, that on the — day of — last, A. O., of the parish of — aforesaid, —, did coin several pieces of money, to wit, — silver shillings and silver sixpences, at the dwelling-house of B. C., situate in — aforesaid, in imitation of the lawful coin of this realm, and contrary to the laws thereof. These are therefore, in his majesty's name, to require and authorise you to apprehend the said A. O., and to bring him before me, or some other of his majesty's justices of the peace for the said county, to be examined in the premises, and to be dealt with according to law. Given under my hand and seal, this — day of — one thousand eight hundred and —.

J. P. (L. S.)

C.

C. Commitment for uttering counterfeit Coin.

County of } J. P. esq. one of the justices of our lord the king,
 to wit. } assigned to keep the peace within the said county.
 To the constable of —, in the said county,
 and to the keeper of the common gaol at —,
 in the said county.

THESE are to command you, the said constable, in his said majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said common gaol the body of A. O., charged this day upon the oath of A. I., before me the said justice, with having on the — day of — instant, at —, in the said county, unlawfully and deceitfully uttered and paid to him the said A. I. one piece of false money, made and counterfeited to the likeness and similitude of the lawful and current coin of this realm, called a half crown; the said A. O. then and there well knowing the said piece of money to have been false and counterfeit. And you, the said keeper, are hereby required to receive the said A. O. into your custody in the said common gaol, and him there safely keep, until he shall be from thence discharged by due course of law. Hereof, fail you not. Given under my hand and seal, the — day of —, in the year of our Lord one thousand eight hundred and —.

J. P. (L. S.)

Commitment.

Without warrant.

ANCIENTLY there were more felons committed to gaol without mittimus in writing than were with it: such were all the commitments by constables, watchmen, and private persons arresting for felony, and bringing to the common gaol, long before there were any justices of the peace; and yet mittimuses are not of so ancient date even as they. 1 Hale, 610.

But now, since the *habeas corpus* act, a commitment in writing seems more necessary than it was in former times; otherwise the prisoner may be admitted to bail upon that act, whatsoever his offence may have been. See *antè*, p. 70.

When a statute appoints imprisonment, but limits no time, it is to be understood that he shall be imprisoned presently. *Dalt.* c. 170. Commitment, when.

Concerning which I will set forth,

I. *Who may be committed.*

[15 G. 2. c. 24. — 5 G. 4. c. 18. — 7 G. 4. c. 64. — 7 & 8 G. 4. c. 29. c. 30. — 9 G. 4. c. 31.]

II. *To what Place.*

[5 H. 4. c. 10. — 6 G. 1. c. 19. — 15 G. 2. c. 24. — 24 G. 2. c. 55. — 60 G. 3. & 1 G. 4. c. 14. — 4 G. 4. c. 64.]

III. *The Form of the Commitment.*

[7 & 8 G. 4. c. 29. c. 30. — 9 G. 4. c. 31.]

IV. *Charges of the Commitment.*

[3 J. 1. c. 10. § 1. — 27 G. 2. c. 3. §§ 1. 4.]

V. *That the Gaoler shall receive the Prisoner.*

VI. *Shall certify the Commitment.*

[3 H. 7. c. 3.]

VII. *Commitment discharged.*

I. *Who may be committed.*

There is no doubt but that persons apprehended for offences which are not bailable, and also all persons who neglect to offer bail for offences which are bailable, must be committed. 2 *Haw.* c. 16. § 1. But not unless a *prima facie* case is made out against them by witnesses entitled to a reasonable degree of credit. Per *Bayley J.* in *Cox v. Coleridge*, 1 B. & C. 49. 50., where he expresses himself not satisfied with the authority of *Dalt.* c. 164. pp. 407, 408.

And it is said, that wheresoever a justice is empowered by any statute to bind a person over, or to cause him to do a certain thing, and such person being in his presence shall refuse to be bound, or to do such thing, the justice may commit him to the gaol, to remain there till he shall comply. 2 *Haw.* c. 16. § 2.

A justice of the peace may commit a *feme covert* who is a material witness upon a charge of felony brought before him, and who refuses to appear at the sessions to give evidence, or to find sureties for her appearance. *Bennet and Wife v. Watson and another*, T. 1814, 3 M. & S. 1. *Vide post*, tit. *Examination*.

By stat. 15 G. 2. c. 24. when any person liable by law to be committed to the house of correction shall be apprehended within any liberty, city, or town corporate, whose inhabitants are contributory to the support and maintenance of the house or houses of correction of the county, riding, or division in which such liberty, city, or town corporate is situate, it shall and may be lawful for the justices of the peace of such liberty, city, or town

Persons not bailable, or not finding bail.

Persons guilty of contempt in disobeying legal authority of justice.

Person refusing to be witness or to give sureties to appear.

15 G. 2. c. 24. Justices of liberty, &c. may commit offenders to house of correction, &c. of the county, &c.

in which such liberty, &c. situate.

corporate to commit such person to the house of correction of the county, riding, or division in which such liberty, city, or town corporate is situate; which person so committed shall and may be received, detained, dealt with and ordered, and be set and kept to hard labour, or conveyed and sent away, or discharged, and be subject and liable to the same correction and punishment, to all intents and purposes, as if committed by any justice or justices of peace of the same county, riding, or division. See *R. v. Amos*, 2 B. & A. 533. *R. v. Musson*, 6 B. & C. 74. tit. *Sessions*.

Persons charged with felony.

If a prisoner be brought before a justice, expressly charged with felony upon oath, the justice cannot discharge him, but must bail or commit him. 2 *Hale*, 121.

Persons charged on suspicion.

But if he be charged with suspicion only of felony, yet if there be no felony at all proved to be committed, or if the fact charged as a felony be in truth no felony in point of law, the justice may discharge him; as if a man be charged with felony for stealing a parcel of the freehold, or for carrying away what was delivered to him, and such like, for which, though there may be cause to bind him over as for a trespass, the justice may discharge him as to felony, because it is not felony. But if a man be killed by another, though it be by misadventure or self-defence (which is not properly felony), or in making an assault upon a minister of justice in execution of his office (which is not at all felony), yet the justice ought not to discharge him, for he must undergo his trial for it; and, therefore, he must be committed, or at least bailed. 2 *Hale*, 121.

Power of committing or bailing under act for improvement of criminal justice.

By stat. 7 G. 4. c. 64. § 1., if a charge of felony or suspicion thereof is supported by positive and credible evidence, or by such evidence as, if not explained or contradicted, shall in the opinion of the magistrate raise a strong presumption of guilt, the person so charged shall be committed; but if the evidence be such as neither to raise a strong presumption of guilt, nor to warrant the dismissal of the charge, the prisoner is then to be detained, and the examination is to take place before two justices, and if the presumption of guilt is not so strong as to require his committal, or if the evidence produced on behalf of the prisoner weakens the presumption of his guilt, but there appears nevertheless sufficient ground for judicial inquiry, the two justices may then admit to bail, but the justice is not required to hear evidence on behalf of the prisoner, unless it appear conducive to the ends of justice to do so.

By § § 2. & 3., before the justices shall commit or bail for felony or misdemeanor, they are to take the examination of the prisoner and the information of the witnesses in writing. See *ante*, 384.

Power of commitment by justices under larceny act.

By 7 & 8 G. 4. c. 29. § 67., where the sum due by virtue of a conviction under that act shall not be paid either immediately or within such time as the justice shall appoint, he may commit the offender for any time not exceeding two months where the sum including costs shall not exceed 5*l.*, and four months where it shall not exceed 10*l.*, to be determinable on the payment of the amount and costs.

A like enactment is made by § 33. of 7 & 8 G. 4. c. 30.

And so, by § 27. of 9 G. 4. c. 31., as to the fine of 5*l.* inflicted by that act.

Under malicious trespass act.

Under act against offences to the person.

Where an offender is convicted in *one* penalty, under a statute providing a corporal punishment on failure of sufficient distress, and has effects sufficient only to satisfy *part*, it has been held that the goods ought not to be taken, but the corporal punishment should be resorted to. If, however, the same person be separately convicted in *two* penalties, and his goods are sufficient to satisfy *one* only, they ought to be levied under *one* conviction, and the corporal punishment should be inflicted for the other. (See *R. v. Wyatt*, 2 *Ld. Raym.* 1195. *Fort.* 132. 11 *Mod.* 54.) But the law never intended that a man should suffer both punishments for *one* conviction. 2 *Ld. Raym.* 1196. *Paley on Convictions*, P. III. Ch. 1. § 4. 1st ed. p. 185., and note *l*.

Commitment where goods are insufficient to pay more than a part of a penalty.

By 5 *G. 4. c. 18. § 1.*, where magistrates have power of issuing a distress warrant for a penalty or forfeiture on conviction, they may detain offender in custody till the return of the distress warrant, unless he gives security to appear, &c.; but if it appear to the justice that the offender has no sufficient goods or chattels, the justice may commit him without issuing any distress warrant, the same as if nulla bona had been returned.

On conviction, power of detaining till return of distress warrant.

By § 2., in cases where justices are empowered to issue distress warrants, but no farther remedy is provided if no sufficient goods or chattels can be found; whenever it shall appear to such justice that sufficient goods and chattels are not to be found, the justice may commit, without issuing any distress warrant, for any term not exceeding three months, unless the sum adjudged and all costs, &c. be sooner paid, the amount of such costs, &c. to be specified in the warrant of commitment. See *Hutchinson v. Lowndes*, 4 *B. & A.* 118. and *post*, p. 167.

Where distress only is authorised, yet if there are not sufficient goods, justice may commit for three months.

By § 4., whereas the recovery of penalty, &c. by distress may be ruinous or injurious to the offender or his family, the justice may, if such consequences are likely to ensue, commit the offender immediately on nonpayment of the penalty, &c.; provided that it be by the desire or consent in writing of the party on whose property the penalty, &c. is to be levied.

If distress may be injurious, justice may commit, with consent in writing of offender.

II. To what Place.

By stat. 5 *H. 4 c. 10.* all felons shall be committed to the common gaol, and not elsewhere.

5 *H. 4. c. 10.*
To the gaol.

And by stat. 23 *H. 8. c. 2.* felons shall be imprisoned in the common gaol, which shall be kept by the sheriff. *Vide* 12 *Howell's St. Tri.* 1376.

23 *H. 8. c. 2.*

By 6 *G. 1. c. 19. § 2.* vagrants and other criminals, offenders, and persons charged with small offences, may for such offences, or for want of sureties, be committed either to the common gaol or house of correction, as the justices in their judgment shall think proper.

Small offenders may be committed either to gaol or house of correction.

By 4 *G. 4. c. 64. § 4.* the justices at sessions may declare and make order to what class of prisoners every gaol, house of correction, or any part thereof shall be applicable, with notice, &c., after which such class of prisoners and no other shall be committed or detained in such gaol, house of correction, &c.; and persons not coming within the class so appointed may be removed; and every such gaol or house of correction shall be deemed the legal place of confinement of persons committed pursuant to such order.

Commitments under order for classification.

4 G. 4. c. 64.
House of cor-
rection.
Vagrants.

By stat. 4 G. 4. c. 64. § 7. (tit. Gaols, &c. § xiv. (a)) idle and disorderly persons, rogues and vagabonds, incorrigible rogues, and other vagrants, shall be committed to some house of correction belonging to such county, &c. or place, and such house of correction shall be deemed the only legal place of commitment of any such person.

60 G. 3. & c.
1 G. 4. c. 14.
Power to
justices, acting
in any place
not being a
county, to com-
mit offenders
to the gaol of
the county.
See 15 G. 2.
c. 24. *antè*,
p. 163.
4 & 5 W. 4.
c. 27. tit.
De prisonis.

Stat. 60 G. 3. & 1 G. 4. c. 14., after reciting that "whereas the trial of capital offences before justices of peace, within local and exclusive jurisdictions not being counties, may be attended with inconvenience, and it is desirable that some remedy should be provided for the same," enacts, "that the justices of the peace acting within and for any town, liberty, soke, or place, not being a county, but having an exclusive jurisdiction for the trial of felonies and misdemeanors committed within the same, shall, from and after the passing of this act (28. Feb. 1820), have full power within their respective limits, at their discretion, to commit any person duly charged before them, or any of them, with any capital offence committed within such limits, to the gaol of the county within which such town, liberty, soke or place shall be situated, then to be tried at the next session of oyer and terminer or general gaol delivery, to be held in and for such county, in the same manner as if such offence had been committed within any other part of the same county, and as if such person had been committed by any other justice of the same county, not being within such limits."

Justices au-
thorised to bind
over witnesses
by recognis-
ance, to give
evidence at the
sessions of oyer
and terminer;
and transmit
depositions
taken before
them to the
clerk of the
crown, &c.

§ 2. "In all cases where any justice or justices of the peace, under the authority of this act, shall commit any person to the county gaol, it shall be lawful for such justice or justices, and he and they is and are hereby authorised and required also to bind over all necessary parties and witnesses by recognisance, to prosecute and give evidence against such offenders at the next sessions of oyer and terminer and general gaol delivery, and to transmit such recognisance, and all depositions taken before him or them relating to the charge, to the clerk of the crown, clerk of assize and other proper officer, to be filed in the court of oyer and terminer and general gaol delivery for such county, to the intent that the same may be used or put in force by the judge or judges of the said court, as he or they shall deem proper, according to law."

Expenses of
the prosecution
to be paid by
the town or
place within
which the of-
fence shall be
committed.

§ 3. "In all cases of any commitments to the county gaol, under the authority of this act, all the expenses to which the county may be put by reason of such commitment, together with all such expenses of the prosecution and witnesses as the judge shall be pleased to allow by virtue of any law now in force, shall be borne and paid by the said town, liberty, soke, or place within which such offence shall have been committed, in like manner and to be raised by the same means whereby such expenses would have been raised and paid, if the offender had been prosecuted and tried within the limits of such exclusive jurisdiction; and the judge or court of oyer and terminer and general gaol delivery shall have full power and authority to make such order touching such costs and expenses as such judge or court shall deem proper; and also to direct by whom and in what manner such expenses shall in the first instance be paid and borne, and in what manner the same shall be repaid and raised within the limits of such exclusive jurisdiction, in case there be no treasurer or other

officer within the same, who, by the custom and usage of such place, ought to pay the same in the first instance." See the new stat. 4 & 5 W. 4. c. 26.

Justices may commit certain offenders to the stocks, or other custody, by particular statutes. Stocks.

Generally, if a man commit felony in one county, and be arrested for the same in another county, he shall be committed to gaol in that county where he is taken. *Dalt. c. 170. p. 409.* Different county.

Yet, if he escape, and be taken on fresh suit in another county, he may be carried back to the county where he was first taken. *Dalt. c. 170. p. 409.*

Also by stat. 24 G. 2. c. 55. § 1., if a person is apprehended upon a warrant indorsed in another county, for an offence not bailable, or if he shall not there find bail, he shall be carried back into the first county, and there be dealt with according to law. See this act at length, *post*, tit. Warrants. See also stat. 15 G. 2. c. 24. *ante*, § 1. p. 163. 24 G. 2. c. 55.

III. The Form of the Commitment.

It must be in writing, either in the name of the king, and only tested by the person who makes it, or it may be made by such person in his own name, expressing his office or authority, and must be directed to the gaoler or keeper of the prison, and must be under hand and seal. 2 *Haw. c. 16. § 13.* In whose name.

The commitments mentioned in 2 *Haw. c. 16. § 13.* mean commitments to the custody of sheriffs, gaolers, &c.; but a magistrate may by *parol* order an offender to be detained in custody until he can make out his warrant of commitment. *Still v. Walls, 7 East, 533. (a)*

So a magistrate, in the case of a breach of the peace within his view, may instantly order the offender to be taken into custody. *Per Cur. S. C.*

A commitment by a court of record need not be under seal, as the record itself, or a memorial of it, will be sufficient. 2 *Hale, 583, 584.*

Where 13 G. 3. c. 80. authorised the justice to issue a distress warrant, on nonpayment of a penalty on conviction, and to order the offender to be detained in custody, unless he give sufficient security for his appearance till the return of the distress warrant, it was held that the order to detain in custody might be by *parol*. *Still v. Walls and another, 7 E. R. 533.*

It is fit to mention the name of the justice, and his authority, in the beginning of the mittimus, though not always necessary; for the seal and subscription of the justice to the mittimus is sufficient warrant to the gaoler; for it may be supplied by averment, that it was done by the justice. 2 *Hale, 122.*

It ought also to mention the time and place at which it is made. 2 *Haw. c. 16. § 13.*

It should contain the name and surname of the party committed, if known; if not known, then it may be sufficient to describe the person by his age, stature, complexion, colour of his hair, and the like, and to add, that he refuseth to tell his name. 1 *Hale, 577.*

Commitment by court of record.

Order to detain till return of distress warrant, by *parol*, good.

The party's name, if known.

(a) Acc. *Hutchinson v. Lowndes, 4 B. & A. 118.*

Oath.

It is safe, but not absolutely necessary, to set forth that the party is charged upon oath. 2 *Haw. c. 17. § 17.*

Cause.

It ought to contain the cause, as for treason, or felony, or suspicion thereof: otherwise, if it contain no cause at all, if the prisoner escape it is no offence at all; whereas, if the mittimus contained the cause, the escape were treason or felony, though he were not guilty of the offence; and therefore for the king's benefit, and that the prisoner may be the more safely kept, the mittimus ought to contain the cause. 2 *Inst. 52.*

And hereupon it appeareth that a warrant or mittimus, "to answer to such things as shall be objected against him," is utterly against law. 2 *Inst. 591.*

The nature of the felony.

Also it ought to contain the certainty of the cause; and therefore, if it be for felony, it ought not to be generally for felony, but it must contain the special nature of the felony, briefly; as for felony *for the death of J. S.*, or for burglary *in breaking the house of J. S.*; and the reason is, because it may appear to the judges of the K. B., upon an *habeas corpus*, whether it be felony or not. 2 *Hale, 122.*

Treason, generally.

In Dr. *Groenveld's* case, it was resolved, "that the cause of commitment ought to be certain, to the end that the party may know for what he suffers, and how he may regain his liberty. 1 *Ld. Raym. 213.*

But a commitment for *treasonable practices* is legal. *R. v. Despard, 7 T. R. 736.*

And commitments for high treason in general are good. 2 *Haw. c. 16. § 16.*

Even in cases of felony, the want of the certainty of the cause seems not to make the commitment absolutely void, so as to subject the gaoler to a false imprisonment; but it lies in averment to excuse the gaoler or officer, that the matter was for felony. 1 *Hale, 584.*

Not the same strictness, as in an indictment.

A commitment need not be drawn with the same precision as an indictment; but if the facts stated therein do not amount to felony, the prisoner will be entitled to be bailed. *R. v. Remnant, 5 T. R. 169.*

Need not state the offence to have been done "feloniously."

And although it is not necessary to state, in a warrant of commitment on a charge of felony, that the act was done "feloniously," yet unless it sufficiently appears on the facts stated in the commitment to be in law a felony, the judges of the court of K. B. are bound to bail the defendant. *R. v. Judd, 2 T. R. 255.*

There may be a fresh valid detainer after a bad commitment. And see *R. v. Marks, post.*

Rex v. James Gordon, M. 1777, 1 B. & A. 572. (n.) *James Gordon* was committed to New Prison, *Clerkenwell*, till the next general sessions, for assaulting a custom-house officer's assistant in execution of his duty. Motion for a *habeas corpus*, because the stat. 13 & 14 *Car. 2. c. 11.* directs that such offender shall be committed, without bail, till the next quarter sessions. Writ granted. Afterwards, the defendant being brought up, the keeper of New Prison returned the warrant of commitment, which appeared to be to the general sessions: but he also returned a warrant of detainer for the same offence, issued the day before he was brought up, by the same justice, which was till the next quarter sessions. The defendant, therefore, was remanded without opposition, the warrant of detainer being strictly regular.

If a man be committed for nonpayment of two sums, one of which is not due, the warrant of commitment is bad for the whole. *Ex parte Addis*, M. 1822, 1 B. & C. 90.

For two sums, one not being due, bad.

Also a warrant of commitment in execution after a conviction must show before whom the conviction was, as likewise the authority of the person committing. *R. v. York*, 5 Burr. 2684.

On conviction, must show before whom.

Though the commitment need not state the conviction in a precise or technical form, yet it must show that the party has been convicted of some specific offence, and by a person having competent authority.

Thus, where there had been a previous regular conviction on 5 G. 4. c. 14. for fishing in a private fishery, but the commitment omitted to state that the offence was committed "in an inclosed ground:" held to be bad, and that the justice was liable in an action for false imprisonment. *Wickes v. Clutterbuck*, 2 B. 483.

Specific offence must be stated.

Rex v. Evered, Cald. 26. Two justices committed *Robert Collehole*, an apprentice, for running away from his master. An objection was taken to the form of the commitment, for the uncertainty thereof, which ran thus: "As an apprentice or servant, for disobeying his indentures or articles." *Ld. Mansfield* said, that the objection to the warrant of commitment, as running in the disjunctive, must undoubtedly prevail. The counsel for the prosecution consented to the prisoner's discharge.

Not to be in the disjunctive.

It must have an apt conclusion; as, if it be for felony, to detain him till he be thence delivered by law, or by order of law, or by due course of law. 2 Hale, 123. 2 Haw. c. 16. § 18.

Apt conclusion.

But when a man is committed for *contumacy* in refusing to do something which he ought to do, the conclusion ought to be "until he comply, and perform the thing required;" for he is entitled to be discharged immediately upon the performance of his duty. If, therefore, an overseer of the poor be committed for refusing to account, the warrant of commitment must conclude, "there to remain until he shall account." *Carth.* 152.

Where as a criminal, or for contumacy.

The true distinction is, that, where a man is committed for any crime, either at common law or created by act of parliament, for which he is punishable by indictment, there he is to be committed till discharged by due course of law: but, when it is in pursuance of a special authority, the terms of the commitment must be special, and exactly pursue that authority. *Nash's case*, H. 12 G. 3. 2 Black. Rep. 806.

Where for an offence, punishable by indictment, or under special authority only.

But in a recent case, where a parish collector of the rates was committed to the county gaol by warrant of two justices, upon complaint "for that he, having been duly appointed collector of the rates for the parish of *Richmond*, pursuant to stat. 25 G. 3. c. 41., refused to account and pay over the monies collected by him by virtue of the act to *W. S.*, the person duly authorised to receive them;" and the justices adjudged that he should be committed to the gaol, there to remain without bail or mainprize, until he should have made a true and fair account, and until such money, as upon the said account should appear to be remaining in his hands, should be paid by him or his sureties to *W. S.*, and they required the keeper of the gaol to receive and safely keep him "until he should be discharged by due course of law," it was contended that the warrant was void; a *habeas corpus* having been obtained, and the prisoner brought up under it (after argument), *Ld. Ellenborough*

Goff's case. Commitment of parish officer till he shall account, and to be detained till discharged by due course of law; good.

C. J. said, "If there was any uncertainty on the face of the commitment, I should have agreed with the argument. But coupling the premises with the conclusion, is it not in effect the same as if the warrant had directed the gaoler to detain the party until he had accounted? We must read the warrant as if the magistrates had in the conclusion recited over again the adjudication." *Le Blanc J.* said, "Some precise authority ought to be shown to justify the court in adopting the objection made to this warrant. When the party has accounted and paid over the money, he will be entitled to be discharged by due course of law." The prisoner remanded. *Goff's case*, *M. 55 G. 3. 3 M. & S. 203.*

Adjudication and commitment varying from conviction, bad

Where a conviction of an overseer, under stat. 17 G. 2. c. 38. was for not delivering over to the succeeding overseers "a certain book, belonging to the parish, called *The Bastardy Ledger*," and the adjudication and warrant of commitment thereon was, "*until he shall have yielded up all and every the books concerning, &c.*;" the court of K. B. held that both the adjudication in respect to the imprisonment, and the commitment made in pursuance thereof, were in that particular a clear excess of jurisdiction, and the imprisonment thereunder a trespass in the committing magistrates, for which the action was maintainable, the warrant being void *in toto*. *Groome v. Forrester*, 5 M. & S. 314. See the case more fully stated, tit. *Door (Overseers)*, § IV. (1.)

A commitment for a contempt, being a commitment for punishment, must be for a time certain, and consequently a commitment for a contempt till the defendant is discharged by due course of law, is bad.

Rex v. James, T. 3 G. 4. 5 B. & A. 894. *Campbell*, on a former day, moved for a writ of *habeas corpus* to the keeper of the gaol for the county of *Caermarthen*, to bring up the body of the defendant, on the ground that he had been illegally committed by two justices of the peace, for contempt, under the following warrant of two justices: "Receive into your custody the body of *Thomas James*, sent by us and charged by us, upon view, for insulting behaviour towards us, by telling us that we were biassed and prejudiced in our conduct towards him as magistrates, in the due execution of our office as magistrates of the county of *Caermarthen*, and keep him in custody until he shall be discharged by due course of law." He contended, first, that justices of the peace, not sitting in a court of sessions, had no power to commit for a contempt; and, secondly, upon the facts disclosed in his affidavit, that the defendant had not been guilty of any contempt for which he could lawfully be committed. In addition to these objections, there was a third, which appeared upon the face of the warrant. For, at all events, as this was a commitment for punishment, it ought to have been for a time certain; and as there was no course of law by which the defendant could be discharged, such a commitment, if valid, amounted to perpetual imprisonment. *Abbott C. J.* (without giving any opinion upon the power of a justice of peace to commit for a contempt). This warrant appears to us to be bad, for not committing for a time certain. Take the writ. The defendant being now brought up under the *habeas corpus*, *Campbell* moved that he might be discharged. *Taunton* appeared for the magistrates, and stated that he had affidavits of the facts of the case, to show the nature of the contempt, and that he meant to contend, that the magistrates were justified in committing for a contempt.—*Abbott C. J.* Supposing a contempt had been committed, and the magistrates to have had power to commit for the contempt, can you contend that

a commitment in this form is valid? *Taunton* admitted, that he could not support the validity of the warrant. Defendant discharged. (a) See tit. *Justices*.

It is to be observed that there is a distinction between commitments for safe custody, and commitments in execution for punishment, because, with respect to the former, although they are irregular, yet the prisoner will not be entitled to his discharge if sufficient appears to warrant his being detained or bailed.

Commitment for safe custody different from commitment in execution.

If the conclusion be irregular, it doth not seem to make the warrant void, but the law will reject that which is surplusage, and the rest shall stand; so that, if the matter appear to be such, for which he is to remain in custody, or be bailed, he shall be bailed or committed as the case requires, and not discharged, but the wrong conclusion shall be rejected. 1 *Hale*, 584.

If sufficient matter appear, an irregular conclusion may be rejected.

But though a warrant of commitment for felony be informal, yet, if the *corpus delicti* appear in the depositions returned to the court, they will not bail, but will remand the prisoner. The defective commitment was in this case altered, to prevent the prisoner thus remanded from renewing the same application to another court or judge. *R. v. Marks and others*, 3 *East*, 157.

Prisoner, on defective commitment, for safe custody may be remanded, if the depositions show a *corpus delicti*.

Where an insane person was committed under 39 & 40 G. 3. c. 94. § 3., as being a dangerous person likely to be guilty of an assault, the commitment was held sufficient, although it omitted to state the name of the individual likely to be assaulted, or that evidence was taken on oath, as it was not considered a commitment in execution, and therefore not to be construed with the same strictness. *R. v. Gourlay*, 7 B. & C. 669.

Commitment of a lunatic under 39 & 40 G. 3.; not in execution.

Where a statute appoints imprisonment, but limits no time how long, in such case the prisoner must remain at the discretion of the court. *Dalt. c.* 170. p. 410.

Where no time is limited.

It must be under seal; without this, the commitment is unlawful, the gaoler is liable to false imprisonment, and the wilful escape by the gaoler, or breach of prison by the felon, makes no felony. 1 *Hale*, 583.

Seal necessary.

By § 73. of 7 & 8 G. 4. c. 29. (the Larceny Act), it is enacted that no warrant of commitment on a conviction under that act, shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same.

As to commitments under 7 & 8 G. 4. c. 29.

A similar enactment is made by § 39. of 7 & 8 G. 4. c. 30. (the act against malicious injuries to property).

7 & 8 G. 4. c. 30.

And also by § 36. of 9 G. 4. c. 31. (the act relating to offences against the person).

9 G. 4. c. 31.

And also by 1 & 2 W. 4. c. 32. § 45. (the Game Act.)

[For the commitment of a rogue and vagabond, see tit. *Warrant*.]

1 & 2 W. 4. c. 32.

(a) See 2 *Hawk. c.* 1. § 16. *Rez v. Darby*, 3 *Mod.* 139. *Rez v. Wrightson*, 2 *Salk.* 698. *Rez v. Revel*, 1 *Str.* 420. *Petit v. Addington*, *Peake's N. P.* 62. *Mayhew v. Locke*, 7 *Taunt.* 63. *Bushel's case*, *Vaugh.* 138. *Rez v. Clement*, 4 B. & A. 218.

IV. Charges of the Commitment.

3 J. 1. c. 10.
Charges to be
paid by the of-
fender, if able.

By stat. 3 J. 1. c. 10. § 1. every person who shall be committed to the common or usual gaol, within any county or liberty, by any justice of the peace, for any offence or misdemeanor, the said person so to be committed, having means or ability thereunto, shall bear his own reasonable charges for so conveying or sending him to the said gaol, and the charges also of such as shall be appointed to guard him to such gaol, and shall so guard him thither : and if any such person so to be committed shall refuse at the time of his commitment and sending to the said gaol to defray the said charges, or shall not then pay or bear the same, then such justice shall and may, by writing under his hand and seal, give warrant (*post*, p. 176.) to the constable of the hundred, or constable of the township, where such person shall be dwelling and inhabit, or from whence he shall be committed, or where he shall have any goods within the county or liberty, to sell such and so much of the goods and chattels of the said person so to be committed, as by the discretion of the said justice shall satisfy and pay the charges of such his conveying and sending to the said gaol, the appraisement to be made by four of the honest inhabitants of the parish where such goods shall be ; the overplus to be delivered to the party to whom the said goods shall belong.

27 G. 2. c. 3.
If not able, to
be paid out of
the county rate.

And by stat. 27 G. 2. c. 3., after reciting stat. 3 J. 1. c. 10., and that whereas " the taxing the parish where such offender was taken to pay such charges is a great discouragement to parishes to take offenders ; and it is also found by experience to be very difficult to make a rate on the inhabitants to raise such tax, whereby constables and others are often kept out of their money by them advanced for the service of the public, and sometimes lose the same, to their very great injury and vexation ;" for remedy whereof, it is enacted, § 1., " that from and after the 24th day of June 1754, when any person not having goods or money within the county where he is taken sufficient to bear the charges of himself, and of those who convey him, is committed to gaol or the house of correction, by warrant from any justice or justices of the peace, then, on application by any constable or other officer who conveyed him, to any justice of the peace for the same county or place," [such justice] " shall upon oath examine into and ascertain the reasonable expenses to be allowed such constable or other officer, and shall forthwith, without fee or reward, by warrant under his hand and seal, order the treasurer of the county or place to pay the same, which the said treasurer is hereby required to do, as soon as he receives such warrant : and any sum so paid shall be allowed in his accounts."

Except in *Middlesex*.
Deserter.

§ 4. But in *Middlesex* the same shall be paid by the overseers of the poor of the parish where the person was apprehended.

A justice before whom a deserter is brought and committed to the county gaol, may, under the authority of these statutes, if the deserter be unable to bear the charges himself, direct the expenses of conveying him thither to be paid by the treasurer of the county, to the constable of the parish who found and apprehended him in the parish, and conveyed him to the gaol. *R. v. Pierce*, 3 M. & S. 62.

V. Gaoler shall receive the Prisoner.

But if a man be committed for felony, and the gaoler will not receive him, the constable must bring him back to the town where he was taken; and that town shall be charged with the keeping of him until the next gaol delivery; or the person that arrested him may in such case keep the prisoner in his own house, as it seemeth. *Dalt. c. 170. p. 410.*

Gaoler refusing to receive prisoner.

But in other cases it seems, that regularly no one can justify detaining a prisoner in custody out of the common gaol, unless there be some particular reason for so doing; as, if the party be so dangerously sick that it would apparently hazard his life to send him to the gaol, or there be evident danger of a *rescous* from rebels, or the like. 2 *Haw. c. 16. § 9.*

Prisoner cannot usually be detained, except in gaol.

VI. The Gaoler shall certify the Commitment.

By stat. 3 *H. 7. c. 3.* the sheriff or gaoler shall certify the commitment to the next gaol delivery. s *H. 7. c. 3.*

VII. Commitment discharged.

It seems that a person legally committed for a crime certainly appearing to have been done by some one or other cannot be lawfully discharged by any one but the king, till he be acquitted on his trial, or have an *ignoramus* found by the grand jury, or none to prosecute him on a proclamation for that purpose by the justices of gaol delivery. But if a person be committed on a bare suspicion, without an indictment, for a supposed crime, where afterwards it appears that there was none, as for the murder of a person thought to be dead, who afterwards is found to be alive, it hath been holden, that he may be safely dismissed without any further proceeding, so that he who suffers him to escape is properly punishable only as an accessory to his supposed offence; and it is impossible that there should be an accessory where there can be no principal, and it would be hard to punish one for a contempt in disregarding a commitment founded on a suspicion, appearing in so uncontested a manner to be groundless. 2 *Haw. c. 16. §§ 22, 23.*

Prisoner, in what case he may be discharged before indictment.

Mittimus for Felony.

County } J. P. esquire, &c. one of the justices of our lord the
 ———. } king assigned to keep the peace in the said county,
 and also to hear and determine divers felonies, trespasses, and other
 misdemeanors in the said county committed; To the keeper of the
 gaol of our said lord the king at ——— in the said county, or to his
 deputy there, and to each of them, greeting: Whereas A. O. late
 of ——— in the said county, labourer, hath been arrested by the
 constable of ———, in the said county, for suspicion of a felony by
 him, as it is said, committed, in stealing a black mare, of the value of
 40s. the property of A. P. of ——— in the said county, yeoman;
 Therefore on the behalf of our said lord the king, I command you
 and each of you, that you or one of you receive the said A. O. into

your custody in the said gaol, there to remain till he be delivered from your custody by the law and custom of England. Given under my hand and seal, at _____ in the said county, the _____ day of _____, in the _____ year of the reign of our said lord _____.

J. P. (L. S.)

Another.

County of } J. P. esquire, &c. *To the keeper of the common gaol _____ at _____ in the said county, or to his deputy there ; These are in his majesty's name to charge and command you that you receive into your said gaol the body of A. O. late of _____ in the said county, yeoman, taken by A. C. constable of _____ in the said county, and by him brought before me for suspicion of felony, that is to say, for stealing _____. And that you safely keep the said A. O. in your said gaol, until the next general gaol delivery for the said county [if he be not bailable, or, if bailable, then thus], until he shall thence be delivered by due course of law. And herein fail you not, &c. Given, &c.*

J. P. (L. S.)

Another.

County of } J. P. esquire, &c. *To the keeper of _____ I send on herewithal the body of A. O. late of _____ in the said county, labourer, brought before me this present day, and charged upon the oath of A. B. of _____ in the said county, _____, with the felonious taking and carrying away forty sheep, the property of _____, which also he hath confessed upon his examination before me [by which he is not bailable] : Therefore these are on the behalf of our said lord the king to command you that immediately you receive the said A. O., and him safely keep in your said gaol until he be thence delivered by the due order of law. Hereof fail you not, as you will answer for your contempt at your peril. Given under my hand and seal at _____, &c.*

J. P. (L. S.)

Or thus, in the King's Name.

County of } WILLIAM the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland king, defender of the faith. *To the keeper of our gaol at _____ in our said county of _____ or to his deputy, greeting : Whereas A. O. late of _____ in our said county, yeoman, is arrested for suspicion of felony, by him, as it is said, committed, in feloniously taking and carrying away _____ of the value of _____, the property of _____. We therefore command you and each of you, that you receive him the said A. O. into your custody in our said gaol, or that one of you do receive him, there to remain till he be delivered from your custody, according to the law of our kingdom of England. Witness J. P. esquire, one of the justices assigned to keep the peace in our said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in our said county committed, at _____ in the said county, the _____ day of _____ in the _____, year of our reign.*

J. P. (L. S.)

Form of a Warrant of Commitment in general.

County of } J. P. esquire, one of the justices of our lord the
king, assigned to keep the peace within the said
county. To the constable of _____ in the said county, and to
the keeper of _____ at _____ in the said county.

These are to command you the said constable, in his majesty's
name, forthwith to convey and deliver into the custody of the said
keeper of the said _____ the body of A. O. charged upon the
oath of A. P. of _____ in the said county, _____, before me,
with [here specify the offence]. And you the said keeper are
hereby required to receive the said A. O. into your custody in the
said _____, and him there safely to keep [here set forth the time],
or until he shall be thence delivered by due course of law. Herein
fail you not. Given under my hand and seal the _____ day
of _____, in the _____ year of the reign of his said majesty
king William the Fourth.

J. P. (L.S.)

Form of Commitment of a Person for further Examination.

County of } J. P. esquire, one of the justices of our lord the king,
assigned to keep the peace within the said county,
To the constable of _____ in the said county, and to the keeper of
the common gaol at _____ in the said county.

These are to command you the said constable, in his said majesty's
name, forthwith to convey and deliver into the custody of the said
keeper of the said common gaol, the body of A. O., charged this day
before me, the said justice, on the oath of A. I., on suspicion of having
in the night of the _____ day of _____ instant, at the parish of
_____ in the said county, burglariously broken and entered the
dwelling-house of the said A. I. [or, as the case may be], but in-
asmuch as A. W., a material and necessary witness against the said
A. O. for the burglary and felony aforesaid, resides at Chester [or,
as the case may be], a distance of _____ miles from the said
dwelling-house of the said A. I. [or, as the case may be], and he
the said A. I. hath not been able to procure the attendance of the
said A. W., but will use his best endeavour so to do on the _____
day of _____ instant.

You the said keeper are hereby required to receive the said A. O.
into your custody in the said common gaol until _____ next, the
_____ day of _____ instant, when you are hereby required to
bring the said A. O. at _____ in the said county, before me or
before such others of his majesty's justices of the peace for the said
county as shall be then and there present, to be re-examined and
further dealt with according to law. Hereof fail you not. Given
under my hand and seal the _____ day of _____ in the year of
our Lord one thousand eight hundred and _____.

J. P. (L. S.)

The following important case shows, that if a magistrate, in
sending back a prisoner for re-examination, commit him for longer
than a reasonable time, he will be doing an illegal act, and be
subject to an action for false imprisonment.

Magistrate committing for re-examination for an unreasonable time, though *bond fide*, held liable to trespass for false imprisonment.

In a case of trespass brought against a magistrate for false imprisonment, it appeared that the plaintiff (a woman) had been brought before him on a charge of felony, and that the magistrate had committed her for re-examination for a period of fourteen days. Verdict for plaintiff, the jury finding that the commitment was *bond fide*, and not from any improper motive, but that it was for an unreasonable time. The court refused to enter a nonsuit, holding that it was the duty of the magistrate to commit for a reasonable time only, and that in going beyond it he was doing an illegal act, and the commitment was therefore void. *Davis v. Capper*, 10 B. & Ad. 28.

The usual practice is stated to be to commit from three days to three days. 1 *Chit. Crim. L.* 7. See tit. Examination.

Order on Overseers (if in Middlesex), or *Treasurer of the County* (if in any other county), to reimburse Expenses of conveying a Prisoner to Gaol by Stat. 27 G. 2. c. 3. § 1. p. 172.

To the treasurer of the county of — (or to the overseers of the poor of the parish or place of —, in the county of *Middlesex*).

County of } *WHEREAS* application hath been this day made to me, one of his majesty's justices of the peace to wit. } in and for the said county, by A. B. one of the constables of the parish of — in the said county, to allow the reasonable expenses of his conveying C. D. to the common gaol at — in the county aforesaid, who was by me committed to the said gaol, for [state the offence].

It having been duly made appear to me, the said justice, that the said C. D. hath not money nor goods within the said county, sufficient to bear the charges of himself and those who conveyed him to the said gaol; and I having, upon oath, examined into the expenses thereof, and made due inquiry into the premises, do hereby ascertain and allow the reasonable expenses thereof, at the sum of —, which I hereby order and require you the treasurer of the said county [or, overseers] forthwith to pay the said A. B. Given under my hand and seal this — day of —, in the year of our Lord one thousand eight hundred and —.

J. P. (L. S.)

Warrant of Distress for Expenses when a Person is committed to Gaol. See stat. 3 J. 1. c. 10. § 1. p. 170.

County of } To the constable of — in the said county.

WHEREAS by warrant under the hand and seal of me, J. P. esquire, one of his majesty's justices of the peace in and for the said county of —, bearing date the — day of —, in the year of our Lord one thousand eight hundred and —, A. O., late of — in the said county, labourer, was committed to the common gaol [or, as the case may be (a)], of the said county of —, for [here state the offence or misdemeanor], he the said

(a) See *Ex parte Evans*, 6 T. R. 172.

A. O. having means or ability to bear his own reasonable charges for so conveying or sending him to the said gaol [or, as the case may be], and the charges of those appointed to guard him thither; and whereas A. C., constable of the parish of — in the said county, who in obedience to such warrant conveyed the said A. O. to the said common gaol [or, as the case may be] of the said county of —, hath made oath before me the said justice, that the said A. O. refused at the time of his commitment and sending to the said common gaol [or, as the case may be], to defray the said charges of conveying him as aforesaid, and did not then pay nor hath since paid the same, which said charges amount to the sum of —. These are, therefore, to command you to sell such and so much of the goods and chattels of the said A. O. as shall satisfy and pay the said sum of —, being the charges of such his conveying to the said gaol [or, as the case may be], the appraisement to be made by four of the honest inhabitants of the parish where such goods and chattels shall be; and I do hereby order and direct the goods and chattels so to be distrained to be sold and disposed of at the expiration of four days from the time of taking such distress, unless the said sum of —, for which such distress shall be made, together with the reasonable charges of taking and keeping such distress, shall be sooner paid, returning the overplus upon demand to him the said A. O., the reasonable charges of taking, keeping, and selling the said distress being first deducted. And if sufficient distress cannot be found of the goods and chattels of the said A. O., whereon to levy the said sum of —, that then you certify the same to me, together with this warrant. Given under my hand and seal at — in the said county of —, the — day of — in the year of our Lord one thousand eight hundred and —.

J. P. (L. S.)

See the form of commitment for non-payment of costs on complaints before magistrates, as given by 18 G. 3. c. 19. See tit. *Costs*.

For commitments upon particular cases, see the several titles in this book: and particularly title *Warrants*.

Conspiracy.

- I. *What it is.*
[6 G. 4. c. 129.]
- II. *How punishable.*

I. *What it is.*

THE conspiring by two or more to obstruct, pervert, or defeat the course of public justice, to injure the public health, or

General principle.

generally to effect any public mischief, are offences punishable by indictment. 2 *Russ.* 553. and the authorities there cited.

So, when two or more combine together to execute some act for the purpose of injuring a third person.

By the common law.

By the common law there can be no doubt, but that all confederates whatsoever, wrongfully to prejudice a third person, are highly criminal; as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in a matter, whether it be true or false. 1 *Haw. c.* 72. § 2.

The conspiring is the gist of the offence, though no act be done.

Not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but those also are guilty of this offence who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not. 1 *Haw. c.* 71. § 2. 2 *Ld. Raym.* 1169.

Illegal means.

So, it is indictable where the conspiracy is to effect a legal purpose by the use of unlawful means. 2 *Russ.* 553.

Action for conspiracy.

But an *action* will not lie for the conspiracy unless it be put in execution; for in such case, the *damage* is the ground of the action. 1 *Ld. Raym.* 378.

A conspiracy to prevent a prosecution for a felony, is an offence. 14 *Ves.* 65.

Combining to injure individuals, or to prejudice the community.

Every confederacy to injure individuals, or to do acts which are unlawful or prejudicial to the community, is a conspiracy. 4 *Blac. Com.* 137. (n.) Thus, journeymen confederating and refusing to work unless for certain wages, may be indicted for a conspiracy, notwithstanding the statutes which regulate their work and wages do not direct this mode of prosecution; for the offence consists in the *conspiring*, and not in the refusal, and all conspiracies are illegal, although the subject-matter of them may be lawful. *R. v. Journeymen Tailors of Cambridge*, 8 *Mod.* 11. 320.

Journeymen meeting to agree about wages, &c.

By 6 *G. 4. c.* 129. (relating to combinations among journeymen, &c.) § 4., the act is not to extend to subject to punishment persons who shall meet together for the sole purpose of consulting upon and determining the rate of wages which they shall require for their work, or the hours for which they shall work, &c., or who shall enter into any agreement, written or verbal, for such purposes, and that they shall not be liable to any prosecution or penalty for so doing.

Masters meeting about journeymen's wages, &c.

And by § 5. the act is not to extend to persons meeting for the purpose of consulting about the rate of wages which they shall pay to their journeymen, &c., or the hours, &c., or who shall enter into any agreement, verbal or written, for such purposes, and that such persons shall not be liable to any prosecution or penalty for so doing.

Doing a lawful act to an unlawful end.

A bare conspiracy to do a lawful act to an unlawful end is a crime, though no act be done in consequence thereof. Suppose there is a conspiracy to let lands of 10*l.* a-year value to a poor man, in order to get him a settlement, or to make a certificate man a parish officer, or a conspiracy to send a woman big of a bastard child into another parish, to be delivered there, and so to charge that parish with the child; certainly these are

crimes indictable. *Per Cur. R. v. Edwards and others*, 8 Mod. 321.

If a man and woman marry in the name of *another*, for the purpose of raising a specious title to the estate of the person whose name is assumed, it is a conspiracy. *R. v. Robinson and Taylor*, O. B. Oct. 1746, 1 *Leach*, 37.

Marrying in another's name.

It is an indictable offence to conspire on a particular day by false rumours to raise the price of the government funds, with intent to injure the subjects who should purchase on that day; for the purpose itself is mischievous; it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price, by means of false rumours, it is a fraud levelled against all the public, for it is against all such as may possibly have any thing to do with the funds on that day. The offence is not raising the funds simply, but in conspiring by false rumours to raise them on that particular day; for to raise the funds may be an innocent act, but to conspire to raise them by illegal means, and with a criminal view, is an offence. To raise them by false rumours is by illegal means. An indictment for such an offence need not specify the particular persons who purchased as the persons intended to be injured, for the conspiracy is the thing which constitutes the crime; and it is sufficient if the indictment state the conspiracy as it existed at the time when the crime was complete. It might have been detected before any purchases were made, or the mischief was effected, yet that would not have altered the offence; because the parties had done every thing in their power, and all that was essential to complete the crime when they had formed the conspiracy, and used illegal means for effecting it. Their criminality must depend on their own act, and not on the consequences that ensue from it. *R. v. De Berenger and others*, 3 M. & S. 67.

By false rumours to raise the price of the funds.

Per Bayley J. S. C.

Where a highway was indicted for being out of repair, and on "not guilty" pleaded, it appeared that two justices conspired to produce before the court a false certificate of the road being in repair, in order to influence the judgment of the court on withdrawing such plea and pleading guilty: this was held to be an indictable offence, as a conspiracy for the perversion of the course of justice, and that it was immaterial whether they knew or not of the road being out of repair at the time. *R. v. Mawbey*, 6 T. R. 619.

For producing a false certificate on a road indictment.

One person alone cannot be guilty of a conspiracy, 1 *Haw. c. 72. § 8.*: but one person may be prosecuted for having conspired with others, and may be tried and convicted alone, if the others escape or die before the time of trial, or the finding of the bill. 1 *Stra.* 198. 2 *Stra.* 1227. And if all but one be acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can be passed on him, *Poph.* 202. 3 *Burr.* 1262. 12 *Mod.* 262. 1 *Haw. c. 72. § 8.*; but if an action on the case in the nature of a conspiracy be brought against several persons, and all but one be acquitted, yet judgment may be given against that one only. 1 *Haw. c. 72. § 8.*

One person alone cannot be guilty of a conspiracy.

And where two conspire and one dies, the survivor may still be indicted for the conspiracy. 2 *Stra.* 1227. *R. v. E. Nicholls*, 13 *East*, 412. (n.)

Nor man and wife.

No such prosecution is maintainable against a husband and wife alone, because they are esteemed but as one person in law. 1 *Haw. c. 72. § 8.*

Persons acting separately may be guilty of a conspiracy.

In the case of *R. v. Cope and others*, 1 *Str.* 144., the husband and wife and servants were indicted for a conspiracy to ruin the trade of the prosecutor, who was the king's cardmaker. The evidence against them was, that they had at several times given money to the prosecutor's apprentices, to put grease into the paste, which had spoiled the cards. But there was no account given that ever more than one at a time was present, though it was proved they had all given money in their turns. It was objected that this could not be a conspiracy; for several persons might do the same thing, without having any previous communication with each other. But it was ruled, that the defendants being all of a family, and concerned in making of cards, it would amount to evidence of a conspiracy.

Act of conspiring need not be proved.

In a prosecution for a conspiracy, the actual fact of conspiring need not be proved; but it may be inferred from circumstances, and the concurring conduct of the defendants. *R. v. Parsons*, 1 *Black. Rep.* 392.

To injure a person in his reputation.

If the indictment lay the offence to be an unlawful conspiracy, this, whether it be to charge a man with *criminal* acts, or such only as may affect his *reputation*, is fully sufficient. The several charges in the indictment are not to be considered as distinct and separate counts, but as one and the same united and continued offence, pursued through its different stages. *R. v. Rispal*, 1 *Black. Rep.* 368.

To prevent a person exercising a particular trade.

An indictment against several persons for conspiring together, "*by indirect means*," to prevent one *H. B.* from exercising the trade of a tailor, was held good, without stating the mode. The illegal combination is the *gist* of the offence, and it is enough to state the conspiracy and the object. *R. v. Eccles and others*, 1 *Leach*, 274. 13 *East*, 230. (n.)

To cheat a person of money.

So also in a recent case, an indictment charging that the defendants conspired, by divers false pretences, and subtle means and devices, to obtain from *P. D.* and *G. D.* divers large sums of money, and to cheat and defraud them thereof, was held sufficient; for the gist of the offence being the conspiracy, if that fact and its object be stated, the particular means and devices need not be set out. *R. v. Gill and Henry*, 2 *B. & A.* 204.

Aliter, if it be to commit a civil trespass only.

But an indictment will not lie for conspiring to commit a *civil trespass*: as, to go by night into a person's grounds to take game. *R. v. Turner and others*, 13 *East*, 228. In which case, Lord *Ellenborough* C. J. said, that the case of *R. v. Eccles* was considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act *affecting the public*. See *Russ.* 564.

Where the fraud is the subject of civil proceeding.

Where two were indicted for conspiring to cheat prosecutor by selling him an unsound horse, and it appeared that one had advertised the horse for sale as sound, and when prosecutor inquired at the stables another of the defendants was there and stated particulars to confirm the fact of soundness, Lord *Ellenborough* held, that the case did not assume the shape of a conspiracy, but that the proceeding ought to have been an action on the warranty. *R. v. Pywell and others*, 1 *Stark.* 402. *Russ.* 464.

So, a conspiracy to deprive a man of the office of secretary to an illegal unincorporated trading company is not indictable, for, per Lord *Ellenborough*, instead of having an interest which the law would protect, he was guilty of a crime. *R. v. Stratton and others*, 1 *Campb.* 549. (n.) *Russ.* 565.

Where the conspiracy is to deprive a person of an illegal situation.

In an indictment against the defendants for a conspiracy to cause themselves to be reputed persons of considerable property and in opulent circumstances, for the purpose of defrauding tradesmen, the prosecutor may prove various instances of their giving a false representation of their circumstances, as overt acts of the conspiracy. *R. v. Roberts and others*, 1 *Campb.* 399.

To defraud tradesmen.

And wherever a sufficient foundation is laid by evidence to go to a jury, of several persons having met for the purpose of a conspiracy, the declarations of any of the parties made at any time or place, relating to the object of the conspiracy, is evidence as against all. *R. v. Saller and others*, *Kingston Lent Ass.* 1804, *cor. Hatham B.* 5 *Esp.* 125. But see 1 *Phill. Ev.* 89.

Declaration or act of each conspirator is evidence against all.

An indictment against workmen for conspiracy against their employers, to prevent them from taking any apprentice, was held to be sufficiently proved, by evidence of their having turned out from their employment with intent to compel their masters to dismiss any one apprentice. *R. v. Ferguson and Edge*, *Lancaster Spring Ass.* 1819, *cor. Wood B.* 2 *Stark. N. P.* 489. — N. B. In Easter term following, the defendants received sentence of fine and imprisonment.

Conspiracy by journeymen against their employers.

II. Trial and Punishment.

A conspiracy being a trespass, and tending to a breach of the peace, is cognisable by the general quarter sessions. *R. v. Rispal*, 3 *Burr.* 1321. 1 *Blac. Rep.* 368.

Trial.

Where the object of conspiracy is illegal, it is not necessary to state the nature of the means by which it is to be effected. *Eccles's case*, 13 *E. R.* 230. (n.) *Russ.* 568.

Not necessary to state the means by which the conspiracy is to be effected
Nor the false pretences.

So, where the indictment charged defendants with conspiring by divers false pretences to cheat A. of divers sums of money, it was held not necessary to set out the specific pretences. *R. v. Gill*, 2 *B. & A.* 204.

But where the act only becomes illegal in consequence of the means used or the object to be attained, as in the case of conspiracies to marry paupers, the illegality ought to be explained by proper statements. See 2 *Russ.* 569. 1 *East*, P. C. 461.

But *aliter* where the illegality results from particular circumstances.

Sembl., that there are no technical terms for charging the conspiracy in an indictment. 2 *Russ.* 569, and see *R. v. Macarty*, 2 *Lord R.* 1179. 2 *East*, P. C. 824.

No technical words of conspiracy.

It was formerly holden that an indictment for conspiracy must be tried where the conspiracy was, and not where the result of it was put in execution. *Reg. v. Best*, 1 *Salk.* 174.

Venue.

But it has since been determined that the crime may be tried wherever a distinct overt act of conspiracy was in fact committed. *R. v. Brisac and Scott*, 4 *E. R.* 171. *R. v. Bowes*, *cit. ib.* 2 *Russ.* 569.

Where any overt act took place.

See 7 *G. 4. c.* 64. § 12, whereby any felony or misdemeanor began in one county and completed in another may be tried in either county.

7 *G. 4.*, offence taking place in two counties.

How far the acts or words of one conspirator are evidence against the others.

Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in the contemplation of law the act of the whole party; and, therefore, the proof of such act would be evidence against any of the others who were engaged in the same conspiracy; and further, any declarations, made by one of the party at the time of doing such illegal act, seem not only to be evidence against himself, as tending to determine the quality of the act, but to be evidence also against the rest of the party, who are as much responsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, cannot, it is conceived, be admitted as evidence to affect them on their trial for the same offence. 1 *Phill. Ev.* 88. 2 *Russ.* 570.

Proof of the conspiracy generally.

On a prosecution for a crime to be proved by conspiracy, general evidence of an existing conspiracy may in the first instance be received, as a preliminary step to the more particular evidence, by which it is to be shown that the individual defendants were guilty participators in such conspiracy. In such cases, the general nature of the whole evidence should be opened to the court, and if upon such opening, it should appear that there was no particular proof sufficient to affect the individual defendants, it would be the duty of the judge to stop the case *in limine*, and not to allow the general evidence to be received. *The Queen's case*, 2 *Brod. & Bing.* 310.

So, assuming that an alleged conspiracy to suborn witnesses against the accused party is a legitimate ground of defence, general evidence of an existing conspiracy is admissible, with this qualification, viz. that the proposed evidence should be previously opened to the court, as in the former case, in order to enable the judge to form an opinion of the probability of bringing the evidence home, so as to affect some person whose acts are material, and relevant to the issue of the indictment then under trial. *The Queen's case*, 2 *Brod. & Bing.* 311.

Wife of one of several defendants not a witness for any of defendants.

On the trial of several persons for a conspiracy, the wife of one of the defendants is not a competent witness for the rest, for their acquittal would be a ground of discharge for the husband. *R. v. Lockyer*, 5 *Esp.* 107. *R. v. Frederick*, 2 *Str.* 1094. 2 *Russ.* 570.

Conspiracy of fraud; similar instances are evidence.

Where defendants were indicted for conspiring to hold themselves out as persons of fortune, for the purpose of defrauding tradesmen, it is competent to give evidence of their making similar representations to other different tradesmen besides the prosecutor, on the ground that in prosecutions of this nature it is necessary to produce cumulative instances to prove the offence. *Per Ld. Ellenborough*, *R. v. Roberts*, 1 *Campb.* 399. 2 *Russ.* 572.

Cross-examination of witness for defence.

On an indictment against *A.*, *B.*, and *C.* only called a witness to prove a conversation between himself and *A.* Held, that the witness might be cross-examined as to other conversations between *C.* and *A.*, though tending chiefly to criminate *A.* *R. v. Krochl*, 2 *Stark.* 343. 2 *Russ.* 573.

Allegation, for whose use the

Where *A.*, *B.*, *C.*, and *D.* were charged with conspiring to obtain money illegally for the use of *A.*, *B.*, and *C.*; and it appeared that

D., in whose hands the money was lodged for the use of *A.* and *B.*, did not know that *C.* was to have any part of it: held, that the averment as to the application of the money, though laid under a "*viz.*" was material, and that as to *D.* the conspiracy was not proved as laid. *R. v. Pollman*, 2 *Campb.* 231. 2 *Russ.* 573.

Indictment for conspiring *falsely* to indict *A.* with intent to extort money, and the jury found them guilty of conspiring to indict with that intent, but not *falsely*: held to be sufficient to enable the court to give judgment, for that such a conspiracy was a misdemeanor, whether the charge was true or false. *R. v. Hollingberry*, 4 *B. & C.* 329.

All the defendants convicted upon an indictment for a conspiracy must be present in court when a motion for a new trial is made on behalf of any of them. *R. v. Teal and others*, 11 *East*, 307. *R. v. Askew*, 3 *M. & S.* 9. *R. v. Lord Cochrane*, 3 *M. & S.* 10. (π).

So also on a motion in arrest of judgment, the defendants must be personally present in court. *R. v. Spragg et al.*, 2 *Burr.* 936.

It is clear that those who are convicted of conspiracy at the suit of the party shall have judgment of fine and imprisonment, and to render the plaintiff his damages. 1 *Haw. c.* 72. § 9.

Also it is certain that he who is convicted at the suit of the king of a conspiracy to accuse another of a matter which may touch his life, shall have judgment that he shall lose the freedom and franchise of the law (whereby he is disabled as a juror and discredited as a witness). 1 *Haw. c.* 72. § 9.

And this is commonly called *villanous* judgment, which is given by the common law, and not by any statute. But it now is the better opinion, that the *villanous* judgment is by long disuse become obsolete, there being no instance of its having been pronounced since the reign of *Edward* the Third; but instead thereof, the delinquents are usually sentenced to fine, imprisonment, and surety for good behaviour. 4 *Blac. Com.* 136, 137. 2 *Burr.* 996. 1027. 1 *Haw. c.* 72. § 9. 7th *edit.*

Previously to the stat. 56 *G. 3. c.* 138., in very aggravated cases, the offenders were generally also sentenced to stand in the pillory. — See the trial of *Lord Cochrane* and others, by *Gurney*, 1814.

See also stat. 3 *G. 4. c.* 114. tit. Judgment.

money to be got by the conspiring was to be applied, is material.

Indictment for conspiring to indict falsely, to extort money; defendant may be convicted, though the indictment was not false.

On motion for new trial, or in arrest of judgment, all the defendants must be present.

Punishment. On actions.

On indictment or information.

Dogs.

[7 & 8 *G. 4. c.* 29. § 31.]

IN this part of the work dogs will be considered only so far as the Criminal Law applies to them.

It is said that if a fierce mastiff is allowed to go in the street unmuzzled, it is considered a common nuisance, as being dangerous and the cause of terror, and that the owner is indictable on that account. 1 *Russ.* 903.

By 7 & 8 *G. 4. c.* 29. § 31., if any person shall steal any dog or any beast or bird ordinarily kept in a state of confinement, not

Fierce mastiff.

7 & 8 *G. 4. c.* 29. Stealing dog, &c.

being the subject of larceny at common law, on conviction before a magistrate, shall forfeit, for the first offence, over and above the value of the dog, &c., such sum not exceeding 20*l.*, as the magistrate shall think fit; and for a second offence may be imprisoned and kept to hard labour for any time not exceeding twelve calendar months; and if the conviction be before two magistrates, they may order the offender, if a male, to be once or twice whipped after the expiration of four days from the conviction.

Having dog, &c., or skin, &c. in possession, &c., knowing it to have been stolen.

By § 32., if any dog, &c. or its skin, &c. be found in possession or on premises of any person by virtue of a search warrant, the justice granting the warrant may restore the same to the owner, and the person in whose possession, &c. it shall have been found (such person knowing the dog, &c. to have been stolen) shall, on conviction before a magistrate, be liable for the first offence to such forfeiture, and, for subsequent offences, to such punishments as persons convicted of stealing any dog, &c.

For *Form of Conviction*, ib. § 71. See tit. *Larceny*.

For Application of Forfeitures and Penalties, and Power of Appeal, ib. §§ 66. 72. See tit. *Larceny*.

The following decision on 10 G. 3. c. 18. (now repealed), being an act for preventing the stealing of dogs, may be useful with reference to the provisions of the above act.

R. v. Helps.
Question on
sufficiency of
commitment
under 10 G. 3.
c. 18. after
appeal.

Parish.

(a) 10 G. 3.
c. 18.

Application of
forfeiture.

Appeal.

Conviction
affirmed.

R. v. Helps, 3 M. & S. 331. A commitment for dog-stealing directed to the constable and the governor of the house of correction, *Coldbath-fields*, was returned upon a *habeas corpus*, to the effect following: — “*Middlesex* (ss). Whereas *Bryan Helps*, late of the parish of *Paddington*, in the county of *Middlesex*, came before us, *P. N.* and *G. F.*, two of H. M.’s justices of the peace in and for the said county, and was charged, and convicted before us the said justices, at *Marlborough-street*, in the said county, on the 1st of *June*, 1814, upon the oaths of *J. Wilson* and others, of having on the 16th of *May* 1814, at the parish of *Paddington*, in the said county, unlawfully stolen a certain dog of the spaniel kind, the property of the said *I. W.*, from one *J. T. G.*, being a person entrusted by the said *I. W.*, the owner thereof, with the said dog, contrary to a certain act of parliament, &c. (a), for which offence we the said two justices did order and adjudge the said *B. Helps* to forfeit and pay the sum of 30*l.* of lawful money, &c., to be applied in such manner as the law directs, and which the said *B. Helps* did neglect and refuse to pay, and did enter into a recognisance before us the said justices, with two sufficient sureties, for his personal appearance at the then next general quarter sessions of the peace to be holden for the said county of *Middlesex*, then and there to prosecute his appeal with effect to the said conviction, and to abide the order of, and pay such costs as should be awarded by the justices at such quarter sessions, and at which said quarter sessions the appeal of the said *B. Helps* was heard, and what was alleged by the respective parties, their counsel, and witnesses, in and concerning the premises, and it was ordered by the court that the said conviction be, and the same was then and there affirmed; and it was further ordered, that the said *B. Helps* should forthwith

pay or cause to be paid unto *John Tapper*, the informer in that behalf, 6*l.* 6*s.*, for the costs and charges by him incurred in defending the said appeal, which said penalty of 30*l.* the said *B. Helps* doth neglect and refuse to pay, or cause to be paid, and also doth neglect and refuse to pay the said sum of 6*l.* 6*s.*, thereby disobeying the order of the said court: These are, therefore, in H. M.'s name, to command you, the said constable, to take, &c. and you the said governor to receive the body of the said *B. Helps* into your custody, and him safely keep without bail or mainprize for six calendar months, or until the said penalty of 30*l.* shall be paid, &c. Dated the 4th of Nov. 1814, under the hands and seals of the said justices." — Exception was taken to this commitment, that as the statute directs the penalty to be paid, one moiety to the informer, and the other moiety to the poor of the parish where the offence shall be committed, it should have been shown by the conviction who is the informer; and then the adjudication that the penalty should be applied as the law directs would, according to *Regina v. Barlett, Salk.* 383., have been well enough. But *R. v. Seale*, 8 *East*, 568., has decided, that if the person to whom any proportion of the penalty is given be not ascertained in the conviction, it is ill. Also the justices should have adjudged in the conviction, that if the penalty were not forthwith paid, the offender should be committed, &c., for so the statute directs: and it was said by the Court in *R. v. Dimpsey*, 2 *T. R.* 96., that a judgment is an entire thing, and one part of it cannot be given at one time, and another at a subsequent time; but here the justices have waited to make one part of their adjudication until after the appeal. — In support of the commitment it was contended, that the defect, if it were one of not naming the informer in the conviction, was cured by a subsequent part of this commitment, which points out who the informer is; for it directs the defendant to pay six guineas to the informer. Therefore, taking the whole commitment together, both the informer and the parish to whom the penalty is given are ascertained, and if so, the justices adjudging the penalty to be applied as the law directs is *ex concessis* sufficient. And the answer to the other objection is, that the defendant is not committed upon the original conviction until after the appeal, and must have been summoned again. — It was urged in reply, that to warrant a commitment there must be a lawful conviction, for though the statute as to the conviction takes away a *certiorari*, yet the commitment must contain lawful cause. And in *Dr. Groenvelt's* case, 1 *Ld. Raym.* 213., it was resolved, "that the cause of commitment ought to be certain, to the end that the party may know for what he suffers, and how he may regain his liberty." But, if the conviction do not point out the informer, how can the party know to whom he is to pay the penalty and regain his liberty? And the conviction cannot be helped by matter *dehors*; so that the informer being named in a subsequent part of this commitment will not remedy it. — *Ld. Ellenborough C. J.* said, If the conviction formed a stage of this proceeding at which we were to stop, in order to look into its sufficiency or insufficiency, I should probably be of opinion that it ought to point out the informer. But we cannot consider the case upon the conviction; the statute has taken away the *certiorari*; we cannot intend that the original did not contain something more; we can only look to this ultimate proceeding. Looking, then, at

R. v. Helps.

Costs to be paid to informer.

that alone which is before us, we find, when we come to the affirmation of the conviction upon appeal, that it does appear with sufficient certainty who the informer is. By the ultimate adjudication both the parish and the name of the informer are supplied. *Le Blanc J.* said, I think the offender has notice, upon the whole commitment, who is the informer and which is the parish to whom the penalty is to be paid. *Bayley J.* said, This is not a commitment which in itself comprises the conviction of the offender, but the commitment recites some other conviction. And in that recital it is not necessary that every thing should be stated which is requisite in the conviction itself; therefore, when the recital states that he was convicted in a penalty, to be applied in such manner as the law directs, that is perfectly consistent with its being more particularly specified in the conviction itself to whom the penalty is to be distributed. Prisoner remanded.

A. A. Indictment for keeping a Mastiff unmuzzled.

County of } *THE jurors for our lord the king upon their oath*
 to wit. } *present, that A. O., late of the parish of _____, in*
 } *the said county, _____, on the _____ day of _____,*
in the _____ year of the reign of our sovereign lord William the
fourth, of the united kingdom of Great Britain and Ireland king,
defender of the faith, and on divers other days and times between
that day and the day of the taking of this inquisition, at the parish
aforesaid, in the county aforesaid, near unto the king's common high-
way, there unlawfully did keep and still doth keep, a certain large
dog of a fierce and furious nature; and the said dog, on the said
_____ day of _____, in the year aforesaid, and on the said
other days and times, at the parish aforesaid, in the county aforesaid,
near unto the said highway there unlawfully did permit and suffer and
still doth permit and suffer to go unmuzzled and at large, by reason
whereof the liege subjects of our said lord the king, on the said _____
day of _____, in the year aforesaid, and on the said other days
and times, at the parish aforesaid, in the county aforesaid, could not
nor can they now go, return, pass, and labour in and through the
said highway there, without great danger and hazard of being bit,
maimed, and torn by the said dog, and losing their lives, to the great
damage, terror, and common nuisance of all the liege subjects of our
said lord the king, in, by, and through the said highway there going,
returning, passing, repassing, and labouring, to the evil example of
all others in the like case offending, and against the peace of the said
lord the king, his crown and dignity.

Sir John Fielding, in his *Observations on the Penal Laws*, p. 291. "recommends it to all persons to put brass or steel collars on their dogs' necks, with the name and place of abode of their owners, and to fasten them with a padlock; for the stealing such collars being felony, it will facilitate the punishing of the offender; and the dog when found is recoverable by action."

Door, breaking open. See *Arrest, ante*.

Dower. See *Forfeiture*.

Duelling. See *Homicide*.

Egyptians.

[22 H. 8. c. 10.—1 G. 4. c. 116.—5 G. 4. c. 83.]

THESE are a strange kind of commonwealth among themselves, of wandering impostors and jugglers, who made their first appearance in *Germany* about the beginning of the sixteenth century, and have since spread themselves all over *Europe* and *Asia*. They were originally called *Zinganees* by the *Turks*, from their captain, *Zinganeus*, who, when Sultan *Selim* conquered *Egypt*, about the year 1517, refused to submit to the *Turkish* yoke, and retired into the deserts, where they lived by rapine and plunder, and frequently came down into the plains of *Egypt*, committing great outrages in the towns upon the *Nile*, under the dominion of the *Turks*. But being at length subdued and banished from *Egypt*, they dispersed themselves in small parties into every country in the known world; and, as they were natives of *Egypt*, a country where the occult sciences, or black art, as it was called, was supposed to have arrived to great perfection, and which, in that credulous age, was in great vogue with persons of all religions and persuasions, they found the people, wherever they came, very easily imposed on. *Mod. Univ. Hist.* vol. xliii. p. 271.

In the compass of a very few years, they gained such a number of idle proselytes, who imitated their language and complexion, and betook themselves to the same arts of chiromancy, begging, and pilfering, that they became troublesome, and even formidable, to most of the states of *Europe*. Hence they were expelled from *France* in the year 1560, and from *Spain* in 1591. And the government in *England* took the alarm much earlier; for in 1590, they are described by the statute of the 22 H. 8. c. 10. as "outlandish people, calling themselves *Egyptians*, using no craft or feat of merchandise, who have come into this realm, and gone from shire to shire, and place to place, in great company, and used great subtle and crafty means to deceive the people; bearing them in hand, that they by palmistry could tell men and women fortunes; and so, many times by craft and subtlety have deceived the people of their money, and also have committed many heinous felonies and robberies." Wherefore they are directed to avoid the realm, and not to return, under pain of imprisonment, and forfeiture of their goods and chattels: and, upon their trials for any felony which they may have committed, they shall not be entitled to a jury *de medietate linguæ*. And afterwards it is enacted by stat. 1 & 2 P. & M. c. 4., and 5 El. c. 20., that if any such persons shall be imported into this kingdom, the importer shall forfeit 40*l*. And if the *Egyptians* themselves remain one month in this kingdom; or if any person being fourteen years old, whether a natural-born subject or stranger, which hath been seen or found in the fellowship of such *Egyptians*, or which hath disguised him or herself like them, shall remain in the same one month at one or several times, it is felony without benefit of clergy. And Sir *Matthew Hale* informs us, that at one *Suffolk* assizes no less than thirteen gypsies were executed upon these statutes, a few years before the Restoration. But, to the honour of our national humanity, there are no instances more modern than this, of carrying these laws into

Gypsies.

Description of,
by 22 H. 8.
c. 10.

1 & 2 P. & M.
c. 4.
5 Eliz. c. 20.

5 Eliz. c. 20.
repealed by
23 G. 3. c. 51.
1 G. 4. c. 116.,
repealing so
much of 1 & 2
P. & M. c. 4.
as inflicts ca-
pital punish-
ment.

execution. (4 *Blac. Com.* 166.) And by stat. 23 G. 3. c. 51. the said stat. 5 *El.* c. 20. is repealed. And now by stat. 1 G. 4. c. 116., after reciting that whereas by stat. 1 & 2 P. & M. c. 4. *suprà*, it is amongst other things enacted, that if any of the persons called *Egyptians* which shall be transported and conveyed into this realm of *England* or *Wales*, do continue and remain within the same by the space of one month, that then he or they so offending shall, by virtue of this act, be deemed and judged a felon and felons, and shall therefore suffer pains of death, loss of lands and goods, as in cases of felony, by the order of the common law of this realm, and shall, upon the trial of them or any of them therein, so tried in the county, and by the inhabitants of the county or place where they or he shall be apprehended or taken, and not *per medietatem linguæ*, and shall lose the benefit and privilege of sanctuary and clergy, enacts that so much of the said act as is herein-before recited shall be, and the same is hereby repealed.

Persons telling
fortunes and
wandering
abroad, rogues
and vagabonds.

By 5 G. 4. c. 83. § 4., all persons pretending to tell fortunes, or using any subtle craft, means, or device by palmistry or otherwise, to deceive and impose on any of his majesty's subjects; and persons wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having visible means of subsistence, and not giving a good account of themselves, shall be deemed rogues and vagabonds.

Embezzlement. See **Larceny**.
Embracerp. See **Maintenance**.

Escape.

See tit. **Rescue**.

THIS is to be understood of escapes in *criminal* cases; and not in *civil* cases, as for debt, or the like.

Escape, what.

An escape is, where one that is arrested gaineth his liberty before he is delivered by the course of law. *Terms of the L.*

Several kinds
thereof.

Escapes are of three kinds. 1. By a person who hath the offender in his custody, by permission or negligence. 2. Caused by a stranger; this is commonly called, if effected by force, a *rescue*. 3. By the party himself; either without force, which is simply an escape, or with force, which is *prison breaking*. *Rescous* and *prison breaking* are treated of under their respective titles: and this title treats only of escapes properly so called. Concerning which we will treat in the following order:—

I. Of Escape by the Party himself.

[13 G. 3. c. 31.—44 G. 3. c. 92.—45 G. 3. c. 92.—54 G. 3. c. 186.]

II. Escape suffered by a Private Person.

III. Escape suffered by an Officer.

IV. What is a voluntary, and what a negligent Escape.

V. Concerning the retaking of a Person escaped.

- VI. *Indictment for an Escape.*
 VII. *Trial and Conviction for an Escape.*
 [4 G. 4. c. 64.]
 VIII. *Punishment of an Escape.*
 [37 G. 3. c. 140.—52 G. 3. c. 156.]
 IX. *Aiding in attempting to escape.*
 [16 G. 2. c. 31.—4 G. 4. c. 64.—5 G. 4. c. 84.]

I. Of Escape by the Party himself.

As all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, whoever in any case refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice before such time as he is delivered by due course of law, is guilty of an high contempt, punishable with fine and imprisonment. 2 Haw. c. 17. § 5. 4 Blac. Com. 129.

But escape, committed by the party himself, if effected by force, belongs more properly to the title *Prison Breaking*.

By stat. 44 G. 3. c. 92. § 3., offenders against whom any warrant shall be issued, escaping from *Ireland* into *England* or *Scotland*, may be apprehended by an indorsed warrant, and conveyed to *Ireland*; and the fourth section of the act makes the same provision as to offenders escaping from *England* or *Scotland* into *Ireland*, being apprehended and conveyed back again to *England* or *Scotland*.

The apprehension of persons escaping from *England* into *Scotland*, and from *Scotland* into *England*, is provided for by stat. 13 G. 3. c. 31. And as to admitting persons apprehended in *England*, *Scotland*, and *Ireland*, to bail, for bailable offences, see statutes 45 G. 3. c. 92., and 54 G. 3. c. 186., which latter stat., § 2., enacts that all warrants issued in *England*, *Scotland*, or *Ireland*, respectively, may and shall be indorsed and executed, and enforced and acted upon, in any part of the U. K., in like manner as is directed by stat. 13 G. 3. c. 31. in relation to warrants issued or granted in *England* and *Scotland* respectively, as fully as if all the provisions of the said act were made part of this act, as to every part of the U. K., and as to all justices of the peace, sheriff's officers, constables or other officer or officers of the peace in *Ireland*, as well as in *England* and *Scotland* respectively. See also title *Warrant*.

Escape by party himself, though without force, a misdemeanor.

44 G. 3. c. 92. Persons escaping from G. B. to Ireland, or from Ireland to G. B. to be apprehended and brought back again.

So, as to Scotland.

54 G. 3. c. 186.

II. Escape suffered by a private Person.

It seems to be a good general rule, that wherever any person hath another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape, if he suffer him to go at large before he hath discharged himself of him, by delivering him over to some other who by law ought to have the custody of him. 2 Haw. c. 20. § 1. 1 Russ. 377.

And the law is generally the same, in relation to escapes suffered by private persons, as by officers. *Id.*

Escape by a private person.

III. Escape suffered by an Officer.

Escape by an officer.

There must be a previous arrest.

And justifiable.

Escape, where commitment is good in substance.

And for a criminal offence.

And not detained only for fees.

Toomuch liberty, an escape.

Improperly bailing, &c.

Losing sight of, an escape.

It must be a recognised officer.

In order to make an escape there must be an *actual arrest*; and therefore, if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. 2 *Haw. c. 19. § 1. 1 Hale, 594.*

The arrest must be also justifiable; for if it be either for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime, and by such an irregular mittimus as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape, by suffering the prisoner to go at large. 2 *Haw. c. 19. § 2.*

But where commitments are good in substance, though they be not strictly formal, the gaoler is as much bound to observe them as if they were made ever so exactly. 1 *Russ. 369.*

And as the imprisonment must be justifiable, so it must be also for a criminal offence. 2 *Haw. c. 19. § 3.*

The imprisonment must also be *continuing* at the time of the escape; and its continuance must be grounded on that satisfaction which the public justice demands for the crime committed. So that if a prisoner be acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, though the judgment were that *he be discharged paying his fees*; he being detained, not as a criminal, but only as a debtor: but if a person, convicted of a crime, be condemned to imprisonment for a certain time, and also "until he pays his fees," and he escape after such time is elapsed, without paying them, perhaps such escape may be criminal, for it was part of the punishment that the imprisonment be continued till the fees should be paid. (a) 2 *Haw. c. 19. § 4. 1 Russ. 369.*

Also, it is an escape in some cases to suffer a prisoner to have greater liberty than by the law he ought to have; as to admit a person to bail, who by law ought not to be bailed, but to be kept in close custody. 2 *Haw. c. 19. § 5.*

So, if a gaoler or other officer shall license his prisoner to go abroad for a time, and to come again, this is an escape, even though the prisoner return again. *Dalt. c. 159.*

If the gaoler so closely pursue the prisoner who flies from him, that he retakes him without losing sight of him, the law looks on the prisoner so far in his power all the time, as not to adjudge such a flight to amount at all to an escape: but if the gaoler once lose sight of the prisoner, and afterwards retake him, he seems in strictness to be guilty of an escape. 2 *Haw. c. 19. § 6.*

But it must be by a known officer of the law. *T. Hill*, a yeoman wardour of the Tower, and *Dod*, the gentleman gaoler there, were indicted for the negligent escape of Colonel *Parker*, committed to the Tower for high treason. Lord *Lucas*, the constable of the Tower, had committed the colonel to the care of the defendants, to be kept in the house of the defendant *Hill*. The judges present (*O. B. January, 1694*) were of opinion, that the

(a) By stat. 55 G. 3. c. 50. all fees payable by prisoners are abolished. See tit. *Gaoles*, &c. § xi.

defendants were not such officers as the law took notice of, and therefore could not be guilty of a negligent escape. It was merely a breach of trust to Lord *Lucas*, their master.

Upon the same principle, *S. Stick*, a wardour of the Tower, who was indicted at the same sessions for the negligent escape of Lord *Clacarty*, was acquitted.

But it is laid down, that whoever, *de facto*, occupies the office of a gaoler, is liable to answer for a negligent escape, and that it is no way material whether his title to the office be legal or not. *2 Haw. c. 19. § 28.* But a gaoler *de facto* is liable.

A sheriff is as much liable to answer for an escape suffered by his bailiff as if he had actually suffered it himself; and the court may charge either the sheriff or bailiff for such an escape. *1 Russ. 372.* Sheriff liable for escape by his bailiff.

IV. What is a voluntary, and what a negligent Escape.

Wherever an officer, who hath the custody of a prisoner, charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him from his trial or execution, this is a voluntary escape. *2 Haw. c. 19. § 10.* Voluntary escape, what.

A negligent escape is, when the party arrested or imprisoned doth escape against the will of him that arrested or imprisoned him, and is not freshly pursued and taken again before he hath lost the sight of him. *Dalt. c. 159.* Negligent escape, what.

If the constable or other officer shall voluntarily suffer a thief, being in his custody, to go into the water to drown himself, this escape is felony in the constable, and the drowning is felony in the thief. Otherwise, if the thief shall suddenly, without the assent of the constable, kill, hang, or drown himself, this is but a negligent escape in the constable. *Id.* Suffering a prisoner to kill himself.

It appears to have been holden, that it is an escape in the constable to discharge a person committed to his custody by a watchman, as a loose and disorderly woman, and a street-walker, although no positive charge was made. *R. v. Bootie, 2 Burr. 864.* Disorderly person given in charge by a watchman.

V. Concerning the retaking of a Person escaped.

If an officer hath arrested a man by virtue of a warrant, and then taketh his promise that he will come again, and so letteth him go, the officer cannot, after arrest, take him again by force of his former warrant, for that this was by the consent of the officer. But if he return, and put himself again under the custody of the officer, it seems that it may be properly argued that the officer may lawfully detain him, and bring him before the justice in pursuance of the warrant. *Dalt. c. 169. 2 Haw. c. 13. § 9.* Officer suffering a voluntary escape cannot retake.

But if the party arrested had escaped of his own wrong without the consent of the officer, now, upon fresh suit, the officer may take him again and again so often as he escapeth, although he were out of view, or that he shall fly into another town or county, and bring him before the justice upon whose warrant he was first arrested. *Dalt. c. 169. p. 405.* Prisoner escaping of his own wrong may be retaken.

And it is said generally in some books, that an officer who hath negligently suffered a prisoner to escape may retake him where-

Escape (Retaking of Person escaped.) [Criminal

ever he finds him, without mentioning any fresh pursuit: and indeed, since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason he should take any manner of advantage from it. 2 *Haw. c. 19. § 12.*

Breaking open doors to retake.

And wherever a person is lawfully arrested for any cause, and afterwards escapes, and shelters himself in a house, the doors may be broken open to take him, on a refusal of admittance. 2 *Haw. c. 14. § 9.*

Retaking excuseth not the escape.

Nor killing the prisoner in pursuit.

It is perhaps the better opinion that wherever a prisoner, by the negligence of his keeper, gets so far out of his power that the keeper loses sight of him, the keeper is punishable for the escape, notwithstanding he took him immediately after. And it is clear that he cannot excuse himself from an escape, by killing a prisoner in the pursuit, though he could not possibly retake him; but must in such case be content to submit to such punishment as his negligence shall appear to deserve. 2 *Haw. c. 19. § 13.*

Question of civil liability of gaoler to sheriff on escape of prisoner.

Ryland v. Lavender and others, E. 1824, 2 Bing. 65. Defendant, as gaoler, covenanted with the sheriff, among other things, to attend the quarter sessions, and to remove prisoners under writs of *habeas corpus*, without permitting them to escape. The defendant being engaged at the quarter sessions, the sheriff, upon a writ of *habeas corpus* for the removal of a prisoner, directed his warrant to the defendant, and "W. W., by me (the sheriff) for this time only thereto specially appointed." W. W., who was the defendant's turnkey, proceeded with the prisoner towards the place of destination. The prisoner having escaped, the court of C. P. held that the sheriff, having specially directed the warrant to W. W., the defendant was not liable upon his covenant.

Special warrant to another person.

VI. Indictment for an Escape.

Indictment.
(A.)

It seems clear that every indictment (A.) for an escape, whether negligent or voluntary, must expressly show that the prisoner was actually in the defendant's custody for such a crime, and that he went at large. And if for a voluntary escape, that the defendant feloniously and voluntarily suffered him to go at large; and it must set forth, not the felony in general, but the particular kind of felony: but it seems questionable, whether such certainty, as to the nature of the crime, be necessary in an indictment for a negligent escape; for that it is not material in this case, whether the person who escaped were guilty or not. 2 *Haw. c. 19. § 14. — c. 25. § 66.*

That prisoner was in defendant's custody, for a certain crime.

Where an indictment stated that the prisoner was in defendant's custody, and charged with a certain crime, judgment was arrested because it did not state that he was committed for that crime; for a person in custody may be charged with a crime, and yet not be in custody on such charge. 1 *Russ. 374.*

The time of the crime being committed.

The indictment ought also to show the time when the offence was committed for which the party was in custody, that it may appear to have been prior to the escape, and subsequent to the last general pardon.

VII. Trial and Conviction for an Escape.

Gaoler not producing him, a conviction.

If the prisoner be of record in a court, and the gaoler being called cannot give an account where he is, this is a conviction of

an escape; but seems not a conviction of a voluntary escape, unless the gaoler confesseth it. And the gaoler may be fined in such a case. 1 *Hale*, 603.

And it seems to be clear, that a keeper who voluntarily suffers another to escape who was in his custody for felony, cannot be arraigned for such escape as for felony until the principal be attainted, for that the felony of the prisoner shall not be tried between the king and the keeper, because the prisoner is a stranger thereunto; yet he may be indicted and tried for it as a misprision before the attainer of the principal offender. 2 *Haw. c. 19. § 26. 2 Inst.* 591, 592.

Felony to be tried before the escape.

Where the commitment is for high treason, the party voluntarily permitting the escape is punishable for such crime, whether the party escaping be ever convicted or not; there being no accessaries in high treason. 1 *Russ.* 374.

Escape in high treason.

In a prosecution for an escape, it was held that a certificate of the clerk of assize was not competent evidence of the conviction in consequence of which the prisoner was in custody. *R. v. Smith, E. T. 1788, 1 Russ.* 367.

Certificate of conviction.

But now by 4 *G. 4. c. 64. § 44.*, in case of any prosecution for an escape, attempt to escape, &c., either against the prisoner escaping, or any other person concerned therein, a certificate by the clerk of assize, or any other clerk of the court where the prisoner shall have been convicted, shall, with due proof of the identity of the person, be sufficient evidence of the conviction, &c.

Made evidence. See post.

Under a statute, authorising a similar certificate, (56 *G. 3. c. 27.*) it was held not sufficient for the certificate to state merely that the prisoner was convicted of felony, but that it ought to set out the effect and substance of the conviction. *R. v. Watson. M. T. 1821. C. C. R.* 468.

What it must state.

VIII. Punishment of an Escape.

If a felon escape before arrest, it is not punishable in him as felony; but for the flight he forfeits his goods when presented. *Hale's Sum.* 111.

Punishment of escape before arrest.

If a private person arrest a felon, and he escape by force from him, the township shall be amerced, but it seems it excuseth the party, because he cannot raise power to assist him: but if a constable or other officer hath the custody of a prisoner, bringing him to the gaol, it seems that a simple escape by the rescue of the prisoner himself doth not wholly excuse him, because he may take sufficient strength to his assistance. 1 *Hale*, 601.

Of escape by a private person.

Wherever a person is found guilty upon an indictment or presentment of a negligent escape of a criminal actually in his custody, he is punishable by fine and imprisonment, according to the quality of the offence. 2 *Haw. c. 19. § 31. — c. 20. § 6. 1 Hale*, 600, 604.

Of a negligent escape.

And it seems to be the better opinion that the sheriff is as much liable to answer for a negligent escape, suffered by his bailiff, as if he had actually suffered it himself, and that the court may charge either the sheriff or bailiff for such an escape; and if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him. 2 *Haw. c. 19. § 29. Rex v. Fell, 1 Ld. Raym.* 424.

Note. Mr. *Hawkins*, although he is one of the most accurate of all writers, yet hath inserted in this place certain penalties for escapes, which were expired above 200 years before. 2 *Haw. c. 19. § 34, 35.*

Prisoner breaking gaol.

Gaoler may iron prisoners.

A voluntary escape, punishable as the crime of the prisoner escaping.

Gaoler *de facto*.

Principal gaoler not punishable as for a voluntary escape when suffered by his deputy.

A voluntary escape not excluded from clergy.

If a prisoner for felony break the gaol, this seems to be a negligent escape in the gaoler, because there wanted either that due strength in the gaol that should have secured him, or that due vigilance in the gaoler or his officers to have prevented it; and therefore it is lawful for the gaoler to hamper them with irons to prevent their escape: for if gaolers might not be punished for this as a negligent escape, they would be careless either to secure their prisoners, or to retake them that escape. 1 *Hale*, 601.

It seems to be generally agreed that a voluntary escape suffered by an officer amounts to the same kind of crime and is punishable in the same degree as the offence of which the party was guilty, and for which he was in custody; whether it be treason, felony, or trespass. 2 *Haw. c. 19. § 22.(a)*

But yet a voluntary escape is no felony, if the act done were not felony at the time of the escape made, as in case of a mortal wound given, and the party not dying till after the escape; but the officer may be fined to the value of his goods. *Dalt. c. 159.*

Also a voluntary escape suffered by one who wrongfully takes upon him the keeping of a gaol seems to be punishable in the same manner as if he was never so rightfully entitled to such custody; for that the crime is in both cases of the same ill consequence to the public; and there seems to be no reason that a wrongful officer should have greater favour than a rightful, and that for no other reason but because he is a wrongful one. 2 *Haw. c. 19. § 23.*

But it seemeth to be clear that no one is punishable as for felony for the voluntary escape of a felon, but the person only who is actually guilty of it; and therefore that the principal gaoler is only fineable for a voluntary escape suffered by his deputy; for that no one shall suffer capitally for the crime of another. *Id. § 27.*

And therefore, although in all civil causes the sheriff is to be responsible, or the gaoler, at election, yet if the gaoler do voluntarily suffer a felon in his custody to escape, this, inasmuch as it reacheth to life, is felony only in the gaoler that was immediately trusted with the custody, and not in the sheriff. 1 *Hale*, 597.

For the escape must be voluntarily permitted in him that permitted it, which could not be in the high sheriff, though it were such in the gaoler, for he was not privy to it, and therefore could not do it feloniously; but it was a negligent escape in him, in trusting such a person with the custody of his prisoners, that would be false to his trust, and therefore the sheriff shall pay, but not corporally suffer for the miscarriage of his gaoler. 1 *Hale*, 597, 598.

But although the felony for which a man is committed be not within clergy, yet the person who voluntarily suffers him to escape shall have the benefit of clergy. 1 *Hale*, 599.

(a) If the cause be expressed in the commitment, 2 *Inst. 52.* See tit. Commitment, § m.

By 4 G. 4. c. 6. § 18. (*Mutiny Act*), when his majesty shall intend that any sentence of transportation passed by a court-martial, or any commuted transportation shall be carried into execution, all the laws in force touching the escape of felons shall apply to such offender, and to all persons aiding and abetting, contriving or assisting in any escape or intended escape of any such offender.

A former statute, 37 G. 3. c. 140. § 6., contains a similar provision with respect to offenders under sentence of death by a naval court-martial and allowed the benefit of a conditional pardon.

Stat. 52 G. 3. c. 156. provides against the aiding of the escape of prisoners of war, and enacts, that "every person who shall knowingly and wilfully aid or assist any alien enemy of H. M., being a prisoner of war in H. M.'s dominions, whether such prisoner shall be confined as a prisoner of war in any prison, or other place of confinement, or shall be suffered to be at large in H. M.'s dominions, or any part thereof, on his parole, to escape from such prison or other place of confinement, or from H. M.'s dominions, if at large upon parole," shall upon conviction be adjudged guilty of felony, and be liable to be transported for life, or for 14 or 7 years. The act also declares (§ 2.) that every person who shall knowingly and wilfully aid or assist any such prisoner at large on parole, in quitting any part of H. M.'s dominions, where he may be on his parole, although he shall not aid or assist such person in quitting the coast of any part of H. M.'s dominions, shall be deemed guilty of aiding the escape of such person within the act. There is a further provision as to assisting such prisoners in their escape after they had got upon the high seas. § 3. enacts, "that if any person or persons owing allegiance to H. M., after any such prisoner as aforesaid hath quitted the coast of any part of H. M.'s dominions in such his escape as aforesaid, shall knowingly and wilfully, upon the high seas, aid or assist such prisoner in his escape to or towards any other dominions or place, such person shall also be adjudged guilty of felony, and be liable to be transported as aforesaid." It is also provided that offences committed upon the high seas, and not within the body of any county, may be tried in any county within the realm. (a)

By stat. 1 & 2 G. 4. c. 88. § 1., if any person shall rescue, or aid and assist in rescuing from the lawful custody of any constable, officer, headborough, or other person whomsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then if the person or persons so offending shall be convicted of felony, and be entitled to the benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the court by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons instead of being so fined and imprisoned as aforesaid (a), shall be transported beyond the seas for seven years, or be imprisoned only, or be imprisoned

5 G. 4. c. 13.

Escape of offenders sentenced by a military court-martial, and conditionally pardoned.

37 G. 3. c. 140.

As to those sentenced by a naval court martial.

52 G. 3. c. 156.

Persons aiding the escape of prisoners of war made liable to transportation.

1 & 2 G. 4. c. 88.

Punishment of persons rescuing persons charged with felony.

(a) *Sic.*

(a) By § 4. the act is not to prevent offenders from being prosecuted as they might have been, if the act had not been passed; but no person prosecuted otherwise than under the provisions of the act is to be liable to be prosecuted for the same offence under the act; and no person prosecuted under the act is, for the same offence, to be otherwise prosecuted.

and kept to hard labour in the common gaol, house of correction, or penitentiary house, for any term not less than one and not exceeding three years.

IX. Aiding in attempting to escape.

Assisting any person to escape from a constable, or from any boat carrying felons for transportation.

By stat. 16 G. 2. c. 31. § 3., if any person shall assist any prisoner to attempt to escape *from any constable*, or other officer or person, who shall have the lawful charge of him in order to carry him to gaol, by virtue of a warrant of commitment for treason or felony (except petty larceny), expressed on such warrant; or if any person shall assist any felon to attempt his escape from on board any *boat, ship, or vessel, carrying felons for transportation*, or from the *contractor* for the transportation of such felons, or his agents, or any other person to whom such felon shall have been lawfully delivered in order for transportation, he shall be guilty of felony, and be transported for seven years.

Felony.

All prosecutions on this act to be commenced within a year after the offence committed.

Stat. 16 G. 2. c. 31. does not extend to cases where an actual escape is made.

It has been decided that stat. 16 G. 2. c. 31. does not extend to cases where an *actual escape* is made, but must be confined to cases of an *attempt*, without effecting the escape itself. Mr. J. Buller, in delivering the opinion of the judges (*O. B., June, 1796*), observed, "the statute purports to be made for the further punishing of those persons who shall aid and assist persons attempting to escape, and makes the offence felony: it creates a new felony; but the offence of assisting a felon in making an actual escape was felony before, and therefore does not seem to fall within the view or intention of the legislature when they made this statute." *R. v. Tilley and others, O. B. April Sess. 1795, 2 Leach, 662.* See also *R. v. Burridge, 3 P. Wms. 439. 1 Hale, 621.*

Knowledge of prisoner's offence.

An indictment at common law for aiding a prisoner's escape, ought to state that the party knew of his offence.

4 G. 4. c. 64. Conveying vizors, &c. into prisons to assist prisoners to escape.

By stat. 4 G. 4. c. 64. § 43., "If any person shall convey or cause to be conveyed into any prison to which this act shall extend, any mask, vizor, or other disguise, or any instrument or arms proper to facilitate the escape of any prisoners, and the same shall deliver or cause to be delivered to any prisoner in such prison, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper of such prison, every such person shall be deemed to have delivered such vizor or disguise, instrument, or arms, with intent to aid and assist such prisoner to escape or attempt to escape; and if any person shall, by any means whatever, aid and assist any prisoner to escape or in attempting to escape from any prison, every person so offending, whether an escape be actually made or not, shall be guilty of felony, and being convicted thereof, shall be transported beyond the seas, for any term not exceeding fourteen years."

Transportation for assisting prisoners to escape.

Method of trial and conviction of offenders making escapes, &c.

§ 44. And, to the intent that prosecutions for escapes, breaches of prison, and rescues, may be carried on with as little trouble and expence as is possible, "any offender escaping, breaking prison, or being rescued therefrom, may be tried either in the jurisdiction where the offence was committed, or in that where he or she shall be apprehended and retaken; and in case of any prosecution for any such escape, attempt to escape, breach of prison, or rescue,

either against the offender escaping or attempting to escape, or having broken prison, or having been rescued, or against any other person or persons concerned therein, or aiding, abetting, or assisting the same, a certificate given by the clerk of assize, or other clerk of the court in which such offender shall have been convicted, shall, together with due proof of the identity of the person, be sufficient evidence to the court and jury of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced."

Clerk of court's certificate.

By 5 G. 4. c. 84. § 22., persons conveying the means of escape to offenders in the custody of the superintendent, or other person removing or conveying them for transportation, are punishable the same as if such offenders had been in prison.

Escape of prisoners while removing for transportation.

A. Indictment against a Constable for an Escape.

A.

County of } *THE* jurors for our lord the king upon their oath
to wit. } present, that on the _____ day of _____, in the
_____ year of the reign of _____, at _____, in the
county aforesaid, one A. I. of _____ came before J. P., esquire,
then and yet one of the justices of our said lord the king, assigned
to keep the peace in the said county, and also to hear and determine
divers felonies, trespasses, and other misdemeanors in the said county
committed; and the said A. I. did, then and there, on his oath be-
fore the same justice, charge, accuse, and give information against
one A. O. of _____ aforesaid, in the county aforesaid, yeoman,
for a certain misdemeanor, in taking fish out of the pond of _____,
at _____, in the said county [or, as the offence shall be]: Where-
upon he the said J. P. the justice aforesaid, did then and there, to
wit, at _____ aforesaid, in the county aforesaid, make a certain
warrant, under his hand and seal, in due form of law, directed to
the constable of _____ aforesaid, in the county aforesaid, thereby
requiring him the said constable to take the body of the said A. O.
and bring him before the said J. P., the justice aforesaid, to answer
to such matters and things as should be alleged against him, touch-
ing the said misdemeanor; which said warrant afterwards, to wit,
on the same day and year above-mentioned, at _____ aforesaid,
in the county aforesaid, was delivered to one A. C. then being con-
stable of _____ aforesaid, in due form of law, to be executed; by
virtue of which said warrant the said A. C. afterwards, to wit, on the
said _____ day of _____, in the year aforesaid, at _____
aforesaid, in the said county, did take and arrest the body of the
said A. O., and him the said A. O. in his custody for the cause
aforesaid, had: Nevertheless, the said A. C. of _____ aforesaid,
in the county aforesaid, yeoman, afterwards, to wit, on the said
_____ day of _____, in the year aforesaid, the duty of his
office in that respect not regarding, at _____ aforesaid, in the
county aforesaid, unlawfully and negligently did permit the said
A. O. to escape and go at large out of the custody of him the said
A. C.; to the great hindrance of justice, in contempt of our said lord
the king and of his laws, and against the peace of our said lord the
king, his crown and dignity.

B.

B. Warrant to apprehend a Person for escaping from the House of Correction.

County of } To the constable of the parish of ———, in the
to wit. } said county of ———.

FORASMUCH as J. H. keeper of the house of correction at ———, in the county aforesaid, hath this day made information and complaint before me, Sir G. C. bart., one of his majesty's justices of the peace acting in and for the said county of ———, that A. O. hath unlawfully and wilfully escaped from the house of correction at ——— aforesaid, and from and out of the custody of him the said J. H., the keeper thereof, before the expiration of a certain term for which he the said A. O. was ordered to be imprisoned and kept to hard labour therein. These are therefore to command you the said constable forthwith to apprehend and bring before me or some other of his majesty's justices of the peace for the said county, the body of the said A. O., to answer unto the said complaint, and to be further dealt with according to law. Herein fail you not. Given under my hand and seal this ——— day of ———, one thousand eight hundred and ———.

G. C. (L. S.) (a)

Escheat. See tit. Forfeiture.

Examination.

[7 G. 4. c. 64. — 9 G. 4. c. 32. — 3 & 4 W. 4. c. 49. c. 82.]

7 G. 4. c. 64.
Examination of
prisoner before
one justice.

When he may
commit.

When he shall
remand till two
justices are
present.

When taken
before two jus-
tices, or re-
manded.

If there is not
strong pre-
sumption of
guilt on the
evidence, two

BY 7 G. 4. c. 64. § 1. where any person shall be taken on a charge of felony, before one or more justice or justices of the peace, and the charge shall be supported by positive and credible evidence of the fact, or by such evidence as, if not explained or contradicted, shall, in the opinion of the justice or justices, raise a strong presumption of the guilt of the person charged, such person shall be committed to prison by such justice or justices, in the manner hereinafter mentioned. But if there shall be only one justice present, and the whole evidence given before him shall be such as neither to raise a strong presumption of guilt, nor to warrant the dismissal of the charge, such justice shall order the person charged to be detained in custody until he or she shall be taken before two justices at the least: and where any person so taken, or any person in the first instance taken before two justices of the peace, shall be charged with felony, or on suspicion of felony, and the evidence given in support of the charge shall, in their opinion, not be such as to raise a strong presumption of the guilt of the person charged, and to require his or her committal, or such evidence shall be adduced on behalf of the person charged, as shall, in their opinion, weaken the presumption of his or her guilt, but there shall, notwithstanding, appear to them, in either of such cases, to be sufficient ground for judicial inquiry into his or her guilt, the person charged shall be admitted to bail by such

two justices, in the manner hereinafter mentioned: Provided always, that nothing herein contained shall be construed to require any such justice or justices to hear evidence on behalf of any person so charged as aforesaid, unless it shall appear to him or them to be meet and conducive to the ends of justice to hear the same.

Justices may admit to bail.

§ 2. The two justices of the peace, before they shall admit to bail, and the justice or justices, before he or they shall commit to prison any person arrested for felony, or on suspicion of felony, shall take the examination of such person, and the information upon oath of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing, and the two justices shall certify such bailment in writing, and every such justice shall have authority to bind by recognizance all such persons as know or declare any thing material, touching any such felony or suspicion of felony, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great sessions, or sessions of the peace, at which the trial thereof is intended to be; then and there to prosecute or give evidence against the party accused: and such justices or justice respectively shall subscribe all such examinations, informations, bailments, and recognizances, and deliver, or cause to be delivered to the proper officer of the court, in which the trial is to be, before or at the opening of the court.

Justices or justice to take examination of prisoner, and information against him.

To bind the parties over to prosecute, and give evidence.

§ 3. Every justice of the peace, before whom any person shall be taken, on a charge of misdemeanor or suspicion thereof, shall take the examination of the person charged, and the information, upon oath, of those who shall know the facts and circumstances of the case, and shall put the same, or as much thereof as shall be material, into writing before he shall commit to prison or require bail from the person so charged; and in every case of bailment, shall certify the bailment in writing, and shall have authority to bind all persons, by recognizance, to appear, to prosecute or give evidence against the party accused, in like manner as in cases of felony, and shall subscribe all examinations, informations, bailments, and recognizances, and deliver or cause the same to be delivered to the proper officer of the court in which the trial is to be, before or at the opening of the court, in like manner as in cases of felony.

And subscribe and deliver examinations, &c. to the proper officer at the sitting of the court.

Depositions, &c. in cases of misdemeanor and suspicion thereof, to be taken in writing, and returned as in cases of felony.

Parties bound to prosecute, or give evidence.

In *R. v. Fearshire*, 1 Leach, 202., who was tried before *Ld. Mansfield C. J.* at the sittings at *Westminster* after *Trin.* term, 1779, on an indictment for a misdemeanor, the counsel for the prosecution attempted to give parol evidence of the information against the defendant before a justice of the peace, on which the warrant to apprehend him had been granted. *Mr. Dunning*, for the defendant, objected to the admission of this evidence, and *Ld. Mansfield* rejected it; observing, that as it is the indispensable duty of every justice of peace to take all charges, of whatsoever nature, kind, or complexion they may be, in writing, the presumption is, that he has in this case done his duty by taking the information in writing, and, therefore, unless it be previously shown that the deposition was not reduced into writing, parol testimony thereof cannot be received.

Indispensable duty of justices to take all charges in writing.

It is now clearly the duty of the magistrates, in misdemeanors, as well as in felonies, not only to take the charge in writing, but also

Same law in misdemeanor

and felonies as to examinations, depositions, &c.

to return the examinations and depositions to the court where the trial is to be, in every case where they commit to prison, or require bail, and to certify the bailment in writing: they have also the same power of compelling the attendance of witnesses in misdemeanor, which, till the recent acts were passed, was confined to cases of felony, and the depositions in both cases are evidence, if the witnesses be dead or absent.

Depositions before coroners.

By 7 G. 4. c. 64. § 4. every coroner, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall have authority to bind by recognizance all such persons as know or declare any thing material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great sessions, at which the trial is to be, then and there to prosecute or give evidence against the party charged; and every such coroner shall certify the same evidence, and all such recognizances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court.

Justice or coroner offending against provisions of stat. may be fined summarily.

§ 5. If any justice or coroner shall offend in any thing contrary to the true intent and meaning of these provisions, the court to whose officer any such examination, information, evidence, bailment, recognizance, or inquisition ought to have been delivered, shall, upon examination and proof of the offence in a summary manner, set such fine upon every such justice or coroner as the court shall think meet.

Provisions apply to justices and coroners for separate jurisdictions.

§ 6. All these provisions shall apply to the justices and coroners not only of counties at large, but also of all other jurisdictions.

Depositions to be taken in presence of the party accused, and in the language used.

Defendant has a right to cross-examine.

At *Gloucester Spring Assizes, April 1. 1824*, Mr. Baron Garrow said, that "depositions should not be full of technical terms introduced from *Burn's Justice*; but that all depositions should be taken in the presence of the party accused, and taken down in the exact natural language and peculiar expressions used by prosecutor or witnesses. This would prevent the deponents being unable to recollect what they had said. Many depositions, on the contrary, were filled up either with Latin words or law technicalities, which when read over to the witnesses, it was impossible they could understand. The defendant, in all such cases, should be permitted to cross-examine the witnesses; and the depositions should be taken down, in all particulars, completely and accurately as the evidence was actually given."

To be taken down in first person.

In almost all cases it would be infinitely better if the depositions were taken in the first person, and if, after the introductory part, which generally concludes with the words "who saith as follows," the deposition proceeded to state, "I saw, &c. at such a time and place," instead of saying, "he, this examinant," and "he, this deponent," terms which many witnesses do not understand, and perhaps may conceive to mean some other person.—See *Car. Sup.* p. 11.

As the enactments of 7 G. 4. c. 64., requiring magistrates to take in writing the examination of the prisoner and the depositions of the witnesses, are the same in effect with those of the statutes of

P. & M., the following decisions in regard to their admissibility in evidence, when taken under the latter, may fitly be given in this place.

The law presumes that every man does his duty until the contrary be proved, and therefore will not permit oral testimony to be given of a prisoner's examination or confession before a magistrate, unless it be most clearly substantiated, that such examination or confession was not reduced into writing as the statutes require. So ruled in *R. v. Jacobs and two others*, 1 *Leach*, 309. Tried before *Gould J.* at the *O. B. Feb. Sess. 1784*, for a highway robbery. *R. v. Hinzman*, 1 *Leach*, 310. n. (a). S. P.

But if a confession be clearly and satisfactorily proved not to have been taken in writing, and to have been made freely and voluntarily, it is sufficient to convict a prisoner without any corroborating evidence.

Daniel Hall and two others were convicted at *Stafford Lent Ass. 1790*, of burglary. The evidence was clear against the two others; but excepting one or two slight circumstances, certainly not sufficient of themselves to have put *Hall* on his defence. The only evidence against him was his examination before the magistrate, which was not taken in writing, either by the magistrate or by any other person, but was proved by the *viva voce* testimony of two witnesses who were present, and which amounted to a full confession of his guilt. The case was referred to the consideration of the judges, whether this evidence of the confession was well received; and all the judges (except *Gould J.*) were of opinion that the prisoner was legally convicted; and he was afterwards executed. Cited *per Grose J.* in delivering the opinion of the judges in *Lambe's case*, 2 *Leach*, 559.

N. B.—The prisoners in this case were tried before *Adair Sergeant*, who sat on the crown side for Mr. Justice *Wilson*. During the trial, a man of the name of *Tart* was, among others, produced to prove the prisoner *Hall* had desired him to apply to the justice to admit him as a witness for the crown; for that he had not entered the house, but had only stood at the door while the other two prisoners went up stairs to commit the felony; but Mr. *Manley*, the prisoners' counsel, objected, that as this confession was made with a view and under the hope of being thereby permitted to turn king's evidence, it was not admissible in evidence against the prisoners; and the learned judge being of opinion that this was not a voluntary confession, the testimony of *Tart* was rejected.

Though an examination is taken down in writing, this will not exclude evidence of a previous parol declaration, which has not been reduced into writing. *R. v. Macarty*, cit. 2 *Stark. Ev.* 52.

On a trial for murder, it appeared that the prisoner made a voluntary confession of his guilt, before the whole of the depositions against him had been taken; which confession was taken down in writing, signed by the prisoner, and attested by the magistrate's clerk. It was objected, that nothing which a prisoner stated before he knew the evidence against him ought to be used to criminate him.

But *per Gaselee J.*, after consulting with Lord *Tenterden C. J.*, the proper course was held to be, that in such case the confession might be repeated by the magistrates' clerk, who heard it, refreshing his memory by the written papers.

Oral testimony of prisoner's examination before justice not usually admissible.

Aliter, if shewn not to have been taken in writing.

A confession made under the idea of being admitted a witness for the crown is not admissible.

Prisoner's examination before a magistrate does not exclude a prior statement. Prisoner's examination taken before the depositions against him were concluded.

It was also held to be no objection that there were interlineations and erasures in the confession so taken. *R. v. Bell, Maidst. Sum. Ass. 1831, 5 C. & P. 162.*

Parol proof of matters stated by prisoner before the justice and not taken down, where his examination as to other particulars was regularly taken.

Admission of one of two prisoners cannot be used against the other.

Depositions of the deceased taken under the stat. 1 P. & M. c. 13. are admissible, although not wholly taken in the presence of the prisoner, if the party in his presence was re-sworn, and the depositions repeated and signed, for he had an opportunity of cross-examining.

On the trial of three prisoners, for stealing a sheep, the property of *A.*, it appeared by the examination regularly taken down and subscribed by the committing magistrate, that two of them had confessed as to being concerned in stealing a sheep belonging to *B.*: it was proved by other witnesses who were present, at the time, before the magistrate, that the two prisoners made confession also as to their having stolen the sheep of *A.*, but this was not taken down by the magistrate. After conviction, the opinion of the judges was requested whether such evidence was admissible. Eleven being met, they were unanimous that the evidence being precise and distinct, was properly received, and the conviction right. *E. T. 1832, R. v. Harris & others, 1 M. 338.*

No admission by one of two prisoners jointly indicted can be used against the other. *A.* and *B.* were charged with the joint commission of a felony. *A.* on his examination before the magistrate stated, in the presence and hearing of *B.*, that he and *B.* jointly committed the felony, and this *B.* does not deny. These circumstances are not evidence against *B.* *R. v. Appleby and others, 3 Stark. 33.*

R. v. Charles Smith. The prisoner was indicted for the wilful murder of *Charles Stuart*, on the night of the 3d of *Sept.* 1816. It appeared that the prisoner on the 4th of *Sept.* was brought before two magistrates upon a charge of assaulting *Charles Stuart*, and of having robbed a manufactory which *Stuart* had been employed to guard. The principal question was, as to the admissibility of the deposition of the deceased, which was taken before the magistrates upon that occasion, under the following circumstances. The clerk of the magistrates took down the deposition of the deceased, which he produced at the time. The oath was administered to the deceased before any part of the deposition was written, and the clerk then proceeded to take down his statement. The prisoner was not present when the deceased commenced his statement, and when the magistrates' clerk began to take it down in writing. The prisoner was brought into the room before the examination was finished, and before the last three lines were written down. The prisoner was then informed that the magistrates were taking the deposition, and he was desired to attend. The oath was then again administered to the deceased, in the presence of the prisoner; and the whole of the deposition, which had been already committed to writing from the mouth of the deceased, was read over to the prisoner very distinctly and slowly. After this had been done, the deceased was asked, in the presence and hearing of the prisoner, whether what had been so written was true, and what he meant to say, and the deceased answered that it was perfectly correct. The magistrates then proceeded to examine the deceased further, and the deceased stated, in the presence and hearing of the prisoner, that which was stated in the last three lines of the deposition of the deceased. The deceased appeared to be perfectly collected at the time.

The prisoner was asked afterwards, whether he chose to put any questions to the deceased, but he did not ask any; he merely said, "God forgive you, *Charles.*" The deceased signed the deposition

in the presence of the magistrates, and of the prisoner, and after he had signed it, the magistrates signed it in the presence of the deceased and of the prisoner. On the part of the prisoner it was objected, that the deposition of the deceased could not be read in evidence: first, because the prisoner did not hear the questions put or the answers given, and had not the opportunity of seeing the manner in which the answers were given, except as to the last three lines of the deposition; and, therefore, it was contended, that the case did not come within the statutes 1 & 2 P. & M. c. 13. and 2 & 3 P. & M. c. 10., which made depositions in any case evidence; and secondly, because the examination under those statutes is confined to the offence with which the prisoner is charged at the time; that the prisoner, in this case, was charged with an assault and robbery, and, therefore, although the deposition in question might possibly have been admissible in evidence, upon an indictment for the assault, or for the robbery, it could not be admitted upon the trial of the present charge, which was for murder, no such offence having been committed at the time when the deposition was taken: but Ld. C. B. *Richards* was of opinion, that the evidence was admissible, since the deceased had been re-sworn in the presence of the prisoner, and had repeated what he had stated before, and the prisoner therefore had an opportunity of cross-examining him. His lordship also cited the case of *The King v. Radbourne*, 1 *Leach*, 457., where the deceased had been examined in the presence of the prisoner, and the deposition had been read upon the trial. The jury found the prisoner guilty. Ld. C. B. *Richards* afterwards respite the execution, in order that the opinion of the judges might be taken as to the admissibility of this evidence; and a great majority of those present being of opinion that the evidence had been properly received, the prisoner was executed. *R. v. Charles Smith*, C. C. R. 339. 1817. 2 *Stark. N. P.* 208. 1 *Holt's Rep.* 614. S. C. 2 *Stark. Ev.* 488, 489.

So, although the charge on which the depositions were taken was different from that for which the prisoner was tried.

Shall take his examination.] And in order thereunto, if by some reasonable occasion the justice cannot at the return of the warrant take the examination, he may by word of mouth command the constable or any other person to detain in custody the prisoner till the next day, and then to bring him before the justice for further examination. And this detainer is justifiable by the constable or any other person, without showing the particular cause for which he was to be examined, or any warrant in writing. 1 *Hale*, 585. 2 *Hale*, 120.

Detention for further examination.

But the time of the detainer must be no longer than is necessary for such purpose. In *Scavage v. Tateham* it was holden, that a party could not be detained sixteen days; and it was there said that the space of three days (a) is a reasonable time. *Cro. Eliz.* 829. 2 *Haw. c.* 16. § 12. See the case of *Kendal and Roe*, 12 *Howell's Sta. Tri.* 1876.

Must be for a reasonable time only.

Mr. Justice *Park*, in his charge to the grand jury at *Monmouth Sum. Ass.* 1823, said, "You are here assembled as grand jurors,

Power of justices of the peace to com-

(a) The usual practice at the present day is stated to be from three days to three days, by a written *mittimus*. 1 *Chitt. Crim. L.* 75. *Vide ante*, tit. *Commitment*.

mit for further examination.

though many of you are magistrates, and through you I must address what I am about to say to magistrates in general. There has been a great irregularity in the commitment of the man in the borough gaol charged with horse-stealing. It is the duty of those who administer justice never to neglect the petitions of the poor; and I received a letter purporting to be signed by this prisoner, stating and complaining that he had been committed on the 27th of *May* last for further examination, that he never had been further examined, and that he never had been, up to that time, (the 25th *July*,) committed for trial! I took for granted it was like many of those letters which persons in my situation often receive; but when the calendar was presented to me on *Tuesday* morning, at *Hereford*, I then found he was, on the 30th *July*, committed for trial, a period of two calendar months and three days after he was first examined! I received from a magistrate of the borough, this morning, an account of various proceedings, and probably satisfactory reasons could be given for this delay, and it is not to find fault with this that I mention it. I do it as a matter of caution to all magistrates, and to state what I conceive to be the law on the subject. That a magistrate may commit for further examination there can be no doubt, because it is not always that the witnesses can be brought forward in the first instance, or the matter may not be ripe for trial; but the further and absolute commitment must be in a reasonable time. What is a reasonable time is a mixed question of law and fact, which those who are to exercise a judgment upon it must decide at the time; but, generally speaking, and without exception almost, two whole months cannot be a reasonable time. A magistrate ought as speedily as possible to make all inquiry. I state that with the greatest confidence, because I can state it on the authority of the twelve judges of *England*; for a case was submitted to us about two years ago, by H. M.'s command, in which that point incidentally came under consideration, and the judges were of opinion, that a further commitment could only be for a *reasonable* time, and that the jury must have found the commitment to be only for a reasonable time, otherwise the man would have been acquitted. (a) It is distressing to see in the calendar of

Commitment for further examination may be without writing.

(a) The editor is enabled to explain this allusion of Mr. Justice *Park*: *Samuel Gooding* was convicted at the *London Sessions* in *May* 1820, for assisting *John Henry Davis* to escape from the *Giltspur Street* Compter, where he had been confined on a charge of forgery. The case was afterwards submitted by H. M. to the judges, in consequence of a petition presented by the prisoner, *Gooding*, alleging, that *Davis* never was in *legal* custody, and, therefore he (*Gooding*) could not legally be found guilty in aiding his escape; the fact being, that *Davis*, at the time of the escape, was under commitment for further examination merely, but no warrant, commitment, or written authority was ever made out by the lord mayor (who was the committing magistrate), or any other justice of the peace. The only question submitted to the judges was, whether a commitment for further examination was legal, not being in writing? Their lordships were unanimously of opinion, that such a commitment for a reasonable time, though not in writing, was good. (See 2 *Hale*, 120, 121., and *Cro. Eliz.* 829. *Scavage v. Tateham*.) But they added, that they considered reasonable time to be a mixed matter of law and fact; and that, as the facts of the case were not fully detailed, they could form no opinion in fact whether the time in the particular case was, or was not, a reasonable time: but they presumed that it must have appeared at the trial that the time was reasonable, as otherwise he ought to have been acquitted. MS. See *Davis v. Bank of England*, M. 1824. 2 *Bingh. Rep.* 393. — (Note to former edition.)

so respectable a county a commitment of this description, and that a man committed on the 27th of May 1823, for further examination, should not have been further examined until the 30th of July following."

In accordance with these principles, where a magistrate had committed plaintiff on a charge of felony for fourteen days for further examination, and an action of trespass for imprisonment was brought in consequence, the jury having found that the commitment was *bonâ fide*, and from no improper motive, but that the time was unreasonable, the court held that such commitment was illegal, and that the action might be maintained. *Davis v. Capper*, 10 B. & C. 28. See *antè*, tit. Commitment.

The examination of the person accused ought not to be upon oath. 1 Hale, 585. *Phill. Ev.* 106.

Prisoner's examination not to be upon oath.

And where the examination of a prisoner before the magistrate purports to have been taken on oath, no evidence on the trial is admissible to show that in fact the examination was not on oath; as appears in the following case.

R. v. Smith and Hornage, *York Spring Ass.* 1816, 1 Stark. N. P. 242. This was an indictment for sacrilege alleged to have been committed in *Sheffield* church. The prosecutors tendered in evidence the examination of *Hornage* before the magistrate previous to his commitment; this was written under the following words, which, except as to the name, were printed:—"The examination of ——— *Hornage*, taken on oath before me," &c. and was undersigned by the magistrate.—Upon the objection being taken, the examination was rejected, because it purported to have been taken on oath; and *Le Blanc J.* would not permit a witness to be examined for the purpose of showing that no oath had in fact been administered to the prisoner, saying, that he could not allow that which had been sent in under the hand of a magistrate to be disputed.

A prisoner, when taken on suspicion before a magistrate, is to be allowed to speak voluntarily, and give his free account; and he ought not to be examined or questioned by the magistrate like a common witness: and when a person had been so examined, his account was rejected by *Richards C. B.* as inadmissible, though nothing like a threat or promise had been used. 1 *Phill. Ev.* 106.

Prisoner is to speak voluntarily.

R. v. John Wilson, *Durham Sum. Ass.* 1817, 1 Holt, 597. The prisoner was indicted for uttering forged notes, knowing them to be forged. There was nothing particular in the immediate act of uttering; and the question was, as to the prisoner's knowledge. An accomplice was the principal witness; and to confirm his evidence, the counsel for the prosecution produced the prisoner's examination before the magistrate who committed him. It was tendered, not as a confession, but as containing facts which appeared upon the prisoner's examination confirmatory of the testimony of the accomplice. The magistrate being examined, stated that he held out no hopes or inducement to the prisoner, employed no threats, but that he had examined him at a considerable extent, in the same manner as he was accustomed to examine a witness. The prisoner, however, was not sworn. — *Richards* Ld. C. B. "I think I am not at liberty to suffer this examination to be read. No matter whether a prisoner be sworn or not. An examination of itself imposes an obligation to speak the truth. If a prisoner will

The examination of a prisoner before a magistrate who examines such prisoner as a witness, although he holds out no threat or inducement, cannot be used against him.

confess, let him do so voluntarily. Ask him what he has to say. But it is irregular in a magistrate to examine a prisoner in the same manner as a witness is examined. I must reject this examination." The prisoner was acquitted.

If the offender, upon his examination before the justice of the peace, shall confess the matter, it shall not be amiss that he subscribe his name or mark to it. *Dalt. c. 164. p. 377.*

Signature of prisoner.

The examination of the prisoner when reduced into writing ought to be read over to him, and is usually tendered to him for his signature. The signature, however, of the prisoner is not essentially necessary, but only for precaution and facility of future proof.

Examination taken down but not signed by prisoner.

In *Lamb's case, 2 Leach, C. C. 625.*, it was held by a majority of the judges, that an examination containing the prisoner's confession, taken in writing by a committing magistrate, and read over to the prisoner, who admitted it to be true, but refused to sign it, would have been evidence at common law, and was not rendered inadmissible by any provision in stats. 1 & 2 and 2 & 3 *Ph. & M. Vide tit. Confession.*

In a case where the clerk to the magistrate stated that he had taken down the examination from the prisoner's mouth, and it was read over to him, and offered to him to sign, which he declined doing, *Wood B.* refused to receive it in evidence, the prisoner not having admitted the truth of what was stated in the examination. *R. v. Telicote, 1 Stark. R. 483.*

Minutes of the prisoner's examination, which have not been signed by him, nor read over to him after they were taken in writing, though they cannot be admitted as evidence as a judicial examination, may yet be used by a witness who was present when the minutes were made, as a memorandum to refresh his memory. *Laver's case, 16 Howell's Sta. Tri. 214. 1 Phill. Ev. 107.*

Proof of information.

Informations taken before a justice of the peace or coroner, pursuant to the stats. of *P. & M.*, before they are admitted in evidence against the party accused, ought to be regularly proved by oath of the justice or coroner who took them, or by the clerk who reduced them to writing, to be the true substance of what the informer stated upon oath. *2 Hale, P. C. 57. 284. 1 Phil. Ev. 379.* But it is not necessary to prove that they were signed by the witness. *R. v. Flemming & Wyndham, 2 Leach, 854. 2 Stark. Ev. 486. infra.*

Witnesses.

Information of them that bring him.] Or of other witnesses, whom the justice may cause to appear before him in pursuance of his summons (E.) for that purpose. *Dalt. c. 164.*

To be examined on oath.

And this information must be upon oath. *Dalt. c. 164. 1 Hale, 586.*

9 G. 4. c. 32. Quakers or Moravians required to give evidence may, instead of an oath, make their solemn affirmation, which shall be of the same effect in all cases civil or criminal.

But by 9 G. 4. c. 32. every Quaker or Moravian, who shall be required to give evidence in any case whatsoever, criminal or civil, shall instead of taking an oath in the usual form, be permitted to make his or her solemn affirmation or declaration, in the words following; that is to say, "I *A. B.* do solemnly, sincerely, and truly declare and affirm;" which said affirmation or declaration shall be of the same force and effect, in all courts of justice, and other places where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form; and if any person making such affirmation or declaration shall be convicted of hav-

ing wilfully, falsely, and corruptly affirmed or declared any matter or thing, which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties, and forfeitures to which persons convicted of wilful and corrupt perjury are or shall be subject.

By 3 & 4 W. 4. c. 49., all Quakers and Moravians are permitted to make their solemn affirmation or declaration, instead of taking an oath, in all places, and for all purposes whatsoever where an oath is or shall be required, either by the common law, or by any act of parliament already made or hereafter to be made, to be of the same force and effect as if an oath had been taken in the usual form; and the same form of declaration is given as in the preceding statute, with the like punishment in case of a wilful, false, and corrupt affirmation, &c.

By 3 & 4 W. 4. c. 82., every person belonging to the sect called separatists, who shall be required upon any lawful occasion to take an oath in any case where by law an oath is or may be required, shall, instead of the usual form, be permitted to make his solemn affirmation or declaration in the words following (here follows the form), to be of the same force and effect in all courts of justice and other places whatsoever, as if he had taken an oath in the usual form.

By § 2, if any person making such affirmation or declaration shall in fact not be a separatist, or shall wilfully, falsely, and corruptly affirm, &c. he shall incur the same penalties and forfeitures as in case of wilful and corrupt perjury.

It is not essential to the validity of depositions, that they should be signed by the deceased witness. In *Flemming's case*, (2 Leach, 854.) on an indictment for a rape, all the judges concurred in opinion, that the deposition of a girl deceased, on whose person the crime had been perpetrated, taken on oath by the committing magistrate, had been properly admitted in evidence at the trial, though such deposition was not signed by the deceased. 1 Phill. Ev. 352.

Or as much thereof as shall be material to prove the felony.] Yet it seemeth also just and right, that the justices who take information against a felon, or person suspected of felony, should take and certify as well such information, proof, and evidence, as goeth to the acquittal or clearing of the prisoner, as such as makes against the prisoner: for such information, evidence, or proof so taken is only to inform the king and his justices of gaol delivery of the truth of the matter. Dalt. c. 165.

One of the objects of the legislature in passing the statutes was to enable the judge and jury, before whom the prisoner is tried, to see whether the witnesses at the trial are consistent with the account given by them before the committing magistrate. See the judgment in *Lambe's case*, 2 Leach, 552. Thus it was admitted in *Ld. Stafford's case*, 7 Howell's Sta. Tri. 1361. et seq. 2 Haw. c. 46. § 22., that the depositions of a witness, taken before a justice of the peace, might be read at the desire of the prisoner, in order to take off the credit of the witness by showing a variance between the depositions and the evidence given in court *vidé voce*. 1 Phill. Ev. 353.

Shall certify at the next gaol delivery.] And yet for petty larcenies, and small felonies, the offenders may be tried at the

3 & 4 W. 4. c. 49. Quakers and Moravians may make affirmation instead of an oath in all cases.

Penalty on false affirmation.

3 & 4 W. 4. c. 82. Separatists may make affirmation instead of oath.

False affirmation to be punished as perjury.

Deposition need not be signed by witness.

Evidence in favour of prisoner ought to be taken down.

Object of legislature in passing stats. P. & M.

quarter-sessions, and the examinations and informations may be certified thither. *Dalt. c. 164.*

A mandamus will not lie to compel a magistrate to produce depositions taken before him on a charge of felony, for the purpose of founding an indictment of perjury against the deponents: the magistrate must be subpoenaed to produce the depositions, which may be read in evidence before the grand jury. (a)

In the matter of ———, one of the Justices of the Peace for the County of Bedford, M. 60 G. 3. 1 Chitt. Rep. 627. On motion for a rule to show cause why a writ of *mandamus* should not be issued, directed to a magistrate for the county of *Bedford*, commanding him to produce certain depositions taken before him, on a charge of felony, in order to enable the party against whom the complaint was made to institute a prosecution against the deponents for perjury. — *Abbott C. J.* This is an application completely without precedent; and as no case is cited in support of it, I see no reason why we should assume a power which it does not appear the law has afforded us. I am not aware of any thing at all analogous to such a motion. We have no power to issue a *mandamus* to a magistrate for any such purpose as that stated at the bar. — *Bayley J.* You may subpoena the magistrate before the grand jury, and from hearing the depositions taken before him read, the grand jury may make a presentment. R. R.

To be holden within the limits of their commission.] And yet examinations taken by justices of the peace in one county, may be by them certified in another county, and there read, and given in evidence against the prisoner. *Dalt. c. 164.*

To bind by recognizance.] And upon refusal may commit the person refusing. 1 *Hale, 586.*

A justice of the peace may commit a *feme covert* who is a material witness, upon a charge of felony brought before him, and who refuses to appear at the sessions to give evidence, or to find sureties for her appearance.

Bennet and wife v. Watson and another, T. 1814. 3 M. & S. 1. Trespass for assault and imprisonment of the wife. *Plea, not guilty.* At the trial before *Thompson C. B.* at *Kent Lent Ass., 1814*, a verdict of one shilling damages was found against one of the defendants (the plaintiff having failed in proving notice to the other). The case was this: The defendant *Watson* was a magistrate residing at *Woolwich*, and *Newhall*, the other defendant, a constable of that place. On the 1st of *January, 1813*, a person having been apprehended on suspicion of felony, and carried before *Watson*, the plaintiff's wife was examined as a witness against the prisoner, and after her examination was desired by *Watson* to procure her husband's recognizance for her appearance at the next quarter sessions. Not having done so, she was, on the 13th of *January*, sent for by *Watson*, who again requested her to procure her husband, or some other person, to be surety for her appearance to give evidence at *Maidstone*, where the sessions were to be holden; to which she answered that she would not go, and nobody should make her. Persisting in her refusal, she was, on the 14th of *January*, conveyed by *Newhall* (under warrant from *Watson*) inside the coach to *Maidstone*, where, on the 15th, she gave evidence, and the prisoner was convicted: and without her evidence

(a) But in the case of *The King v. Smith, 1 Stra. 126.*, a rule was granted, after time had been taken to deliberate, to compel a justice of the peace to cause an examination taken before him to be produced at the trial, and to give the party a copy in the mean time: and in *Welsh v. Richards, Barnes, 468.*, in an action for a malicious prosecution, a rule was obtained for the committing magistrate to show cause why he should not permit the plaintiff to inspect and take a copy of the information at his own expense, and cause the original information to be produced at the trial; and after cause shown, the rule was made absolute on the authority of the case in 1 *Str. 126.* The practice and authorities are stated in 1 *Chitt. Crim. L. 88, 89. 575. 585.*

he could not have been convicted.—A *R. N.* having been obtained, 2 *Haw. B. 2. c. 8. § 58.* and *c. 16. § 2.* were cited to show that justices may commit those who refuse to be bound, if it appear that they can give material evidence.—After argument, *Ld. Ellenborough C. J.* said, that the law intended that the witness should be forthcoming at all events, and it is a lenient mode which the statute provided to permit the witness to go at large upon his own recognizance. However, that is only one mode of accomplishing the end, which is, the due appearance of the witness; therefore, when that mode as well as the end is frustrated, as far as it can be, by the witness's refusal, it seems but reasonable that the justice should be warranted in committing, which is the only means left of securing the end.—*Le Blanc J.* said, the justice is not to commit by way of punishment, but in order that crimes may not go unpunished; he is to secure the appearance of the witness, who is to establish the delinquency, after he shall have been examined before him on oath. The statute has provided that the magistrate shall bind him by recognizance. If he had done more than was necessary to secure her appearance, it would have been bad; but in this instance he has done no more than was necessary for that purpose.—*Dampier J.* said, The power of commitment is absolutely necessary to the existence of the stat. of *Ph. & M.*, for unless there were such a power, every person would of course refuse to enter into a recognizance, and the magistrate could not compel him; and then, if he could further avoid being served with a subpoena, the party delinquent might escape unpunished. This consideration, coupled with *Ld. Hale's* judgment, founded on the practice, seems to me sufficient to establish the power. Rule absolute.

But a justice of the peace is not authorised by law to commit a witness willing to enter into a recognizance for his appearance to give evidence against an offender, merely because such witness is unable to find a surety to join him in such recognizance, nor ought the justice to require such surety. The party's own recognizance (at the peril of commitment) is all that ought to be required. So held *per Graham B., Bodmin Sum. Ass. 1817.* MS.

At *Somersetshire Sum. Ass. 1817*, it appeared that two poor women, witnesses in trifling cases, had been imprisoned nine months on account of the prevalence of a malignant fever in *Ilchester* gaol, which prevented the prisoners from being sent for trial in the spring to *Taunton* gaol.

The practice of committing witnesses unable to find sureties for their appearance is clearly repugnant to every principle of the English law.

And at the *Sum. Ass. 1821*, for the same county, Mr. Baron *Graham*, in his charge to the grand jury, expressed in the strongest terms his disapprobation, at finding that a boy of only eleven years of age had been sent to gaol and kept there till the assizes, for want of sureties to appear as a witness to give evidence against a man committed upon a charge of felony. He had not expected to meet with such an instance in this country in the present enlightened age; it resembled the barbarous practice of days long since gone by. When witnesses had given their depositions, it was the duty of magistrates to bind them over to appear at the assizes or sessions to give evidence against the prisoner; and per-

Illegality of
commitment of a
witness for
want of sureties
to appear to
give evidence.

haps, in some cases, they might be justified in requiring sureties from the witness. But if a poor man or woman, not resident at or near the place, should be a necessary witness, it was too much to require sureties, and in default thereof to commit them: the magistrate's duty was to bind them over to appear on their own recognizance, and not to ask impossibilities. But to send an innocent child, only eleven years old, to gaol for three months, because he could not obtain two responsible persons to be bound for his appearance to give evidence, was most unjustifiable; it was inflicting upon him, considering his tender age, by an imprisonment of three summer months, a greater punishment than the culprit himself would, if convicted, receive. In Italy, it was true, this practice prevailed of old; but what was the consequence? When assassinations and the most atrocious crimes were openly committed in their streets, persons present and eye-witnesses, instead of preventing or appearing against the criminals, ran away and hid themselves, because in that country the witnesses were sent to prison together with the accused, to secure their attendance at the trials. He could not refrain from making these animadversions on this practice, which he trusted would never again occur.

Custody of depositions.

In an action for maliciously, and without probable cause, charging plaintiff with an assault before a magistrate, the magistrate proved that the depositions taken before him were reduced into writing, and that he delivered them at the court of quarter sessions to the clerk of the peace, or his deputy. The clerk of the peace stated that a bill of indictment for the assault was preferred, and that the grand jury returned *ignoramus*, and that it was usual, in such case, to throw away or destroy the depositions; that he had searched among his papers, and could not find them. Held, that parol evidence of their contents was admissible, and that it was not necessary to call the deputy clerk of the peace to shew that the original depositions were not in his possession, inasmuch as it was his duty, if he had received them, to have delivered them to his principal; and not being in his custody, it was to be presumed that they were lost or destroyed. *Freeman v. Arkell*, M. 4 G. 4., 2 B. & C. 494.

Parol evidence of, when lost or destroyed.

Recognizance to prosecute.

The parties grieved ought to be bound, not only to give evidence, but also to prefer a bill of indictment against the prisoner. *Dalt. c. 164.*

44 G. 3. c. 102.

Habeas corpus for witnesses.

By stat. 44 G. 3. c. 102., any judge of the superior courts in England or Ireland, and of great session in Wales, and the county palatine of Chester, may award writs of *habeas corpus*, for bringing prisoners before courts of record to be examined as witnesses. See *antè*, tit. Bail, § ix.

An attorney has no right to be present at examination of persons charged with felony.

An attorney has no right to be present during the investigation of a charge of felony before a magistrate. *R. v. Borron, esq.* H. 60 G. 3. & 1 G. 4., 3 B. & A. 432.

Cox, gent. onc, &c. v. Coleridge, esq. and another, M. 1822, 1 B. & C. 37. A prisoner when examined before magistrates on a charge of felony is not entitled as of right to have a person skilled in the law present as an advocate on his behalf, it being a preliminary investigation only, and not conclusive upon him. See tit. Justices of the Peace, § 5.

A. The Examination of a Person charged with Felony.

A.

County of } *THE examination of A. O., of ———, labourer,*
 to wit. } *taken before me, J. P. esquire, one of his majesty's*
 justices of the peace, acting in and for the said county
 of ——— [or, in the case of bail, taken before us ———, two of
 his majesty's justices of the peace acting in and for the said county,
 one of us being of the quorum], the ——— day of ———, in the year
 of our Lord one thousand eight hundred and ———.

The said A. O. being charged before me [or, us], the said justice,
on the oath of A. I., of ———, yeoman, with feloniously stealing,
at the parish of ———, in the said county, on the ——— day of
——— instant, one silver spoon of the value of ten shillings, the
property of the said A. I.

Upon his examination now taken before me [or, us] saith ———

Taken before me [or, us] the day and } A. O.
year above mentioned. J. P. }

It is recommended that the justice, or his clerk, do take the examinations of persons accused in the first person, and in the identical words and expressions used by the prisoner. See *antè*, p. 199. and 1 *Phill. Ev.* 106.

B. The Examination of a Witness against a Person charged with Felony.

B.

County of } *THE examination of A. I., of ———, yeoman,*
 to wit. } *taken on oath this ——— day of ———, in the*
 year of our Lord one thousand eight hundred and
 ———, before me, J. P. esquire, one of his majesty's justices of
 the peace acting in and for the said county of ———, in the pre-
 sence and hearing of A. O., charged this day before me the said
 justice with feloniously stealing, at the parish of ———, in the said
 county, on the ——— day of ——— instant, one silver spoon of the
 value of ten shillings, the property of the said A. I.

This deponent saith, On the ——— day of the present month of
——— I (a) saw the silver spoon now produced in the possession of
the prisoner A. O. [or, as the case may be]. (a) See *antè*, p. 199.

Taken and sworn before me the } A. I.
day and year above mentioned. J. P. }

The plain and obvious meaning of the words spoken by the witness ought to be taken down, and not merely the result of the evidence. *Vide* 1 *Phill. Ev.* 106.

C. Recognizance to prefer a Bill of Indictment, and give Evidence.

C.

County of } *BE it remembered, that on the ——— day of*
 to wit. } *———, in the ——— year of the reign of*
 ———, A. I., of ———, in the said county, yeo-
 man, personally came before me, H. C., doctor of laws, one of the
 justices of our said lord the king assigned to keep the peace in the
 said county, and acknowledged himself to owe to our said lord the
 king the sum of ———, of good and lawful money of Great Britain,
 to be made and levied of his goods and chattels, lands and tenements,
 to the use of our said lord the king, his heirs and successors, if he the
 said A. I. shall fail in the condition indorsed. H. C.

The condition of the within-written recognizance is such, that whereas one A. O., late of ———, was this present day brought before the justice within mentioned by the within-bounden A. I., and was by him charged with the felonious taking and carrying away ———, of the goods of him the said A. I., and thereupon was committed by the said justice to the common gaol in and for the said county; if, therefore, he the said A. I. shall and do, at the next general quarter sessions of the peace [or, gaol delivery] to be holden in and for the said county, prefer, or cause to be preferred, one bill of indictment of the said felony against the said A. O., and shall then also give evidence there concerning the same, as well to the jurors that shall then inquire of the said felony, as also to them that shall pass upon the trial of the said A. O., that then the said recognizance to be void, or else to stand in full force for the king.

D.

D. Recognizance to give Evidence.

County of } **BE** it remembered, that on the ——— day of
to wit. } ———, in the ——— year of the reign of
———, A. W., of ———, in the said county, yeoman, did come before me, H. C., doctor of laws, one of the justices of our said lord the king assigned to keep the peace in the said county, and did acknowledge himself to owe to our said lord the king the sum of ten pounds of lawful money of Great Britain, to be made and levied of his goods and chattels, lands and tenements, to the use of our said lord the king, his heirs and successors, if he the said A. W. shall fail in the condition hereon indorsed [or, under-written, as the case may be].

The condition of the within-written [or, above-written] recognizance is such, that if the within [or, above-bounden] A. W. shall personally appear at the next general quarter sessions of the peace, [or, gaol delivery] to be holden at ———, in and for the said county, and then and there give such evidence as he knoweth, upon a bill of indictment to be exhibited by A. I., of ———, yeoman, to the grand jury, against A. O. late of ———, labourer, for feloniously stealing ———, the property of the said A. I.; and in case the said bill be found a true bill, then, if the said A. W. shall then and there give evidence to the jurors that shall pass on the trial of the said A. O., upon the said bill of indictment, and not depart thence without leave of the court; then this recognizance to be void, or else remain in its full force.

E.

E. Summons of a Witness.

Westmorland. To the constable of ———.

WHEREAS information hath been made before me, J. P. esquire, one of his majesty's justices of the peace for the said county, that [here set forth the substance of the complaint]; and that A. W., of ———, in the said county, yeoman, is a material witness to be examined concerning the same: These are therefore to require you to summon the said A. W. to appear before me, at ———, in the said county, on ——— the ——— day of ———, at the hour of ——— in the ——— noon of the same day, to testify his knowledge concerning the premises. Herein fail you not. Given under my hand and seal, the ——— day of ———, in the ——— year of the reign of ———.

Exchequer Bills. See **Larceny.**

Execution.

WHERE a person attainted hath been at large after his attainder, and afterwards is brought into court and demanded why execution should not be awarded against him, if he deny that he is the same person, it shall immediately be tried by a jury returned for that purpose. 2 *Haw. c. 51. § 3.*—*Vid. Ratcliff's case, Fost. 40, 41. 1 Bla. R. 3. S. C.*; but see Lord Kenyon's observations in this case in *Duberley v. Gunning, Peake's C. N. P. 98.*

The court may command execution to be done, without any writ. 2 *Haw. c. 51. § 4.*

In fixed and stated judgments, the law makes no distinction between a peer and a commoner, or between a common and ordinary case, and one attended with extraordinary circumstances; for which reason it was adjudged in *Felton's case*, who murdered the duke of *Buckingham*, that the court could not order his hand to be cut off, nor make it part of the sentence that his body should be hanged in chains, but that the body after execution, being at the king's disposal, might be hung in chains, or otherwise ordered, as the king should think fit. 2 *Haw. c. 48. § 2.*

An execution cannot be lawfully executed by any but the proper officer. 2 *Haw. c. 51. § 6. 2 Hale, 411.*

It must be done pursuant to the judgment, and cannot be altered by the king, as from beheading to hanging. *Hale's Sum. 272. 2 Hale, 411.*

But the king may pardon part of the execution; as in treason he may pardon all but the beheading. *Hale's Sum. 272.— 2 Hale, 412.*

He may alleviate, but not aggravate, punishment beyond the intension of the law. *Fost. 269.*

It is clear that if a man, condemned to be hanged, come to life after he be hanged, he ought to be hanged again; for the judgment was not executed till he was dead. 2 *Haw. c. 51. § 7.*

For execution in cases of *Murder*, see *Homicide, s. v.*

Question of identity after attainder.

No writ necessary for execution.

No change of punishment legal.

Proper officers alone can execute.

The king cannot change punishment.

He may pardon, but cannot aggravate it.

Person restored from hanging must be re-executed.

Extortion.

[Stats. 3 Ed. 1. c. 26.—31 El. c. 5.—55 G. 3. c. 50.]

IT is said that extortion, in a large sense, signifies any oppression under colour of right; but that in a strict sense it signifies the taking of money, by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due. 1 *Haw. c. 68. § 1.*

And by stat. 3 Ed. 1. c. 26. (which is only in affirmance of the common law), *No sheriff, nor other the king's officer, shall take any reward to do his office, but shall be paid of that which they take of the king; and he that so doth shall yield twice as much, and shall be punished at the king's pleasure.*

No sheriff nor other the king's officer.] Under these words, the law beginning with the *sheriffs*, are understood *escheators*, *coroners*, *bailiffs*, *gaolers*, and other *inferior officers* of the king, whose offices were instituted before the making of this act, which do

Definition.
3 Ed. 1. c. 26.

All public officers.

any way concern the administration or execution of justice, or the common good of the subject, or for the king's service. *2 Inst.* 209.

Magistrates.

Also the justices of the peace, whose office was instituted after this act, are bound by their oath of office to take nothing for their office of justice of the peace to be done, but of the king, and fees accustomed, and costs limited by statute.

**Unless by stat.
or ancient cus-
tom.**

And generally, no public officer shall take any other fees or rewards for doing any thing relating to his office than some statute in force gives him, or else as hath been anciently and customably taken; and if he do otherwise, he is guilty of extortion. *Dalt. c. 41. 1 Russ. 145.*

Coroner.

A coroner is guilty of extortion if he refuses to take the view of a dead body till the fees are paid. *1 Russ. 145.*

Under-sheriff.

So, if an under-sheriff gets his fees by refusing to execute process till they are paid, or takes a bond for his fee before execution is sued out. *1 Russ. ib.*

**Miller.
Ferryman.**

So, if a miller, or a ferryman, where custom has ascertained the amount of the respective tolls, takes more than the custom warrants, it is extortion. *1 Russ. ib.*

Indictment.

Two persons may be indicted jointly for extortion in taking money where no fee is due, for there are no accessories in extortion. *1 Russ. 146.*

**The exact sum
need not be
stated.**

The indictment must state a sum which the defendant received, but it is not necessary to prove the exact sum as laid in the indictment. *1 Russ. 146.*

**Collector of
duties infor-
mally ap-
pointed.**

But where a person was appointed collector of certain duties, under stat. 43 G. 3. c. 99., by the proper constituted authorities, and considered himself and was considered by those authorities to be such collector, but whose appointment was informally made, it was decided that he could not be indicted at common law for the receipt of duties *by colour and pretence of being collector* of such duties, though the money were fraudulently collected and misapplied by him, because he was in fact appointed collector, and in that character received the money. *R. v. Dobson, 7 East, 218.*

**Such officers
cannot take
more than par-
liament has
allowed.**

Shall take any reward.] Therefore by the statute, they can at this day take no more for doing their office than hath been since allowed to them by authority of parliament. *2 Inst. 210.*

**Prescriptions
contra, void.**

All prescriptions which have been contrary to this statute, and to the common law, in affirmation of which it is made, have been always holden to be void. *1 Haw. c. 68. § 2.*

**Promise to pay,
void.**

It has been resolved, that a promise to pay them money for doing of a thing, which the law will not suffer them to take any thing for, is merely void. *1 Haw. c. 68. § 2.*

**Fees other than
for doing his
office.**

To do his office.] It is not said, that he shall take no reward generally, but no reward to do his office: thus the fee of 20d., called bar fee, time out of mind taken by the sheriff of every prisoner that is acquitted, is not against this statute; for it is not taken for doing his office. *2 Inst. 210.*; but see stat. 14 G. 3. c. 20. *post*, p. 216.

**No fees on
acquittals, &c.**

By 55 G. 3. c. 50. § 4., prisoners charged with felony or misdemeanor, against whom no indictment is found, or who are acquitted on their trial, shall be discharged without payment of any fee whatever.

By § 9., any clerk of assize, clerk of the peace, &c., or their deputies or other officers exacting such fees, are rendered incapable of holding their offices, and are declared guilty of a misdemeanor.

Exactng them
a misdemeanor.

It cannot be intended to be the meaning of the statute to restrain the courts of justice, in whose integrity the law always reposes the highest confidence, from allowing reasonable fees for the labour and attendance of their officers; the chief danger of oppression is from officers being left at their liberty to set their own rates on their labour, and make their own demands; but there cannot be so much fear of these abuses, while they are restrained to known and stated fees, settled by the discretion of the courts, which will not suffer them to be exceeded, without a proper resentment.

Regular fees
allowable.

1 *Haw. c. 68. § 3.*

But in the ecclesiastical court a person was libelled against for fees, and upon motion a prohibition was granted, for that it was holden that no court had a power to establish fees; the judge of a court may think them reasonable, but that is not binding; but if on a *quantum meruit* a jury think them reasonable, then they become established fees. *Gifford's case*, 1 *Salk.* 393.

Courts cannot
establish fees at
their discretion.

The fees in sessions, for traversing, trying, or discharging indictments, discharging recognizances, and the like, do vary according to the different customs in different places. *Dalt. c. 41.*

Shall yield twice as much] At the common law this offence is severely punishable at the king's suit by fine and imprisonment, and also by a removal from the office in the execution whereof it was committed. And this statute doth add a greater penalty than the common law did give; for hereby the plaintiff shall recover his double damages. 2 *Inst.* 210. 1 *Haw. c. 68. § 5.*

Punishment of
extortion.

Double
damages.

And by stat. 31 *El. c. 5.*, actions for extortion may be laid in any county.—N. B. This is doubted—see 1 *Russ.* 146.

31 *El. c. 5.*

At the king's pleasure.] That is, by the king's justices, before whom the cause depends. 2 *Inst.* 210.

Indictment for Extortion in a Gaoler.

County of } *THE jurors for our lord the king upon their oath*
_____. } *present, that A. O. late of _____ in the said county,*
yeoman, on the _____ day of _____, in the _____ year of the reign of _____,
was taken up on suspicion of having committed a certain felony, by
_____ constable of _____ in the said county, by virtue of a warrant
directed to the said _____ under the hand and seal of Sir William
Dalston, knight, then and yet one of the justices of our sovereign lord
the king assigned to keep the peace in the said county, and was on the
same day in the year aforesaid committed by him the said Sir Wil-
liam Dalston to A. G. keeper of the goal of our said sovereign lord
the king at _____ in the said county, under the custody of him the
said A. G. to be safely kept, upon suspicion of the felony aforesaid,
and the said A. O. was detained in that prison under the custody of
the said A. G. from the time that he was committed to the said prison
for one month from thence next ensuing, upon suspicion of the said
felony; nevertheless the said A. G., being such keeper as aforesaid,
in no wise regarding the statute in that case made, and the penalty
therein contained, did on the _____ day of _____, at _____ afore-
said, in the said county, demand and receive _____ pounds of lawful

money of Great Britain of and from the said A. O. for ease and favour in the said gaol for the said time, in contempt of our said sovereign lord the king, and against the form of the statute aforesaid, and against the peace of our said sovereign lord the king, his crown and dignity.

Indictment for Extortion of a Bailiff.

County of } **T**HE jurors for our lord the king upon their oath present, that A. B. late of — in the said county, yeoman, being bailiff of the hundred of — in the said county, on the — day of — in the — year of the reign of —, at — in the said county, by pretext and colour of his said office, did unjustly and by extortion take and extort 5s. of one A. I. of — in the said county, yeoman, one of the freeholders qualified to serve upon juries in the said county, to excuse the said A. I. from attending or appearing at the assizes that were then next to be holden in and for the said county, when in fact the said A. I. was not returned by the sheriff of the said county in any panel of jurors, and also when indeed no such sum of money was due to the said A. B. for his fee for excusing the attendance or appearance of the said A. I. at the assizes aforesaid, to the evil example of other offenders, to the great damage of him the said A. I., and against the peace of our said lord the king, his crown and dignity.

False Pretences, } See tit. Cheat.
False Tokens. }

Fees. See Extortion.

Felo de se. See Homicide.

Felony, &c.

I. Felony.

[14 G. 3. c. 20.—7 & 8 G. 4. c. 28.]

II. Misprision of Felony.

III. Theft or Compounding.

IV. Rewards for apprehending Felons.

[7 G. 4. c. 64.]

Offences committed during juries, &c. or on boundaries of counties.

AS to trials of felonies and misdemeanors committed on board vessels employed on inland navigations, stage coaches, and stage waggons, &c., or on the boundaries of counties, see stat. 7 G. 4. c. 64. §§ 12, 13. tit. Indictment.

I. Felony.

Etymology.

Felony is supposed by some to come from the Saxon *fel*, which signifieth fierce or cruel; of which the verb *fell* signifieth to throw down or demolish; and the substantive of that name is used to signify a mountain rough and uncultivated. But the same word, with a little variation, runneth through most of the European languages, and signifieth more generally an offence at large; and the Saxon word *fellan* signifieth to offend, and *fellnissæ* an offence or failure; and although *felony*, as it is now become a technical

term, signifieth in a more restrained sense an offence of a high nature, yet it is not limited to *capital* offences only, but still retaineth somewhat of this larger acceptation; for petit larceny is felony, although it is not capital.

According to Sir *Henry Spelman's* observation, it signifies such an offence for which during the feudal institution a man should lose or forfeit his estate; which he derives of two northern words, *fee*, which signifies the fief, feud, beneficiary estate, and *lon*, which signifies price or value.

The correct definition, however, of "felony," in our criminal law, appears to be such an offence as occasions a total forfeiture of either goods or chattels, or both, at the common law, and to which the punishment of death may or may not be superadded. 4 *Bl. Com.* 95.

Definition of the offence.

Where a statute made any new offence felony, the law implied that it should be punished with death as well as with forfeiture, unless the offender prayed the benefit of clergy, which all felons were entitled to have once, unless it was expressly taken away by statute. 4 *Bl. Com.* 98. 1 *Russ.* 42.

By statute.

By 7 & 8 G. 4. c. 28. (a) § 6., benefit of clergy with respect to persons convicted of felony is abolished.

Clergy abolished.

By § 7., no person convicted of felony shall suffer death, unless for some felony that was excluded from the benefit of clergy on the first day of the session (Feb. 8. 1827), or made punishable with death by some statute passed since.

Punishment of felony, where capital.

By § 8., persons convicted of felony not punishable with death, and for which no punishment is specially provided, shall be liable, at the discretion of the court, to be transported for seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice whipped (if the court shall think fit), in addition to such imprisonment.

Its punishment where not capital.

§ 9. provides, "That where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet."

Court may order hard labour, or solitary confinement, as part of the sentence of imprisonment.

§ 10. enacts, "That wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence either of imprisonment or of transportation, the court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded."

If a person under sentence for another crime is convicted of felony, court may pass a second sentence, to commence at expiration of first.

Conviction for felony after a previous conviction.

§ 11. "That if any person shall be convicted of any felony not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall so think fit, in addition to such imprisonment."

For allowance of expenses in prosecution for felony, see 7 G. 4. c. 64. § § 22. 24. *et seq.* See tit. *Costs*.

14 G. 3. c. 20. Prisoner acquitted, &c. to be discharged without fee.

By stat. 14 G. 3. c. 20., every prisoner charged with any felony or other crime, or as accessory thereto, before any court holding criminal jurisdiction, against whom no bill of indictment shall be found by the grand jury, or who shall on trial be acquitted, or who shall be discharged by proclamation for want of prosecution, shall be immediately set at large in open court, without the payment of any fee or sum of money to the sheriff, gaoler, or keeper; and such fees as have been usually paid shall cease; and in lieu of such fees the treasurers or proper officers of the county, or of such districts, hundreds, ridings, or divisions of a county as are not usually assessed to the county at large, and of such cities, towns corporate, cinque ports, liberties, franchises, and places not paying to the county rates, shall pay such sum as has been usually paid on that occasion, not exceeding 13s. 4d. for each prisoner, on certificate signed by a judge or justice before whom such prisoner shall have been discharged, out of the general county rate, or public stock of such city, &c. See also 55 G. 3. c. 50. § 4. tit. *Gaols*, § XI. and *antè*, p. 212. tit. *Extortion*.

II. Misprision of Felony.

Definition.

Misprision of felony (from the *French* word *mespris*, a neglect or contempt) is the concealing of a felony which a man knows, but never consented to; for if he consented, he is either a principal or accessory in the felony, and consequently guilty of misprision of felony, and more. 3 *Inst.* 36. 1 *Hale*, 374.

For it is said that every felony includes misprision of felony, and may be proceeded against as a misprision only, if the king please. 1 *Haw. c.* 59. § 1.

Punishment.

The punishment of misprision of felony in a common person, is fine and imprisonment; in an officer, as sheriff or bailiff of liberties, imprisonment for a year, and ransom at the king's pleasure, by the statute of *Edw.* 1. c. 9.

If any person will save himself from the crime of misprision, he must discover the offence to a magistrate with all speed that he can. 3 *Inst.* 140.

Signifies a high misdemeanor.

Misprision in a larger sense is used to signify every considerable misdemeanor, which hath not a certain name given to it in the law.

III. Theftbote or Compounding.

Definition.

Theftbote (from the *Saxon* words *theft* and *bote*, boot or amends) is, where one not only knows of a felony, but takes his goods again, or other amends, not to prosecute. 1 *Haw. c.* 59. § 5. 1 *Russ.* 210.

But the bare taking of one's own goods again, which have been stolen, is no offence, unless some favour be shewn to the thief. Favour shewn to the thief.

1 *Haw. c. 59. § 7.*

This offence is very nearly allied to felony, and is said to have been anciently punished as such: but at this day it is punishable only with ransom and imprisonment, unless it were accompanied with some degree of maintenance given to the felon, which makes the party an accessory after the fact. Punishment.

IV. Rewards for apprehending Felons.

The 7 G. 4. c. 64. § 28. enacts, "That where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine or court of great sessions, to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded fire-arms at any other person, or with stabbing, cutting, or poisoning, or with administering any thing to procure the miscarriage of any woman, or with rape, or with burglary or felonious house-breaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen, every such court is hereby authorised and empowered, in any of the cases aforesaid, to order the sheriff of the county in which the offence shall have been committed to pay to the person or persons, who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time, in or towards such apprehension; and where any person shall appear to any court of sessions of the peace to have been active in or towards the apprehension of any party charged with receiving stolen property, knowing the same to have been stolen, such court shall have power to order compensation to such person in the same manner as the other courts herein-before mentioned: Provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation, as courts are by this act empowered to allow to prosecutors and witnesses respectively."

7 G. 4. c. 64. Court may order rewards to those who have been active in apprehending.

Proviso as expenses.

And by § 29. it is enacted, "That every order for payment to any person in respect of such apprehension as aforesaid, shall be forthwith made out and delivered by the proper officer of the court unto such person, upon being paid for the same the sum of 5s. and no more; and the sheriff of the county for the time being is hereby authorised and required, upon sight of such order, forthwith to pay to such person, or to any one duly authorised on his or her behalf, the money in such order mentioned; and every such sheriff may immediately apply for repayment of the same to the commissioners of his majesty's treasury, who, upon inspecting such order, together with the acquittance of the person entitled to receive the money thereon, shall forthwith order repayment to the sheriff of the money so by him paid, without any fee or reward whatsoever."

Officer to be paid 5s. for the order, and the reward to be paid by the sheriff, who is to be repaid by the treasurer.

7 G. 4. c. 64.
 Allowance may
 be made to
 widow, child,
 or parent of a
 person killed in
 endeavouring to
 apprehend cer-
 tain offenders;
 to be paid by
 the sheriff.

By § 30. it is enacted, "That if any man shall happen to be killed in endeavouring to apprehend any person who shall be charged with any of the offences herein-before last mentioned, it shall be lawful for the court before whom such person shall be tried to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children, in case his wife shall be dead, or to his father or mother, in case he shall have left neither wife nor child, such sum of money as to the court in its discretion shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his or her behalf, to be named in such order by the direction of the court; and every such order shall be paid by and repaid to the sheriff in the manner herein-before mentioned."

Information against a Person for Felony.

County of { *THE information and complaint of A. I. of ——— in the county of ———, yeoman, made on oath before me J. P. esquire, one of his majesty's justices of the peace for the said county, the ——— day of ——— in the year ———, that yesterday in the night or early in the morning of this day divers goods of him the said A. I., to wit, ———, have feloniously been stolen, taken, and carried away from the house of him the said A. I. at ——— aforesaid in the county aforesaid, and that he hath just cause to suspect and doth suspect that A. O. late of ———, labourer, feloniously did steal, take, and carry away the same: [or otherwise, as the case shall be:] And thereupon he the said A. I. prayeth that justice may be done in the premises.*

A. I.

Before me,
 J. P.

Warrant for Felony.

County of { To ———, the constable of ———.

FORASMUCH as A. I. of ——— in the county of ———, yeoman, hath this day made information and complaint upon oath before me ———, one of his majesty's justices of the peace for the said county, that this present day divers goods of him the said A. I., to wit, ———, have feloniously been stolen, taken, and carried away from the house of him the said A. I. at ——— aforesaid in the county aforesaid, and that he hath just cause to suspect and doth suspect that A. O. late of ———, labourer, feloniously did steal, take, and carry away the same: [or otherwise, as the case shall be.] These are therefore to command you forthwith to apprehend him the said A. O., and to bring him before me to answer unto the said information and complaint, and to be further dealt withal according to law. Herein fail you not. Given under my hand and seal the ——— day of ——— in the year ———.

The form of a commitment for felony; see **Commitment**.

The form of a search warrant for stolen goods; see **Search Warrant**.

Fern, Burning of. See **Burning**.

Fireworks.

BY stat. 9 & 10 W. 3. c. 7. § 1., it shall not be lawful for any person (of what age, sex, degree, or quality soever) to make or cause to be made, or to sell or expose to sale any squibs, rockets, serpents, or other fireworks, or any cases, moulds, or other implements for making the same; or to permit the same to be cast, thrown, or fired from out of or in his house, lodging, or habitation, or other place thereto belonging, into any public street, highway, road, or passage; or to throw, cast, or fire, or be aiding in throwing, casting, or firing the same in or into any public street, house, shop, river, highway, road, or passage; and every such offence shall be adjudged a common nuisance.

9 & 10 W. 3. c. 7.
Fireworks a
nuisance.

§ 2. If any person shall make or cause to be made, or give, sell, or offer to sale any squibs, rockets, serpents, or other fireworks, or any cases, moulds, or other implements for making the same, he shall, on conviction before one justice, or chief magistrate, by confession, or oath of two witnesses, forfeit 5*l.*, half to the poor, and half to the prosecutor, to be levied by distress, by warrant of such justice or chief magistrate.

Making and
selling rockets,
&c.

§ 2. And if any person shall permit any of the same to be cast, thrown, or fired from, out of, or in his house, shop, dwelling, lodging, habitation, or other place thereto belonging, into any public street, highway, road, or passage, or any other house or place, he shall forfeit 20*s.* in like manner.

Suffering
rockets to be
fired.

§ 3. If any person shall throw, cast, or fire, or be aiding in throwing, casting, or firing any the same into any public street, house, shop, river, highway, road, or passage, he shall forfeit 20*s.* in like manner; and if he shall not immediately on conviction pay to the justices the said forfeiture for the uses aforesaid, the latter shall commit him to the house of correction, to be kept to hard labour for any time not exceeding one month, unless he shall sooner pay the forfeiture.

Firing rockets.

Where a squib was wantonly thrown among the stands at a fair, and being removed from off that on which it alighted, it occasioned the loss of the eye of a by-stander, it was holden by *De Grey C. J.*, and *Nares and Gould Js.*, against *Blackstone J.*, that all that was done subsequent to the original throwing was a continuation of the first force and first act, which continued till the squib was spent by bursting; and that trespass, not an action on the case, was the proper remedy. *Scott v. Shepherd*, 2 *Blac. Rep.* 892.

Liability of per-
son throwing a
firework.

In a like case at N. P. it was held by Lord *Ellenborough C. J.*, that a schoolmaster who permits an infant pupil under his care to make use of fireworks, is responsible in an action for the mischief which ensues. *King v. Ford*, 1 *Stark. N. P. C.* 421.

By stat. 3 G. 4. c. 126. § 121., a penalty of 40*s.* is imposed for making or assisting in making bonfires, or wantonly letting off any squib, rocket, serpent, or other firework whatsoever, within 80 feet of the centre of any turnpike road. See tit. *Highways (Turnpike)*.

3 G. 4. c. 126.

Information on stat. 9 & 10 W. 3. c. 7. § 2. for selling Fireworks.

County of } *BE it remembered, that on the — day of — in the*
 ————— } *year of our Lord —, at —, in the said county*
 to wit. } *of —, A. I. of —, in the said county, gentleman,*
cometh before me, J. P. esquire, one of his majesty's justices of
the peace in and for the said county, and giveth me, the said justice,
to understand and be informed, that A. O. of the town and parish of
—, in the said county, toyman, at his shop in the said town and
parish, on the — day of this instant month of —, unlaw-
fully and against the form of the statute did sell to one R. F. cer-
tain squibs, serpents, rockets, and other fireworks, whereby the said
A. O. by virtue of the said statute in that case made and provided,
hath for his said offence forfeited the sum of five pounds; wherefore
the said A. I. prayeth the judgment of me, the said justice, in the
premises, and that he may have one moiety of the said forfeiture of
five pounds.

Exhibited, &c.

For casting and throwing Squibs and other Fireworks.

———— That A. O. late of — in the said county, yeoman,
 on the — day of — now last past, at the town and
 parish of — in the said county, in the public street and high-
 way there, unlawfully did throw, cast, and fire certain fireworks,
 against the form of the statute in such case made and provided,
 whereby and by force of the said statute, the said A. O. for his said
 offence hath forfeited the sum of twenty shillings. Wherefore, &c.

Fish and Fisheries.

[7 & 8 G. 4. c. 29.—c. 30.]

No larceny of
 fish, if uncon-
 fined, at C. L.

AS to offences in regard to fish, it is to be understood that larceny cannot be committed of fish in an open river or pond, whatever may be the exclusive right of taking them, being animals in which there is no property, like beasts feræ naturæ; but if they are dead, or confined, and may serve for food, it is otherwise at C. L.: for of fish in a trunk or net, or, as it should seem, in any other enclosed place which is private property, larceny may be committed. 2 East, P. C. 607. The following statutory provisions have however been enacted for the protection of fish.

7 & 8 G. 4. c. 29.
 Taking fish in
 any water situ-
 ated in land
 belonging to a
 dwelling-
 house;
 in any private
 fishery else-
 where.

By 7 & 8 G. 4. c. 29. § 34., "If any person shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling house of any person being the owner of such water, or having a right of fishery therein, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully take or destroy, or attempt to take or destroy any fish in any water not being such as aforesaid, but which shall be private property, or in which there shall be any private right of fishery, every such offender, being convicted thereof before a justice of the peace,

shall forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding 5*l.*, as to the justice shall seem meet: Provided always, that nothing herein-before contained shall extend to any person angling in the day-time; but if any person shall by angling in the day-time unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, he shall, on conviction before a justice of the peace, forfeit and pay any sum not exceeding 5*l.*; and if in any such water as last mentioned, he shall, on the like conviction, forfeit and pay any sum not exceeding 2*l.*, as to the justice shall seem meet; and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as is herein-before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto.

Provision
respecting
anglers.

§ 35. "If any person shall at any time be found fishing, against the provisions of this act, it shall be lawful for the owner of the ground, water, or fishery where such offender shall be so found, his servants, or any person authorised by him, to demand from such offender any rods, lines, hooks, nets, or other implements for taking or destroying fish, which shall then be in his possession; and in case such offender shall not immediately deliver up the same, to seize and take the same from him for the use of such owner: Provided always, that any person angling in the day-time, against the provisions of this act, from whom any implements used by anglers shall be taken, or by whom the same shall be delivered up as aforesaid, shall by the taking or delivering thereof be exempted from the payment of any damages or penalty for such angling."

The tackle of
fishers may be
seized.

Angler, on
seizure of his
tackle, exempt
from penalty.

§ 36. "If any person shall steal any oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, every such offender shall be deemed guilty of larceny, and being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any such oyster fishery, for the purpose of taking oysters or oyster brood, although none shall be actually taken, or shall, with any net, instrument, or engine, drag upon the ground or soil of any such fishery, every such person shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be punished by fine or imprisonment, or both, as the court shall award; such fine not to exceed 20*l.*, and such imprisonment not to exceed three calendar months; and it shall be sufficient in any indictment or information to describe, either by name or otherwise, the bed, laying, or fishery in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill: Provided always, that nothing herein contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery with any net, instrument, or engine adapted for taking floating fish only."

Stealing oysters
or oyster brood
from oyster
beds.

Dredging for
oysters within
the limits of
any oyster
fishery.

Punishment.

Proviso.

By § 63. it is enacted, that any person found committing any offence punishable, either upon indictment or upon summary conviction, under this act, except only the offence of angling in the day-time, may be immediately apprehended without a warrant, by

Persons offend-
ing against the
act, except
angling in the
day-time, may

be apprehended
without war-
rant.

7 & 8 G. 4. c. 30
Breaking down
or destroying
fish-ponds, &c. ;

or putting
noxious ma-
terials into
same ;
or destroying
mill-ponds ;
a misdemeanor.
Seven years'
transportation
or imprison-
ment.

Power to
apprehend
offender with-
out warrant.

The fish stated
to be the goods,
&c. of the
owner.
Surplusage.

any peace officer, or by the owner of the property in respect to which the offence shall be committed, or by his servant, or by any person authorised by him, and forthwith taken before some neighbouring justice of the peace. For the application of forfeitures and penalties under this act, the form of conviction, &c., see tit. *Larceny*.

By 7 & 8 G. 4. c. 30. § 15., "If any person shall unlawfully and maliciously break down or otherwise destroy the dam of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish therein, or shall unlawfully and maliciously break down or otherwise destroy the dam of any millpond, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

By § 28. any person found offending against the act, whether punishable by indictment or summary conviction, may be immediately apprehended without a warrant, by any peace officer or the owner of the property injured, or any person authorised by him, and forthwith taken before some neighbouring justice. For the application of forfeitures and penalties under this act, the form of conviction, &c., see tit. *Malicious Injuries*.

By 5 G. 3. c. 14. (now repealed) § 1., if any person entered into any park, garden, &c. wherein was any stream, pond, &c., and stole, took, killed, or destroyed any fish in such stream, &c. without consent of the owner, on being indicted for such offence within six months, he should, on conviction, be transported for seven years.

On the above act the following decision has taken place, in regard to fish so taken being called the goods and chattels of the owner.

Hunsdon's case, O. B. 1781, 2 *East's P. C.* 611. Indictment against *J. H.* on stat. 5 G. 3. c. 14. § 1. charged him with unlawfully entering a garden of *A. T.* adjoining and belonging to her dwelling-house, in which was a certain pond used for keeping fish, and without *A. T.*'s consent, with a certain net, stealing and taking out of the said pond a certain quantity of live gold and silver fish of the goods and chattels of the said *A. T.*, against the form of the statute. On evidence it appeared that the pond out of which the fish were taken adjoined to the house, and was about 20 yards in length and 10 in breadth; that gold fish and other fish were kept in it, which were usually fished for with a hook and line. It was objected, that fish in an open pond were *feræ naturæ*, unreclaimed, and not the property of any particular person, as they were laid to be in the indictment. In answer to which a distinction was taken on the part of the crown, that this was not an indictment for a felony, but only for a misdemeanor on the statute [which, it is to be observed, uses the word *steal*], though the punishment directed was transportation. In *E. T.* 1781, all the judges held the indictment good, the case being fully brought within stat. 5 G. 3., without the allegation that the fish were the goods and

chattels of any person, and therefore that part of the indictment was surplusage. But if the indictment had been at common law for felony, it was the opinion of some that it should have described what sort of a pond it was, that it might appear on the face of the indictment that taking fish out of such a pond was felony.

By § 3. of the above repealed act, any person taking, killing, &c. any fish in any river, pond, &c. not being in any park, &c. but in any other inclosed ground, being private property, is made liable to a penalty.

It has been holden, that it must appear upon a conviction under this third clause of the statute, that there was a complaint by the owner, and that the fishing was without the owner's consent. *R. v. Corden*, 4 Burr. 2279.

And in the following case it was expressly decided, that in a conviction on stat. 5 G. 3. c. 14. § 3. it must be distinctly stated in the information, and in the evidence, that the proceeding was at the instance of the owner of the fishery. *R. v. Daman*, H. 1819. 2 B. & A. 378. 1 Chitt. Rep. 147. S. C. The defendant had been convicted before three justices of the county of Southampton, under stat. 5 G. 3. c. 14. § 3. of destroying, with a net, fish in inclosed grounds, being private property. The conviction stated as follows, "Be it remembered, that on 31st January 1818, at, &c. Sir Henry Fane, of, &c. at the instance and on the behalf of the Honourable Anne Fane, widow, lady of the manor of Avon Tyrrell, in the said county, came in his proper person before us, and gave us to be informed," &c. It then proceeded to set out a regular information by Sir H. Fane against the defendant, for the offence, concluding thus; "Whereupon the said Sir H. Fane, on behalf of the said A. Fane, lady of the manor, and owner of the fishery aforesaid, prayed judgment, and that the defendant might be brought before us," &c. The conviction then set out the defendant's appearance and plea, and the evidence. But it was not expressly stated, either upon the face of the information, or in the evidence, that the proceedings originated with the Honourable Anne Fane, the owner of the fishery. The conviction having been removed into K. B. by certiorari, a rule nisi was obtained to quash it. After argument, in which *R. v. Corden*, 4 Burr. 2279. was cited as conclusive against the conviction—per Bayley J. (absente Abbot C. J.) In the case of a conviction, nothing can be supplied, either by intendment or argument; and therefore we must, on the present occasion, look only to the express words of the conviction, and of the act of parliament. The act was passed for the more effectual preservation of fish, and it directs, that the offender shall forfeit for every offence 5*l.* to the owner of the fishery; and gives him a power of obtaining the penalty either by information or action. In the latter case the proceeding must be in his name; and in the former, therefore, it follows, by necessary intendment, that it must appear on the face of the proceedings, either that the penalty is sued for in his name, or at his instance. And it is not sufficient that this fact should be stated by the justice in the conviction, but it must be also embodied in the information, and established by the proof. In this case, the magistrates state in the conviction, that Sir Henry Fane, at the instance and on the behalf of the Honourable Anne Fane, lady of the manor, &c. appeared before them. Now it does not appear upon what authority

Under 5 G. 3. c. 14. on conviction it must appear that such fishing in private property was without consent of the owner, and that there was a complaint by him.

R. v. Daman. that fact is stated, and there is nothing proceeding from the party which leads to that conclusion. Then, in the information it is stated, that Sir *H. Fane*, on the behalf of *A. Fane*, prays the judgment; but it is not stated that he does so at her instance, and there is a material distinction between the two phrases. For the latter necessarily implies a previous communication, which the former does not. Then comes the appearance of the defendant, and his plea of not guilty, after hearing the information read. Now as the information is wholly silent as to the person at whose instance the charge is made, the defendant is unapprised of that circumstance; and it is to be observed, that if that fact had formed part of the information, the plea of not guilty would have put it in issue, and made it necessary for the prosecutor to prove it. I am, therefore, of opinion, that the act of parliament requires the information to be in the name, or at the instance of the party grieved, and that that must appear both in the information and in the evidence stated in the conviction. And that not having been done in this case, this conviction must be quashed. — *Holroyd J.* All the facts necessary to subject the party to the penalty imposed by the act of parliament, must appear upon the information, and be established by proof. It is indeed here stated, that the person applying, appeared on the behalf of the lady of the manor, but that is only the language of the justices, and the information does not contain any allegation, that it is prosecuted at her instance. The case of *R. v. Corden* is an authority to show that that is necessary. — *Best J.* It is not clear that the lady of the manor has ever adopted this proceeding; and she may, for any thing that appears here, still bring an action for the penalty. Now the party ought not to be oppressed by two prosecutions for one offence. The conviction is therefore bad, and ought to be quashed. *Conviction quashed.*

Non-consent of owner may be inferred.

In an indictment under 5 G. 3. c. 14. for taking fish out of a pond, it was held on ca. res. for the opinion of the judges, that admitting the onus of proving the non-consent of the owner to lie on the prosecutor, such non-consent might well be inferred from circumstances, or proved by his agents. *H. T.* 1827. *R. v. Argent*, and *R. v. Chamberlain*, S. P. 1 R. & M. 154.

Forcible Entry and Detainer.

FORCE, in the common law, is most commonly taken in ill part, for unlawful violence; for *maximè paci sunt contraria vis et injuria*. 1 *Inst.* 161. b.

General principle.

It seems that at the common law (1 *Haw. c.* 64. § 1. *et vide Anon.* 3 *Salk.* 169.) a man disseised of any lands or tenements (if he could not prevail by fair means) might lawfully regain the possession thereof by force, unless he were put to a necessity of bringing his action, by having neglected to re-enter in due time: And it seems certain that even at this day he who is wrongfully dispossessed of his goods may justify the retaking of them by force from the wrong-doer, if he refuse to redeliver them; for the violence which happens through the resistance of the wrongful possessor, being originally owing to his own fault, gives him no just

cause of complaint, inasmuch as he might have prevented it by doing as he ought. Perhaps, however, as Lord *Kenyon* observed, (*R. v. Wilson and others* (a), 8 T. R. 364.) some doubt may arise respecting what Mr. Serjt. *Hawkins* says, that at common law the party may enter with force into that to which he has a legal title. But without giving any opinion concerning that *dictum* one way or the other, but leaving it to be proved or disproved whenever that question should arise, all that the court wished to say was, that their opinion in the principal case left that question untouched, it appearing by the indictment there (which was at common law) that the defendants "unlawfully" entered, and therefore the court could not intend that they had any title.

(a) *Post*,
p. 227.

But this indulgence of the common law, in suffering persons to regain the lands they were unlawfully deprived of, having been found by experience to be very prejudicial to the public peace, by giving an opportunity to powerful men, under the pretence of feigned titles, forcibly to eject their weaker neighbours, and also by force to retain their wrongful possessions; it was thought necessary by many severe laws to restrain all persons from the use of such violent methods of doing themselves justice. 1 *Haw. c. 64. § 2.*

However, even at this day, in an action of forcible entry grounded on those laws, if the defendant make himself a title which is found for him, he shall be dismissed without any inquiry concerning the force, for howsoever he may be punishable at the king's suit, for doing what is prohibited by statute, as a contemner of the laws, and disturber of the peace, yet he shall not be liable to pay any damages for it to the plaintiff, whose injustice gave him the provocation in that manner to right himself. 1 *Haw. c. 64. § 3.*

Yet still forcible entry and detainer are offences at the common law; and the prosecutor, if he please, may proceed in that way: but then the indictment ought to express not only the common technical words *with force and arms*, but also such circumstances as thereby it may appear upon the face of the indictment to be more than a common trespass; for a man cannot be indicted for a bare trespass. *Vide 3 Burr.* 1698—1731. 8 T. R. 357. *post*, p. 227.

Forcible entry
an offence at
common law.

Indeed there is no doubt but that the offence of forcible entry is indictable at common law, though the statutes give other remedies to the party aggrieved, restitution and damages; and therefore in an indictment on the statutes it is necessary to state the interest of the prosecutor; but I do not know, said Lord *Kenyon* Ch. J., that it has ever been decided that it is necessary to allege a greater degree of force in an indictment at common law for a forcible entry than in an indictment on the statutes. Therefore an indictment at common law, charging the defendants with having "unlawfully and with a strong hand" entered the prosecutor's mill, and certain lands and houses, and expelled him from the possession, is good: for the words, "with a strong hand," mean something more than a common trespass. *Per* *Ld. Kenyon* C. J. *R. v. Wilson*, 8 T. R. 357.

But the safest and most usual way is to proceed upon the statutes: and, therefore, (after having premised that by stat. 8 H. 6. c. 9. § 7. *they which keep their possessions with force in any lands and tenements, whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued their posses-*

8 H. 6. c. 9.
Persons having
been in posses-
sion three years.

sion in the same by three years or more, be not endangered by force of this statute), I shall consider those several statutes, with the interpretation that hath been put upon them, under the following heads: 1 *Haw. c. 64. § 13.*

- I. *What is a forcible Entry.*
- II. *What is a forcible Detainer.*
- III. *How the same are punishable by Action at Law.*
- IV. *How punishable at the General Sessions.*
- V. *How punishable by one Justice.*
- VI. *How punishable on a Certiorari.*
- VII. *How punishable as a Riot.*

I. What is a forcible Entry.

What it is.

A forcible entry or detainer is committed by violently taking or keeping possession of lands and tenements with menaces, force, and arms, and without the authority of law. 4 *Blac. Com.* 148.

Statutes.

5 R. 2. c. 8.

15 R. 2. c. 2.

3 H. 6. c. 9.

By stat. 5 R. 2. c. 8. none shall make any entry into any lands or tenements, (or benefice of holy church, 15 R. 2. c. 2. or other possessions, 8 H. 6. c. 9. § 2.) but in cases where entry is given by the law; and in such cases not with strong hand, nor with multitude of people, but only in peaceable and easy manner, on pain of imprisonment and ransom at the king's will.

Not, for an
easement office.

It seems clear that no one can come within the danger of these statutes, by a violence offered to another in respect of a way, or such like easement, which is no possession, and there seems to be no good authority that an indictment will lie on this case for a common or office. 1 *Haw. c. 64. § 34.*

Joint tenant or
tenant in com-
mon may com-
mit forcible
entry.

A joint tenant or a tenant in common may be guilty of a forcible entry: for though his entry may be lawful *per my et per tout*, so that he will not commit a trespass, yet the lawfulness of his entry does not excuse violence, or lessen the injury done to his companion. 1 *Russ.* 286.

So, of incor-
poreal heredita-
ment for which
writ of entry
lies.

A forcible entry may be committed upon such incorporeal hereditament for which a writ of entry lies, either at common law, as for rent, or by statute, as for tithe, &c. 1 *Russ.* 286.

So, for a distress
by force.

So, there may be a forcible entry to distrain for rent in arrear. 1 *Russ.* 287.

It must be for
the purpose of
claim.

It seems certain that if one who pretends a title to lands barely go over them, either with or without a greater number of attendants, armed or unarmed, in his way to the church or market, or for such like purpose, without doing any act, which either expressly or impliedly amounts to a claim of such lands, he cannot be said to make an entry thereinto. 1 *Haw. c. 64. § 20.*

Trespass with
violence.

But it seemeth that if a person enter into another man's house or ground, either with apparent violence offered to the person of any other, or furnished with weapons, or company, which may offer fear, though it be but to cut or take away another man's corn, grass, or other goods, or to fell or crop wood, or to do any other like trespass, and though he do not put the party out of his possessions, yet it seemeth to be a forcible entry. *Dalt. c. 126. p. 294.*

Disseisin with-
out violence.

But if the entry were peaceable, and after such entry made, they cut or take away any other man's corn, grass, wood, or other

goods, without apparent violence or force; though such acts are counted a disseisin with force, yet they are not punishable as forcible entries. *Dalt. c. 126. p. 294.*

But if he enter peaceably, and there shall by force or violence cut or take away any corn, grass, or wood, or shall forcibly or wrongfully carry away any other goods there being, this seemeth to be a forcible entry punishable by the statutes. *Ibid.*

Quiet entry and force afterwards.

So also shall those be guilty of a forcible entry, who having an estate in land by a defeasible title continue with force in the possession thereof, after a claim made by one who had a right of entry thereto. *1 Haw. c. 64. § 23.*

Forcible detainer.

But he who barely agrees to a forcible entry made to his use, without his knowledge or privity, shall not be adjudged to make an entry within the statutes, because he no way concurred in or promoted the force. *1 Haw. c. 64. § 24.*

Bare agreement afterwards.

And, in general, it seemeth clear that to denominate the entry forcible, it ought to be accompanied with some circumstances of actual violence or terror; and therefore that an entry which hath no other force than such as is implied by the law, in every trespass whatsoever, is not within these statutes. *1 Haw. c. 64. § 25.*

There must be actual violence or terror.

R. v. Wilson and eleven others, 8 T. R. 357. The defendants were indicted for a forcible entry and detainer at common law. The first count stated, that they with force and arms unlawfully and injuriously, and with a strong hand, entered, &c. &c. The third count was the same as the first, in those words; the second and fourth, the same as first and third, excepting that they omitted the words with a strong hand. There was a demurrer to all these counts; and in support of the demurrer, it was contended that a private trespass only was charged upon the face of the indictment, and not a public breach of the peace indictable. Against the demurrer, it was admitted that the second and fourth counts were not maintainable. And by the court these points were determined; *Ld. Kenyon C. J., Grose J., Lawrence J., Le Blanc J.*

Averment of strong hand sufficient.

A mere trespass, which is the subject of a civil action, and where the words *vi et armis* are a matter of form, cannot be converted into an indictable offence;

That the offence of forcible entry is indictable at common law;

In an indictment on the statutes, it is necessary to state the interest of the prosecutor;

Forcible entry indictable at common law.

It is sufficient to state the same degree of force in an indictment at common law, and in an indictment upon the statutes; but there must be stated that degree of force and violence in fact which constitutes the offence;

If by statute, it must shew the party's interest.

The words *manu forti* mean something more than a common trespass;

It is not sufficient to charge the defendant with having entered *vi et armis*.

No particular technical words are necessary in such an indictment at common law; all that is required is, that it should appear by the indictment that such force and violence have been used as constitute a public breach of the peace.

No technical words necessary.

And the first and third counts were adjudged good. And at another day Lord Kenyon C. J. added, that the court desired that their decision might not be considered as a precedent in other cases to which it did not apply. And that what *Hawkins* says, (*antid*,

p. 224., that at common law the party may enter with force into that to which he has a legal title, was left untouched by this case, for that here the indictment stated the defendants to have *unlawfully* entered, and therefore the court could not intend that they had any title.

There must be actual violence.

As to the matter of *violence*; it seems to be agreed that an entry may be forcible, not only in respect of a violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession, but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in or not, especially if it be a dwelling-house, and perhaps also by an act of outrage after the entry, as by carrying away the party's goods; but it seems that an entry is not forcible by the bare drawing up a latch, or pulling back the bolt of a door, there being no appearance therein of being done by *strong hand*, or *multitude of people*; and it hath been holden that an entry into a house through a window, or by opening a door with a key, is not forcible. 1 *Haw. c. 64. § 26.*

So, terror must be for personal danger.

In respect of the circumstances of *terror*; it is to be observed, that whenever a man, either by his behaviour or speech at the time of his entry, gives those who are in possession just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible: whether he cause such a terror by carrying with him such an unusual number of attendants, or by arming himself in such a manner as plainly intimates a design, or by actually threatening, to kill, maim, or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force, as if one say that he will keep his possession in spite of all men, or the like. 1 *Haw. c. 64. § 27.*

Not for injury to goods, &c.

But it seems that no entry shall be judged forcible from any threatening to spoil another's *goods*, or to destroy his cattle, or to do him any other such like damage which is not personal. 1 *Haw. c. 64. § 28.*

As to a single person.

However, it is clear that it may be committed by a single person, as well as by twenty. 1 *Haw. c. 64. § 29.*

As to those who accompany him.

But nevertheless all those who accompany a man, when he makes a forcible entry, shall be judged to enter with him, whether they actually come upon the lands or not.

II. What is a forcible Detainer.

Same as to detainer.

It seemeth certain that the same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also. And a detainer may be forcible, whether the entry were forcible or not. 1 *Haw. c. 64. § 30.*

Conviction for a forcible detainer held bad, it not appearing that the entry was unlawful.

On a conviction for a forcible detainer under 8 *H. 6. c. 9.*, which set out the complaint of *E. P.*, that defendants had entered his house, &c. and forcibly detained it, and alleged that the justices personally came and found defendants with strong hand and armed power detaining the house, &c.; the defendants being brought up by *habeas corpus*, the court held, that, though 8 *H. 6. c. 9.* gave *summary power* of conviction for a forcible detainer after a peaceable entry, still that it was intended the entry must have been *unlawful*, and this not appearing on the present conviction, they

discharged defendants. *R. v. Oakley and others*, 4 B. & Ad. 307.
See tit. *Trespass*, *post*.

III. How they are punishable by Action at Law.

By stat. 8 H. 6. c. 9. § 6. If any person be put out or disseised of any lands or tenements in forcible manner, or put out peaceably and after holden out with strong hand, the party grieved shall have assize of novel disseisin, or writ of trespass against the disseisor; and if he recover, he shall have treble damages, and the defendant moreover shall make fine and ransom to the king.

Civil action under 8 H. 6. c. 9.

But this action, being at the suit of the party, and only for the right, is only where the entry of the defendant was not lawful; for if a man entereth with force, where his entry is lawful, he shall not be punished by way of action; but yet he may be indicted upon the statute, for the indictment is for the force and for the king; and he shall make fine to the king, although his right be never so good. *Dalt. c. 129. p. 303.*

He shall recover treble damages as well for the mesne occupation as for the first entry: and albeit he shall recover treble damages, yet he shall recover costs, which shall be trebled also: for the word *damages* includeth costs of suit. 1 *Inst. 257.*

Treble damages.

IV. How punishable at the General Sessions.

The party grieved, if he will lose the benefit of his treble damages and costs, may be aided and have the assistance of the justices at the general sessions, by way of indictment (A) on the statute of 8 H. 6.; which being found there, he shall be restored to his possession, by a writ of restitution granted out of the same court to the sheriff. *Dalt. c. 129. p. 303.*

Indictment at sessions.

A.
Writ of restitution.

In the caption of which indictment, it will be sufficient to say *justices assigned to keep the peace of our lord the king*, without shewing that they have authority to hear and determine felonies and trespasses; for the statute enables all justices of the peace, as such, to take such indictments. 1 *Haw. c. 64. § 36.*

Before justices.

And the tenement in which the force was made must be described with convenient certainty; and the indictment must set forth that the defendant actually entered, and ousted the party grieved; and continueth his possession at the time of finding the indictment; otherwise he cannot have restitution, because it doth not appear that he needeth it. 1 *Haw. c. 64. § 27. et seq.*

Necessary averments.

Description of tenement.

But if a man's wife, children, or servants, do continue in the house or upon the land, he is not ousted of his possession; but his cattle being upon the ground, do not preserve his possession. *Dalt. c. 132. p. 307.*

Entire dis-possession.

Where husband and wife lived apart, and the wife was indicted, with others, for making a forcible entry on the dwelling-house in the possession of the husband, it being objected that a wife could neither commit a trespass nor a forcible entry upon her husband's premises, Lord *Tenterden* C. J. held, that though she could not be a trespasser, yet he was inclined to think she might be liable for a forcible entry, if made under circumstances of violence amounting to a breach of the public peace. The defendants were acquitted on

the facts. *February, 1832, R. v. Smyth and others, 1 M. & Robinson, N. P. C. 155.*

Nature of estate.

An indictment for forcible entry was quashed, for not setting forth that the party was seised or disseised, or what estate he had in the tenement : for if he had only a term for years, then the entry must be laid, into the freehold of *A.* in the possession of *B.* We need scarcely observe that this respects an indictment on the statutes. *R. v. Griffith, 3 Salk. 169. 3 Burr. 1732.*

Party grieved not a competent witness.

Upon an indictment under 5 R. 2. and 21 J. 1. for a forcible entry and detainer, it has been ruled, that the party grieved is not a competent witness, as in case of a conviction he would be entitled to restitution. *R. v. Beavan, 1 R. & M. N. P. C. 242. cit. 2 Russ. 602.*

V. How punishable by one Justice.

On 8 H. 6. c. 9. before one justice.

By stat. 8 H. 6. c. 9. for a more speedy remedy, the party grieved may complain to any one justice, or to a mayor, sheriff, or bailiff, within their liberties.

But although one justice alone may proceed in such cases, yet it may be advisable for him, if the time for viewing the force will suffer it, to take to his assistance one or two more justices.

Concerning which power of one justice it is enacted as follows :

After complaint made to such justice, by the party grieved, of a forcible entry made into lands, tenements, or other possessions, or forcible holding thereof, he shall within a convenient time, at the costs of the party grieved (without any examining or standing upon the right or title of either party), take sufficient power of the county and go to the place where such force is made. Dalt. c. 44. p. 96. See stats. 15 R. 2. c. 2. 8 H. 6. c. 9. § 2.

No necessity for an actual complaint.

Complaint ——— by the party grieved.] Yet these words do not enforce any necessity of such a complaint ; for it is holden that the justice may and ought to proceed, upon any information or knowledge thereof whatsoever, though no complaint at all be brought unto him by any party grieved thereby. *Lamb. 147.*

15 R. 2. c. 2. Power of the county.

Power of the county.] All people of the county, as well the sheriff as other, shall be attendant on the justices to arrest the offenders ; on pain of imprisonment and fine to the king.

Doors may be broken.

If the doors be shut, and they within the house shall deny the justice to enter, it seems he may break open the house, to remove the force. *Dalt. c. 44. p. 96.*

15 R. 2. c. 2. 8 H. 6. c. 9.

And if after such entry made, the justice shall find such force, he shall cause the offenders to be arrested.

Offenders to be arrested, &c.

He shall also take away their weapons and armour, and cause them to be appraised, and after to be answered to the king as forfeited, or the value thereof. *Dalt. c. 44. p. 96.*

B.
Record to be made of such force.

Also such justice ought to make a record (B) of such force by him viewed ; which record shall be a sufficient conviction of the offenders, and the parties shall not be allowed to traverse it : And this record, being made out of the sessions by a particular justice, may be kept by him ; or he may make it indented, and certify the one part into the K. B., or leave it with the clerk of the peace, and the other part he may keep himself. For this view of the force by the justice, being a judge of record, maketh his record thereof, in the judgment of the law, as strong and effectual, as if the offenders had confessed the force before him ; and touching

the restraining of traverse, more effectual than if the force had been found by a jury, upon the evidence of others. (This is as to the fine and imprisonment, but not as to restitution.) *Dalt. c. 44. p. 96.*

And the offenders being arrested (as before is said) *shall be put in the next gaol (C), there to abide convict by the record of the same justice until they have made fine and ransom to the king.* 15 R. 2. c. 2. C.

It is said that the justice hath no power to commit the offender to gaol, unless he do it upon his own view of the fact, and not upon the jury finding the same afterwards. *Dalt. c. 44. 1 Haw. c. 64. § 8.* Committal on view of the justice.

And if such offenders being in the house at the coming of the justice shall make no resistance, nor make shew of any force, then the justice cannot arrest or remove them at all upon such view. *Dalt. c. 44.*

But howsoever if the force be found afterwards by the inquiry of the jury, the justice may bind the offenders to the peace: and if they be gone, he may make his warrant to take them, and may after send them to the gaol, until they have found sureties for the peace. *Dalt. c. 44. p. 99.* Binding over to the peace on finding of jury.

Note. — Mr. Dalton in this place says *good behaviour*, which I have presumed to alter to *the peace*, as deeming it much the safer: and not being sufficiently satisfied concerning the power of a justice of the peace to bind to the good behaviour in the like cases, which power Mr. Dalton hath enlarged more than all other authors, without any assistance from the commission of the peace, or any act of parliament, other than had been for above 200 years before. Observation by Dr. Burn.

Until they have made fine.] R. v. Sir Edm. Elwell, 2 Str. 795. 2 Ld. Raym. 1514. He was brought up upon a *habeas corpus*, with a return of the cause of his commitment, which was upon a conviction of forcible entry and detainer. And it being moved to discharge him upon exceptions to the commitment, the court refused to enter into the consideration of them, till the conviction was likewise regularly removed before them. But by consent he was bailed in the meantime. And this term the conviction being before the court, it appeared that there was no fine set by the justices, and it was therefore moved to be quashed. It was agreed on both sides that there should be a fine; but it was insisted, that it being now before the K. B. by a *certiorari*, they might set the fine. But by the court: We are not to execute the judgment of an inferior court. The conviction is to be upon view; and they who view the nature of the force are the properest judges what fine to set: and though a *certiorari* should come before the fine is set, yet it would be no contempt in the justices to complete their judgment by setting one. *Lambard* indeed was of opinion, that the justices could not set the fine at all: but upon what foundation we can never imagine. The justices are not bound to do it upon the spot, but may take a reasonable time to consider of the fine, because, by the words of the act, the commitment is to be, till he has paid the fine. The conviction must be quashed, and the defendant discharged. Fine must be set on view of justice.

The same was likewise solemnly resolved in *Leighton's* case; and that the justice may assess the same either before the commitment or after. 1 *Haw. c. 64. § 8.*

On each
offender
severally.

And the fine must be assessed upon every offender severally, and not upon them jointly; and the justice ought to estreat the fine, and to send the estreat into the exchequer, that from thence the sheriff may be commanded to levy it for H. M.'s use. *Dalt. c. 44. p. 97.*

Discharge of
offenders on
payment, &c.

But upon payment of the fine to the sheriff, or upon sureties found (by recognizance) for the payment thereof, it seemeth that the justice may deliver the offenders out of prison again at his pleasure. *Dalt. c. 44. p. 97.*

And so much concerning removing the force: But the party ousted cannot be restored to his possession by the justice's view of the force, nor unless the same force be found by the inquiry of a jury.

8 H. 6. c. 9.
Restitution of
party ousted.

Concerning which it is by stat. 8 H. 6. c. 9. § 3. enacted as follows:—And though that the persons making such entry be present, or else departed before the coming of the justice, he may notwithstanding in some good town next to the tenements so entered, or in some other convenient place by his discretion (and that though he go not to see the place where the force is [*Dalt. c. 44.*]) have power to inquire by the people of the county, as well of them that make such forcible entry, as of them which hold the same with force.

D.
On inquest.

§ 4, 5. In order to which, the justice shall make his precept (D) to the sheriff, commanding him in the king's behalf to cause to come before him, sufficient and indifferent persons dwelling next about the lands so entered, to inquire of such entries; whereof every man shall have lands or tenements of 40s. a year above reprises. And the sheriff shall return issues on every of them, at the day of the first precept returnable 20s., and at the second day 40s., and at the third day 100s., and at every day after double. And the sheriff making default shall, on conviction before the same justice or before the judge of assize, forfeit 20l.; half to the king, and half to him who shall sue, with costs; and moreover shall make fine and ransom to the king.

Mode of pro-
ceeding.

And the justice may proceed against the sheriff for this default, either by bill at the suit of the party, or by indictment at the suit of the king. *Dalt. c. 44. p. 99.*

Defendant
ought to be
called to an-
swer, and may
traverse.

And the defendant also, if he be not present, ought to be called to answer for himself; for it is implied by natural justice in the construction of all laws, that no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself. 1 *Haw. c. 64. § 60.*

And it seems to be settled at this day that if the defender tender a traverse of the force, the justice ought not to make any restitution, till the traverse be tried. *R. v. Bengough, 3 Salk. 170.*

31 Eliz. c. 11.
No restitution
to be made if
the party in-
dicted hath been
three years in
quiet possession,
and his estate
not ended.

The defendant may also by stat. 31 Eliz. c. 11. plead *three years' possession*; whereby it is enacted, that *no restitution upon an indictment of forcible entry, or holding with force, be made to any person or persons, if the person or persons so indicted hath had the occupation, or hath been in quiet possession by the space of three whole years together next before the day of such indictment so found; and his, her, or their estate or estates therein not ended or determined; which the party indicted shall and may allege for stay of restitution, and restitution to stay until that be tried, if the other will deny or traverse the same; and if the same allegation be tried against the same person or persons so indicted, then the same person or per-*

sons so indicted, to pay such costs and damages to the other party as shall be assessed by the judges or justices before whom the same shall be tried; the same costs and damages to be recovered and levied as is usual for costs and damages contained in judgments upon other actions.

Costs.

It hath been holden that the plea of such possession is good, without shewing under what title or of what estate such possession was; because it is not the title, but possession only, which is material in this case. 1 *Haw. c. 64. § 56.*

And it was holden by the court in *Leighton's case*, that if the defendant shall either traverse the entry or the force, or plead that he has been three years in possession, the justice may summon a jury for the trial of such traverse, for it is impossible to determine it upon view; and if the justice have no power to try it, it would be easy for any one to elude the statute by the tender of such a traverse, and therefore by a necessary construction the justice must needs have this power incidental to what is expressly given him. 1 *Haw. c. 64. § 8.*

Justice may summon a jury for the traverse.

And this traverse must be tendered in writing, and not by a bare denial of the fact in words; for thereupon a *venire facias* must be awarded, a jury returned, the issue tried, a verdict found, and judgment given, and costs and damages awarded; and there must be a record, which must be in writing, to do all this, and not a verbal plea. *Dalt. c. 133. p. 309. 1 Haw. c. 64. § 58.*

Upon which traverse tendered, the justice shall cause a new jury to be returned by the sheriff, to try the traverse; which may be done the next day, but not the same day. *Dalt. c. 133. p. 309.*

And it seemeth he who tendereth the traverse shall bear all the charges of the trial; and not the king or the party prosecuting. *Id.*

And by stat. 8 *H. 6. c. 9. § 3.* if such forcible entry or detainer be found (E) before such justice, then the said justice shall cause to reseize (F) the lands and tenements so entered or holden, and shall restore the party put out to the full possession of the same.

8 H. 6. c. 9.
E.
F.

It seems to be agreed that no other justices of the peace, except those before whom the indictment shall be found, shall have any power, either at the sessions or out of it, to make any award of restitution. 1 *Haw. c. 64. § 50.*

Same justice to restore.

And the justice may break open the house by force to reseize the same; and so may the sheriff do, having the justice's warrant. *Dalt. c. 44. p. 98.*

May break open doors.

Reseize.] That is, shall remove the force, by putting out all such offenders as shall be found in the house, or upon the lands, that entered or held with force. *Dalt. c. 130. p. 304.*

And shall restore the party put out.] And this he may do in his own proper person; or he may make his warrant to the sheriff to do it. *Dalt. c. 44. 1 Haw. c. 64. § 49.*

And by stat. 21 *J. 1. c. 15.* it is enacted, that such judges, justices, or justice of the peace, as may give restitution unto tenants of any estate of freehold, may give the like unto tenants for term of years, tenants by copy of court roll, guardians by knight's service, tenants by elegit, statute merchant and staple, of lands or tenements by them so holden, which shall be entered upon by force, or holden of them by force.

21 J. 1. c. 15.
To what estates.

VI. How punishable on a Certiorari.

On certiorari
court above
may restore.

Although regularly the justices only who were present at the inquiry, and when the indictment was found, ought to award restitution, yet if the record of the presentment or indictment shall be certified by the justice or justices into the K. B., or the same presentment or indictment be removed or certified thither by *certiorari*, the justices of that court may award a writ of restitution to the sheriff, to restore possession to the party expelled; for the justices of the K. B. have a supreme authority in all cases of the crown. *Dalt. c. 44. p. 98.*

Where a con-
viction of
forcible entry
is quashed, the
court must
award resti-
tution.

Also where upon a removal of the proceedings into the K. B. the conviction shall be quashed, the court will order restitution to the party injured. As in the case of *R. v. Jones, 1 Str. 474.*, a conviction of forcible entry was quashed for the old exception of *messuage or tenement*, by reason of the uncertainty: but the restitution was opposed on an affidavit that the party's title (which was by lease) was expired since the conviction. But the court said, they had no discretionary power in this case, but were bound to award restitution on quashing the conviction.

VII. How punishable as a Riot.

Riot.

If a forcible entry or detainer shall be made by three persons or more, it is also a riot, and may be proceeded against as such, if no inquiry hath before been made of the force. *Dalt. c. 44. p. 99.*

A.

A. Indictment for a forcible Entry and Detainer.

County of } *THE* jurors for our lord the king upon their oath
present that A. I. late of the parish of ———, in
the county aforesaid, gentleman, on the ——— day of ———
in the ——— year of the reign of ———, was possessed of a cer-
tain messuage, with the appurtenances, situate, lying, and being
in ——— in the parish aforesaid, in the county aforesaid, for
a certain term of years, then and still to come, and unexpired,
and being so possessed thereof, one A. O. late of ——— in the
said county, yeoman, afterwards, to wit, the said ——— day of
—— in the year aforesaid, into the same messuage, with the
appurtenances aforesaid in ——— aforesaid, in the parish and
county aforesaid, with force and arms, and with strong hand (a),
unlawfully did enter, and the said A. I. from the peaceable pos-
session of the said messuage, with the appurtenances aforesaid,
then and there with force and arms, and with strong hand, unlaw-
fully did expel and put out, and the said A. I. from the possession
thereof, so as aforesaid, with force and arms, and with strong
hand, being unlawfully expelled and put out, the said A. O. him
the said A. I. from the aforesaid ——— day of ——— in the year
aforesaid, until the day of the taking this inquisition, from the pos-

(a) These words are not necessary in an indictment for forcible entry at common law. They are added in indictments on the statute, because the statute uses them. *Say. 225.* But enough must appear upon the indictment, to shew that it was not a common trespass. *R. v. Wilson and others, 8 T. R. 357. And, p. 227.*

session of the said messuage, with the appurtenances aforesaid, with force and arms, and with strong hand, unlawfully and injuriously them and there did keep out, and doth still keep out, to the great damage of the said A. I. against the peace of our said lord the king, and against the form of the statutes (a) in that case made and provided.

Note. — If it is a freehold, then the party must be said to be *seised* thereof in his demesne as of fee; and consequently he must be thereof *disseised*: otherwise it is of a lesser estate, of which he is not properly said to be *seised*, but possessed thereof at the will of the lord, according to the custom of the manor, or the like, and then he must be *expelled, ejected, amoved*, or the like.

B. Record of a forcible Detainer upon View.

B.

Note. — The books upon the office of a justice of the peace generally set forth that the record ought to be in the present tense, and not in the time past, (and herewith do accord the adjudged cases in the court of K. B.); yet nevertheless they all exhibit the form of a record in the time past, and not in the present. (1 *Sir*. 443.) Therefore I have taken the liberty to alter the same from the record in *Ld. Raymond* of the conviction of *Sir Edm. Elwell* and others (see *antè*, p. 231.); adding the fine thereunto, for the want of which that conviction was quashed. And I have given the form of a record of a forcible *detainer* rather than a forcible *entry*, because the justice for the most part cannot be supposed to be present at the entry, as not having knowledge thereof till after the entry is made.

Kent, { *BE it remembered, that on the ——— of ——— in the*
to wit. *——— year of the reign of our sovereign lord William,*
&c. *at Beckingham, in the county of Kent aforesaid, Eliz. Elwell*
complaineth to us Sir E. Bettenson, baronet, P. Burrell, and W. Pas-
senger, esquires, three of the justices of our said lord the king as-
signed to keep the peace in the said county, and also to hear and
determine divers felonies, trespasses, and other misdemeanors in the
said county committed, that Sir Edm. Elwell, late of London,
baronet, Joseph Billers, late of ———, and Daniel Monty, late of
———, into the messuage of her the said E. E., being the mansion
house of her the said E. E., called Langley House, situate within
the parish of Beckingham aforesaid, did enter, and her the said
E. E. of the messuage aforesaid, whereof the said E. E. at the time
of the entry aforesaid was seised as of the freehold of her the said
E. E. for the term of her life, unlawfully ejected, expelled, and
amoved, and the said messuage from her the said E. E. unlawfully,
with strong hand and armed power, do yet hold and from her detain,
against the form of the statute in such case made and provided;
whereupon the same E. E. then, to wit, on the said 15th day of Sept.
at the parish of B. aforesaid, prayeth of us, so as aforesaid being
justices, to her in this behalf that a due remedy be provided, accord-

(a) Though the indictment conclude *contra formam statuti*, these latter words may be rejected, if the indictment be good as an indictment at common law. *Say*. 225. But if the indictment be upon the stat. and bad as such, *Qu.* if it can be good at common law by rejecting the above words? See *R. v. Wilson*, *antè*, p. 227.

ing to the form of the statute aforesaid; which complaint and prayer by us the aforesaid justices being heard, we the aforesaid E. B. baronet, P. B. and W. P. esquires, justices aforesaid, to the messuage aforesaid personally have come, and do then and there find and see the aforesaid Ed. E., J. B., and D. M. the aforesaid messuage, with force and arms, unlawfully, with strong hand and armed power detaining, against the form of the statute in such case made and provided, according as she the same El. El. so as aforesaid hath unto us complained; therefore it is considered by us the aforesaid justices that the aforesaid Edmund Elwell, Joseph Billers, and Daniel Monty, of the detaining aforesaid with strong hand, by our own proper view then and there as aforesaid had, are convicted, and every of them is convicted, according to the form of the statute aforesaid: Whereupon we the justices aforesaid, upon every of the aforesaid Ed. E., J. B., and D. M. do set and impose severally a fine of 10*l.* of good and lawful money of Great Britain, to be paid by them and every of them severally to our said sovereign lord the king, for the said offences; and do cause them, and every of them, then and there to be arrested; and the same Ed. E., J. B., and D. M. being convicted and every of them being convicted upon our own proper view, of the detaining aforesaid with strong hand as is aforesaid, by us the aforesaid justices are committed, and every of them is committed to the gaol of our said lord the king, at Maidstone in the county of Kent aforesaid, being the next gaol to the messuage aforesaid, there to abide respectively, until they shall have paid their several fines respectively to our said lord the king, for their respective offences aforesaid. Concerning which the premises aforesaid, we do make this our record. In witness whereof, we the aforesaid E. B. baronet, P. B. and W. P. esquires, the justices aforesaid, to this record our hands and seals do set at the parish of B. aforesaid, in the county of Kent aforesaid, on the — day of — in the — year aforesaid of the reign of our said sovereign lord the now king.

c.

C. Mittimus for forcible Detainer.

County of } EDWARD Hassel esquire, one of the justices of
our sovereign lord the king, assigned to keep the peace within the said county of W., and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed: To the keeper of his majesty's gaol at — in the said county, and to his deputy and deputies there, and to every of them, greeting: Whereas upon complaint made unto me this present day by A. I. — in the said county, yeoman, I went immediately to the dwellinghouse of the said A. I. at — aforesaid in the said county, and there found A. O. late of —, labourer, B. O. late of the same, weaver, and C. O. late of —, butcher, forcibly with strong hand and armed power holding the said house, against the peace of our said lord the king, and against the form of the statute in such case made and provided: Therefore I send you, by the bringers hereof, the bodies of the said A. O., B. O., and C. O., convicted of the said forcible holding, by mine own view, testimony, and record; commanding you in his said majesty's name to receive them into your said gaol, and there safely to keep them, and every of them respectively, until they shall have respectively paid the several sums of 10*l.* of good and lawful money of Great Britain to our said sovereign

lord the king, which I have set and imposed upon every of them separately, for a fine and ransom for their said trespasses respectively. Herein fail you not, at the peril that may follow thereof. Given at ——— aforesaid, in the county aforesaid, under my seal, the ——— day of ——— in the ——— year of the reign of our said sovereign lord king William the fourth.

Note.—By the forms in all the books, all the offenders stand committed until all have paid, so as that the first shall not be discharged on payment of his own fine, but continue until all the rest have paid likewise; which seems unreasonable, and is not warranted by the statute. See *antè*, p. 231.

D. Precept to the Sheriff to return a Jury.

D.

County of } **R**ICHARD Whinfield esquire, one of the justices
 ———. } of our lord the king, assigned to keep the peace in
 the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, to the sheriff of the said county, greeting: On behalf of our said lord the king, I command you that you cause to come before me at ——— in the county aforesaid, on the ——— day of ——— next ensuing, twenty-four sufficient and indifferent men, of the neighbourhood of ——— aforesaid, in the county aforesaid, every of whom shall have lands or tenements of 40s. yearly at the least, above reprizes, to inquire upon their oaths for our said lord the king, of a certain entry made with a strong hand (as it is said) into the messuage of one A. L. ——— aforesaid, in the county aforesaid, against the form of the statute in such case made and provided. And you are to return upon every of the jurors by you in this behalf to be impannelled 20s. of issues at the aforesaid day. And have you then there this precept. And this you shall in nowise omit, upon the peril that shall thereof ensue. Witness the said R. W. at ——— in the county aforesaid, the ——— day of ——— in the ——— year of the reign of ———.

The Juror's Oath.

YOU shall true inquiry and presentment make of all such things as shall come before you, concerning a forcible entry [or detainer] said to have been lately committed in the dwelling house of ——— yeoman, at ——— in this county; you shall spare no one for favour or affection, nor grieve any one for hatred or ill-will, but proceed herein according to the best of your knowledge, and according to the evidence that shall be given to you: So help you God.

The oath that A. F. your foreman hath taken on his part, you and every of you shall truly observe and keep on your parts: So help you God.

E. The Inquisition, Indictment, or Finding of the Jury.

E.

County of } **A**N inquisition for our sovereign lord the king, in-
 ———. } dented and taken at ——— in the said county,
 the ——— day of ——— in the ——— year of the reign of
 ——— by the oaths of ——— good and lawful men of the said
 county, before J. P. esquire, one of the justices of our said lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in

Forcible Entry and Detainer. [Criminal

the same county committed, who say upon their oaths aforesaid, that A. I. of ——— aforesaid, yeoman, long since lawfully and peaceably was seised in his demesne, as of fee [if it is not freehold, then say possessed] of and in one messuage, with the appurtenances, in ——— aforesaid, in the county aforesaid, and his said possession [and seisin] so continued until A. O. late of ——— yeoman, B. O. late of the same, yeoman, and C. O. late of the same, yeoman, and other malefactors unknown, the ——— day of ——— now last past with strong hand and armed power into the messuage aforesaid with the appurtenances aforesaid did enter, and him the said A. I. thereof disseised, and with strong hand expelled; and him the said A. I. so disseised and expelled from the said messuage with the appurtenances aforesaid, from the said ——— day of ——— until the day of the taking of this inquisition with like strong hand and armed power did keep out, and do yet keep out; to the great disturbance of the peace of our said lord the king, and against the form of the statute in such case made and provided.

We whose names are hereunto set, being the jurors aforesaid, do, upon the evidences now produced before us, find the inquisition aforesaid true.

A. B.
C. D. &c.

F.

F. Warrant to the Sheriff for Restitution.

County of } **M**ARTIN Dunn esquire, one of the justices of our sovereign lord the king, assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, to the sheriff of the said county, greeting: Whereas by an inquisition taken before me the justice aforesaid, at ——— in the ——— year of the reign of ——— upon the oaths of ——— and by virtue of the statutes made and provided in cases of forcible entry and detainer, it is found that A. O. late of ——— yeoman, and B. O. late of ——— yeoman, on the ——— day of ——— now last past, into a certain messuage with the appurtenances of A. I. of ——— aforesaid, in the county aforesaid, gentleman, situate, lying, and being at ——— aforesaid, in the county aforesaid, with force and arms did enter, and him the said A. I. thereof then with strong hand did disseise and drive out, and him the said A. I. thus driven out from the aforesaid messuage, with the appurtenances, from the ——— day of ——— aforesaid to this present day of the taking of the said inquisition with strong hand and armed force did keep out, and do yet keep out, as by the inquisition aforesaid more fully appeareth of record: Therefore on the behalf of our said sovereign lord the king, I charge and command you, that taking with you the power of the county (if it be needful) you go to the said messuage and other the premises, and the same with the appurtenances you cause to be re-seised, and that you cause the said A. I. to be restored and put into his full possession thereof, according as he, before the entry aforesaid, was seised, according to the form of the said statutes. And this you shall in no wise omit, on the penalty thereon incumbent. Given under my hand and seal at ——— in the said county, the ——— day of ———, in the ——— year of the reign of ———.

For any additional forms which may be requisite, see *Wentworth's System of Pleading*, vol. iv. from 148. to 156.

Foreign Service.

[3 J. 1. c. 4. — 59 G. 3. c. 69.]

ENTERING into the service of any foreign state without the king's consent, or contracting with it any engagement which subjects the party to an influence or control inconsistent with the allegiance due to his sovereign, such as receiving a pension from a foreign prince without the king's leave, is at common law a high misdemeanor, and punishable accordingly. 1 *East's P. C.* 81. 4 *Blac. Com.* 122.

Any engagement inconsistent with allegiance, a misdemeanor at common law.

Indeed, it is considered as so high an offence to prefer the interest of a foreign state to that of our own, that any act is criminal which may but incline a man to do so; as to receive a pension from a foreign prince without the leave of the king. 1 *Haw. c. 22.* § 3. 1 *Russ.* 91.

But with respect to serving, or procuring others to serve, foreign states, provisions have been made by several statutes. Stat. 3 *Jac.* 1. c. 4. § 18. enacts, that "every subject of this realm that shall go or pass out of this realm to serve any foreign prince, state, or potentate, or shall pass over the seas, and shall voluntarily serve any such foreign prince, state, or potentate, not having before his going taken the oath of obedience (a), shall be a felon." The 19th section enacts, that "if any gentleman or person of higher degree, or any person which hath borne or shall bear any office, or place of captain, lieutenant, or any other place, charge, or office, in camp, army, or company of soldiers, or conductor of soldiers, shall after go or pass voluntarily out of this realm, to serve any such foreign prince, state, or potentate, or shall voluntarily serve any such prince, state, or potentate, before that he and they shall become bound by obligation, with two sureties, &c." with a condition to the effect that he will not be reconciled to the see of Rome, nor enter into any conspiracy against the king (as particularly set forth in the act) "he shall be a felon."

3 J. 1. c. 4. English subject going into foreign service without taking oath, &c.

Military officers going into foreign service.

And by stat. 59 G. 3. c. 69. (after repealing stats. 9 G. 2. c. 30., 29 G. 2. c. 17., and the Irish acts, 11 G. 2. and 19 G. 2.),

59 G. 3. c. 69.

§ 2. "If any natural-born subject of H. M., his heirs and successors, without the leave or licence of H. M., his heirs or successors, for that purpose first had and obtained, under the sign manual of H. M., his heirs or successors, or signified by order in council, or by proclamation of H. M., his heirs or successors, shall take or accept, or shall agree to take or accept any military commission, or shall otherwise enter into the military service as a commissioned or non-commissioned officer, or shall enlist or enter himself to enlist, or shall agree to enlist or to enter himself to serve as a soldier, or to be employed or shall serve in any warlike or military operation in the service of or for or under or in aid of any foreign prince, state, potentate, colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or

Subjects enlisting or engaging to enlist or serve in foreign service, military or naval, guilty of misdemeanor.

(a) Stat. 1 W. & M. st. 1. c. 8. gives a new oath.

59 G. 3. c. 69. people, either as an officer or soldier, or in any other military capacity; or if any natural-born subject of H. M. shall, without such leave or licence as aforesaid, accept, or agree to take or accept, any commission, warrant, or appointment as an officer, or shall enlist or enter himself, or shall agree to enlist or enter himself, to serve as a sailor or marine, or to be employed, or engaged, or shall serve in and on board any ship or vessel of war, or in and on board any ship or vessel used or fitted out, or equipped or intended to be used for any warlike purpose, in the service of or for or under or in aid of any foreign power, prince, state, potentate, colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people; or if any natural-born subject of H. M. shall, without such leave and licence as aforesaid, engage, contract, or agree to go, or shall go to any foreign state, country, colony, province, or part of any province, or to any place beyond the seas, with an intent or in order to enlist or enter himself to serve, or with intent to serve in any warlike or military operation whatever, whether by land or by sea, in the service of or for or under or in aid of any foreign prince, state, potentate, colony, province, or part of any province or people, or in the service of or for or under or in aid of any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people, either as an officer or a soldier, or in any other military capacity, or as an officer or sailor, or marine, in any such ship or vessel as aforesaid, although no enlisting money or pay or reward shall have been or shall be in any or either of the cases aforesaid actually paid to or received by him, or by any person to or for his use or benefit; or if any person whatever, within the U. K. of *G. B. and Ireland*, or in any part of H. M.'s dominions elsewhere, or in any country, colony, settlement, island, or place belonging to or subject to H. M., shall hire, retain, engage, or procure, or shall attempt or endeavour to hire, retain, engage, or procure any person or persons whatever to enlist, or to enter or engage to enlist, or to serve or to be employed in any such service or employment as aforesaid, as an officer, soldier, sailor, or marine, either in land or sea service, for or under or in aid of any foreign prince, state, potentate, colony, province, or part of any province or people, or for or under or in aid of any person or persons exercising or assuming to exercise any powers of government as aforesaid, or to go or to agree to go or embark from any part of H. M.'s dominions, for the purpose or with intent to be so enlisted, entered, engaged, or employed as aforesaid, whether any enlisting money, pay, or reward shall have been or shall be actually given or received, or not; in any or either of such cases, every person so offending shall be deemed guilty of a misdemeanor, and upon being convicted thereof, upon any information or indictment, shall be punishable by fine and imprisonment, or either of them, at the discretion of the court before which such offender shall be convicted."

All persons retaining or procuring others to enlist, guilty of the like offence.

Act not to extend to persons enlisted or serv-

§ 3. Nothing in this act contained shall extend to render any person liable to any punishment or penalty under this act, who at any time before the 1st of *August*, 1819, within any part of the

U. K., or of the islands of *Jersey, Guernsey, Alderney, or Sark*, or at any time before the 1st of *November*, 1819, in any part or place out of the U. K., or of the said islands, shall have taken or accepted, or agreed to take or accept any military commission, or shall have otherwise enlisted into any military service as a commissioned or non-commissioned officer, or shall have enlisted, or entered himself to enlist, or shall have agreed to enlist or to enter himself to serve as a soldier, or shall have served, or having so served shall, after the said 1st of *August*, 1819, continue to serve in any warlike or military operation, either as an officer or soldier, or in any other military capacity, or shall have accepted, or agreed to take or accept, any commission, warrant, or appointment as an officer, or shall have enlisted or entered himself to serve, or shall have served, or having so served shall continue to serve as a sailor or marine, or shall have been employed or engaged, or shall have served, or having so served shall, after the said 1st of *August*, continue to serve in and on board any ship or vessel of war, used or fitted out, or equipped or intended for any warlike purpose; or shall have engaged, or contracted or agreed to go, or shall have gone to, or having so gone to shall, after the said 1st day of *August*, continue in any foreign state, country, colony, province, or part of a province, or to or in any place beyond the seas, unless such person shall embark at or proceed from some port or place within the U. K., or the islands of *Jersey, Guernsey, Alderney, or Sark*, with intent to serve as an officer, soldier, sailor, or marine, contrary to the provisions of this act, after the said 1st of *August*, or shall embark or proceed from some port or place out of the U. K., or the islands of *Jersey, Guernsey, Alderney, or Sark*, with such intent as aforesaid, after the said 1st of *November*, or who shall, before the passing of this act, and within the said U. K., or the said islands, or before the 1st of *November*, 1819, in any port or place out of the said U. K. or the said islands, have hired, retained, engaged, or procured, or attempted or endeavoured to hire, retain, engage, or procure any person whatever to enlist or to enter, or to engage to enlist or to serve, or be employed in any such service or employment as aforesaid, as an officer, soldier, sailor, or marine, either in land or sea service, or to go, or agree to go or embark for the purpose or with the intent to be so enlisted, entered, or engaged or employed, contrary to the prohibitions in this act contained; but all and every such persons shall be in such state and condition, and no other, and shall be liable to such fines, penalties, forfeitures, and disabilities, and none other, as such person was liable to before the passing of this act, and as such person would have been in and liable to, in case this act and the said recited acts by this act repealed had not been passed.

§ 4. It shall be lawful for any justice of the peace residing at or near to any port or place within *G. B. and Ireland*, where any offence made punishable by this act as a misdemeanor shall be committed, on information on oath of any such offence, to issue his warrant for the apprehension of the offender, and to cause him to be brought before such justice, or any justice of the peace; and it shall be lawful for the justice of the peace before whom such offender shall be brought, to examine into the nature of the offence upon oath, and to commit such person to gaol, there to remain until delivered by due course of law, unless such offender

59 G. 3. c. 69.

ing before the times herein specified.

Justices to issue warrants for the apprehension of offenders.

59 G. S. c. 69.

Where offences
shall be tried.

shall give bail, to the satisfaction of the said justice, to appear and answer to any information or indictment to be preferred against him, according to law, for the said offence; and all such offences which shall be committed within *England*, shall be proceeded and tried in H. M.'s court of K. B. at *Westminster*, and the venue in such case laid at *Westminster*, or at the assizes or session of oyer and terminer and gaol delivery, or at any quarter or general sessions of the peace in and for the county or place where such offence was committed; and that all such offences which shall be committed within *Ireland* shall and may be prosecuted in H. M.'s court of K. B. at *Dublin*, and the venue be laid at *Dublin*, or at any assizes or session of oyer and terminer and gaol delivery, or at any quarter or general sessions of the peace in and for the county or place where such offence was committed; and all such offences as shall be committed in *Scotland* shall and may be prosecuted in the court of justiciary in *Scotland*, or any other court competent to try criminal offences committed within the county, shire, or stewartry within which such offence was committed; and where any offence made punishable by this act as a misdemeanor shall be committed out of the said U. K., it shall be lawful for any justice of the peace residing near to the port or place where such offence shall be committed, on information on oath of any such offence, to issue his warrant for the apprehension of the offender, and to cause him to be brought before such justice, or any other justice of the peace for such place; and it shall be lawful for the justice of the peace before whom such offender shall be brought, to examine into the nature of the offence on oath, and to commit such person to gaol, there to remain till delivered by due course of law, or otherwise to hold such offender to bail to answer for such offence in the superior court, competent to try, and having jurisdiction to try, criminal offences committed in such port or place; and all such offences committed at any place out of the said U. K. shall and may be prosecuted and tried in any superior court of H. M.'s dominions competent to try, and having jurisdiction to try, criminal offences committed at the place where such offence shall be committed.

Vessels with
persons on
board engaged
in foreign ser-
vice, may be
detained at any
port in H. M.'s
dominions.

§ 5. "In case any ship or vessel in any port or place within H. M.'s dominions, shall have on board any such person or persons who shall have been enlisted or entered to serve, or shall have engaged or agreed or been procured to enlist or enter or serve, or who shall be departing from H. M.'s dominions for the purpose and with the intent of enlisting or entering to serve, or to be employed, or of serving or being engaged or employed in the service of any foreign prince, state, or potentate, colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise the powers of government in or over any foreign colony, province, or part of any province or people, either as an officer, soldier, sailor, or marine, contrary to the provisions of this act, it shall be lawful for any of the principal officers of H. M.'s customs, where any such officers of the customs shall be, and in any part of H. M.'s dominions in which there are no officers of H. M.'s customs, for any governor or persons having the chief civil command, upon information on oath given before them respectively, which oath they are hereby respectively authorised and empowered to administer, that such person or persons as aforesaid

is or are on board such ship or vessel, to detain and prevent any such ship or vessel, or to cause such ship or vessel to be detained and prevented from proceeding to sea on her voyage with such persons as aforesaid on board: Provided nevertheless, that no principal officer, governor, or person shall act as aforesaid, upon such information upon oath as aforesaid, unless the party so informing shall not only have deposed in such information that the person or persons on board such ship or vessel hath or have been enlisted or entered to serve, or hath or have engaged or agreed or been procured to enlist or enter or serve, or is or are departing as aforesaid, for the purpose and with the intent of enlisting or entering to serve or to be employed, or of serving, or being engaged or employed in such service as aforesaid, but shall also have set forth in such information upon oath the facts or circumstances upon which he forms his knowledge or belief, enabling him to give such information upon oath; and that all and every person and persons convicted of wilfully false swearing in any such information upon oath shall be deemed guilty of, and suffer the penalties on, persons convicted of wilful and corrupt perjury."

§ 6. If any master or other person having or taking the charge or command of any ship or vessel, in any part of *G. B. and Ireland*, or in any part of *H. M.'s dominions beyond the seas*, shall knowingly and willingly take on board, or if such master or other person having the command of any such ship or vessel, or any owner of any such ship or vessel, shall knowingly engage to take on board any person who shall have been enlisted or entered to serve, or shall have engaged or agreed or been procured to enlist or enter or serve, or who shall be departing from *H. M.'s dominions* for the purpose and with the intent of enlisting or entering to serve, or to be employed, or of serving, or being engaged or employed in any naval or military service, contrary to the provisions of this act, such master or owner or other person as aforesaid shall forfeit and pay the sum of 50*l.* for each such person so taken or engaged to be taken on board; and moreover every such ship or vessel, so having on board, conveying, carrying, or transporting any such person, may be seized and detained by the collector, comptroller, surveyor, or other officer of the customs, until such penalty or penalties shall be satisfied and paid, or until such master or person, or the owner of such ship or vessel, shall give good and sufficient bail, by recognizance before one of *H. M.'s justices of the peace*, for the payment of such penalty or penalties.

§ 7. "If any person, within any part of the *U. K.*, or in any part of *H. M.'s dominions beyond the seas*, shall without the leave and licence of *H. M.* for that purpose first had and obtained as aforesaid, equip, furnish, fit out, or arm or attempt or endeavour to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state, or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people, as a transport or store ship, or with intent to cruise or commit hostilities against

59 G. 3. c. 69.

Oath to be made as to facts and circumstances.

Penalty on masters of ships, &c. taking on board persons enlisted contrary to this act, 50*l.* for each.

Penalty on persons fitting out armed vessels to aid in military operations with any foreign powers without licence;

59 G. 3. c. 69. any prince, state, or potentate, or against the subjects or citizens of any prince, state, or potentate, or against the persons exercising or assuming to exercise the powers of government in any colony, province, or part of any province or country, or against the inhabitants of any foreign colony, province, or part of any province or country, with whom H. M. shall not then be at war; or shall, within the U. K., or any of H. M.'s dominions, or in any settlement, colony, territory, island, or place belonging or subject to H. M., issue or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid, every such person so offending shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the court in which such offender shall be convicted; and every such ship or vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores, which may belong to or be on board of any such ship or vessel, shall be forfeited; and it shall be lawful for any officer of H. M.'s customs or excise, or any officer of H. M.'s navy, who is by law empowered to make seizures for any forfeiture incurred under any of the laws of customs or excise, or the laws of trade and navigation, to seize such ships and vessels aforesaid, and in such places and in such manner in which the officers of H. M.'s customs or excise and the officers of H. M.'s navy are empowered respectively to make seizures under the laws of customs and excise, or under the laws of trade and navigation; and that every such ship and vessel, with the tackle, apparel, and furniture, together with all the materials, arms, ammunition, and stores which may belong to or be on board of such ship or vessel, may be prosecuted and condemned in the like manner, and in such courts as ships or vessels may be prosecuted and condemned for any breach of the laws made for the protection of the revenues of customs and excise, or of the laws of trade and navigation."

Penalty for aiding the warlike equipment of vessels of foreign states, &c.

§ 8. "If any person in any part of *G. B.* and *Ireland*, or in any part of H. M.'s dominions beyond the seas, without the leave and licence of H. M. for that purpose first had and obtained as aforesaid, shall, by adding to the number of the guns of such vessel, or by changing those on board for other guns, or by the addition of any equipment for war, increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting the warlike force of any ship or vessel of war, or cruizer, or other armed vessel, which at the time of her arrival in any part of the U. K., or any of H. M.'s dominions, was a ship of war, cruizer, or armed vessel in the service of any foreign prince, state, or potentate, or of any person or persons exercising or assuming to exercise any powers of government in or over any colony, province, or part of any province or people, belonging to the subjects of any such prince, state, or potentate, or to the inhabitants of any colony, province, or part of any province or country under the control of any person or persons so exercising or assuming to exercise the powers of government, every such person so offending shall be deemed guilty of a misdemeanor, and shall, upon being convicted thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the court before which such offender shall be convicted."

§ 9. Offences punishable by this act, committed out of the U. K., may be tried in the court of K. B. at *Westminster*, and the venue laid at *Westminster*, in the county of *Middlesex*.

§ 10. Any penalty inflicted by this act may be sued for and recovered by action of debt, bill, plaint, or information, in any of H. M.'s courts of record at *Westminster* or *Dublin*, or in the court of exchequer, or in the court of session in *Scotland*, in the name of H. M.'s attorney-general for *England* or *Ireland*, or H. M.'s advocate for *Scotland* respectively, or in the name of any person or persons whatsoever, wherein no essoin, protection, privilege, wager of law, nor more than one imparlance shall be allowed; and in every action or suit the person against whom judgment shall be given for any penalty under this act shall pay double costs; and every such suit may be brought at any time within twelve months after the offence committed, and not afterwards; and one moiety shall go to H. M., and the other moiety to the use of such person or persons as shall first sue for the same.

§ 11. If any action or suit shall be commenced, either in *G. B.* or elsewhere, against any person or persons for any thing done in pursuance of this act, all rules and regulations, privileges and protections, as to maintaining or defending any suit or action, and pleading therein, or any costs thereon, in relation to any acts done, or that may be done by any officer of customs or excise, or by any officer of H. M.'s navy, under any act in force for the protection of the revenues of customs and excise, or prevention of smuggling, shall apply in any such action or suit brought for any thing done in pursuance of this act.

§ 12. Nothing in this act contained shall extend to subject to any penalty any person who shall enter into the military service of any prince, state, or potentate in *Asia*, with leave or licence from the governor general in council, or vice president in council, of *Fort William* in *Bengal*.

Disobedience to the king's letter to a subject commanding him to return from beyond the seas, or to the king's writ of *ne exeat regno*, commanding a subject to stay at home, is a high misprision and contempt. 4 *Blac. Com.* 122.

And it is also a high offence to refuse to assist the king for the good of the public, either in councils, by advice, if called upon, or in his wars by personal service for the defence of the realm against a rebellion or invasion. 1 *Haw. c.* 22. § 2. 1 *Russ.* 130.

59 G. 3. c. 69.

Offences committed out of the kingdom may be tried at *Westminster*.
How penalties shall be sued for and recovered.

Double costs.

Limitation of actions.

Former rules established by law to be applied to actions commenced in pursuance of this act.

Penalties not to extend to persons entering into military service in *Asia*.

Prerogative of *ne exeat regno*, &c.

Refusing to assist H. M. in council, &c.

Forestalling, ingrossing, and regrating.

[5 & 6 Ed. 6. c. 14.—12 G. 3. c. 71.]

FORESTALLING (*forestellan*, or *forestallan*) in the English Saxon, signifieth properly to market before the public, or to prevent the public market; and metaphorically, to intercept in general; and seemeth derived from *fore*, which is the same as *before*, and *stalle*, a standing place or department; from whence sprang the ancient word *stallage*, which signifieth money paid for erecting a stall or stand, for the selling of goods in a fair or market.

Derivation.

Ingrossing is from *in*, and *gross*, great or whole.

And *regrating*, from *re*, again, and the French *grater*, to *grate* or scrape; and signifieth the scraping or dressing of cloth or other goods, in order for selling the same again.

All the statutes
against those
offences are
repealed.

There have been several statutes made from time to time against these offences in general, and also especially with respect to particular species of goods, according to their several circumstances; almost all of which, from stat. 5 & 6 Ed. 6. c. 14., and others downwards made for enforcing the same, are repealed by stat. 12 G. 3. c. 71. But these offences still continue punishable upon indictment at the common law by fine and imprisonment.

But the offences
remain punish-
able at common
law.

Enhancing the
price of mer-
chandise.

And at the common law all endeavours whatsoever to enhance the common price of any merchandize, and all kinds of practices which have an apparent tendency thereto, whether by spreading false rumours, or by buying things in a market before the accustomed hour, or by buying and selling again the same thing in the same market, or by any other such like devices, are highly criminal, and punishable by fine and imprisonment. 1 Haw. c. 80. § 1. 1 Russ. 255.

Ingrossing at
common law.

By the common law a merchant bringing victuals into the realm may sell the same in gross: but no person can lawfully buy within the realm any merchandize in gross, and sell the same in gross again, without being liable to be indicted for the same. 3 Inst. 196.

The bare ingrossing of a whole commodity, with an intent to sell it at an unreasonable price, is an offence indictable at common law, whether any part thereof be sold by the ingrosser or not. 1 Haw. c. 80. § 3.

And so jealous is the common law of all practices of this kind, that it will not suffer corn to be sold in the sheaf; perhaps for this reason, because by such means the market is in effect forestalled. 1 Haw. c. 80. § 4.

By statute 5 & 6 Ed. 6. c. 14. these offences were particularly described; which statute, though now repealed as aforesaid, yet may be of use, as containing a parliamentary exposition of the respective terms denoting the several particular offences; and is to the following effect:—

5 & 6 E. 6. c. 14.
Foretaller.
Now repealed.

Whosoever shall buy or cause to be bought any merchandize, victual, or any other thing whatsoever, coming by land or by water, toward any market or fair, to be sold in the same, or coming towards any city, port, haven, creek, or road from any parts beyond the sea, to be sold; or make any bargain, contract, or promise for the having or buying the same, or any part thereof, so coming as is aforesaid, before the said merchandize, victuals, or other things shall be in the market, fair, city, port, haven, creek, or road, ready to be sold; or shall make any motion by word, letter, message, or otherwise, to any person for the enhancing of the price, or dearer selling of any thing above mentioned; or else dissuade, move, or stir any person coming to the market or fair, to abstain or forbear to bring or convey any of the things above rehearsed to any market, fair, city, port, haven, creek, or road to be sold as aforesaid ————— shall be deemed a forestaller.

Ingrosser.

§ 3. *Whosoever shall ingross, or get into his hands by buying, contracting, or promise taking, other than by demise, grant, or lease of land or tythe, any corn growing in the fields, or any other corn or*

grain, butter, cheese, fish, or other dead victuals whatsoever, to the intent to sell the same again, shall be deemed an unlawful ingrosser. 5 & 6 E. 6. c. 14.

§ 2. And whosoever shall by any means regrate, obtain, or get into his hands or possession, in a fair or market, any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead victual whatsoever, that shall be brought to any fair or market to be sold, and shall sell the same again in any fair or market holden or kept in the same place, or in any other fair or market within four miles thereof, shall be deemed a regrator. (a) *Regrator.*

It has been observed that, notwithstanding the repeal of stat. 5 & 6 E. 6., the offences of forestalling, ingrossing, and regrating, remain punishable at common law; and indeed lamentable would be the plight of the public and of the state, were there no remedy against practices which have been justly termed most heinous offences against religion and morality, and against the established law of the country.

In the case of *R. v. Waddington*, 1 East, 143. 145., which was ably argued at the bar, and well considered by the court, the following were declared to be among the offences at common law, and not done away by the repeal of stat. 5 & 6 E. 6., viz. *R. v. Waddington.*

1. Spreading false rumours with intent to enhance the price of hops. *Measures for raising prices.*

2. Endeavouring to enhance the price of hops by persuading dealers, &c. not to take their hops to market, and to abstain from selling for a long time.

3. Ingrossing large quantities of hops, by buying with intent to resell the same for an unreasonable profit, and thereby to enhance the price.

4. Getting into hand large quantities, by contracting with various persons for the purchase, with intent to prevent the same being brought to market, and to resell at an unreasonable profit, and thereby greatly to enhance the price.

5. Unlawfully ingrossing by buying large quantities, with like intent.

6. Ingrossing hops then growing, by forehand bargains, with like intent.

To forestall any commodity which is become a common victual and necessary of life, or is used as an ingredient in the making or preservation of any victual, though not formerly used or considered as such, is an offence at common law. *R. v. Waddington*, 1 East, 143.

It is well observed by Mr. Chitty, that at the present day, it would probably be holden that no offence is committed unless there is an intent to raise the price of provisions by the conduct of the party, for the mere transfer of a purchase in the market where it is made, the buying articles before they arrive at a public market, or the purchasing of a large quantity of a particular article, can scarcely be regarded as in themselves necessarily injurious to the community, and, as such, indictable offences; a party buying and selling again, does not necessarily increase the price of the commodity to the consumer, for the division of labour or occupations will, in general, occasion the commodity to be sold cheaper to the con-

Modern principles contrd.

(a) *Regrator* is said to be derived from the French word *regratement*, for *huckstery*. 3 Inst. 195.

R. v. Rusby.
Conviction for
regrating.
Court divided.
Defendant not
brought up for
judgment.
Indictment
must state the
quantity.

sumer; see *Smith's Wealth of Nations*, book 4. c. 5. and Index, tit. *Labour*; and many cases may occur in which a most laudable motive may exist for buying large quantities of the same commodity. See the arguments, &c. in 14 *East*, 406. 15 *East*, 511. Indeed, in the case of the *King v. Rusby*, *H. T.* 40 G. 3., the court were equally divided on the question, whether regrating is an indictable offence at common law, and though the defendant was convicted, no judgment was ever passed upon him. 2 *Crim. Law*, 528. (n), 537. (n).

An indictment for ingrossing "a great quantity" of fish, geese, and ducks, was holden bad; for the quantity of each ought to be specified. *R. v. Gilbert*, 1 *East*, 583.

Forests. See **Game.**

Forfeiture.

The forfeitures for particular offences may be found under their respective titles: here it is treated of forfeitures in general.

I. Of Forfeiture of Lands and Goods.

[17 Ed. 2. c. 16. — 54 G. 3. c. 145. — 7 & 8 G. 4. c. 28. — 4 & 5 W. 4. c. 23.]

II. Of Loss of Dower.

[1 Ed. 6. c. 12. — 5 & 6 Ed. 6. c. 11.]

III. Of Corruption of Blood.

I. Of Forfeiture of Lands and Goods.

THERE is a remarkable general difference in principle between the forfeiture of lands, and the forfeiture of goods and personal estate; lands are forfeited upon attainder by judgment of death or outlawry, and not before; but goods and personal estate are forfeited by conviction. 4 *Bl. Comm.*, 386, 387.

It seems agreed that by the common law all lands of inheritance, whereof the offender was seised in his own right, and also all rights of entry to lands in the hands of a wrong-doer, are forfeited to the king, by an attainder of high treason, and to the lord of whom they are immediately holden, by an attainder of petit treason or felony. 2 *Haw. c.* 49. § 1.

But it seems clear that the lord cannot enter into the lands holden of him, upon an escheat for petit treason or felony, without a special grant, till it appear by due process that the king hath had his prerogative of the year, day, and waste. *Id.* § 3.

By 4 & 5 *W. 4. c.* 23. § 3. no land chattels or stock vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to his majesty, his heirs and successors, or to any corporation, lord of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his co-trustee, or descend or vest in his representative, as if no such attainder or conviction had taken place.

Concerning which year, day, and waste, it is enacted by the

Forfeiture of
lands.

4 & 5 *W. 4.*
c. 23.
No forfeiture
on account of
conviction or
attainder of
trustee or mort-
gagee.

17 Ed. 2. c. 16.

17 Ed. 2. c. 16. that the king shall have the goods of all felons attainted, and fugitives, wheresoever they be found. And if they have freehold, it shall be forthwith taken into the king's hands, and the king shall have all profits of the same by one year and one day: and the land shall be wasted and destroyed in the houses, woods, and gardens, and in all manner of things belonging to the same land. And after the king hath had the year, day, and waste, the land shall be restored to the chief lord of the fee, unless that he fine before with the king for the year, day, and waste.

It seems also that a copyhold of inheritance will be forfeited to the lord by attainder of treason or felony, but not upon conviction only, except by special custom. 2 Hawk. P. C. c. 49. § 7. acc. *R. v. Willes*, 3 B. & A. 510.

By stat. 54 G. 3. c. 145. no attainder, except for high treason, petit treason, or murder, or for abetting the same, shall extend to the disinheriting of any heir, &c. *Vide tit. Attainder.*

As to forfeiture of goods, it seems agreed that all things whatsoever which are comprehended under the notion of a personal estate, whether they be in action or possession, which the party hath or is entitled to in his own right, and not as executor or administrator to another, are liable to such forfeiture, in the following cases:

Forfeiture of goods.

(1) Upon a conviction of treason or felony. 2 Hawk. c. 49. § 13. (a)

Conviction of treason or felony.

(2) Upon a presentment by the oaths of 12 men that a person arrested for treason or felony fled from or resisted those who had him in custody, and was killed by them in the pursuit or scuffle. *Id.* § 16.

Person arrested killed in pursuit or scuffle.

But where the killing a man in his own defence is in the law no felony, there is no forfeiture unless he fled; for that is a distinct forfeiture, although the party be not guilty of the fact. 1 Hale, 493.

Forfeiture by flight though the party flying be innocent.

By 7 & 8 G. 4. c. 28. § 5., where any party shall be indicted for treason or felony, the jury empannelled to try such person shall not be charged to inquire concerning his lands, tenements, or goods, nor whether he fled for such treason or felony.

7 & 8 G. 4. c. 28.

This enactment does not, however, apply to the case of a presentment, made by a coroner's inquest on view of a dead body, that *A.* killed *B.*, and fled for it, which, by a strange anomaly, is held not traversable, but conclusive for the forfeiture of goods, although a petty jury afterwards acquit *A.* on his trial, and find that he did not fly. 2 Hale, 63. 154. But see 1 Saund. R. 362. n. (1.)

Jury who try not to inquire of flight; does not extend to a coroner's inquest.

The whole doctrine of forfeiture for flight may perhaps be now well considered as altogether obsolete.

(3) By being waived or left by a felon in his flight, whereby he forfeits the goods so waived, whether they be his own, or the goods of others stolen by him, which shall not be restored to the right owners but upon a proper prosecution. *Id.* § 17.

Goods waived.

(4) If a person be found *felo de se*, he shall forfeit his goods and chattels, but not his lands. 3 Inst. 54. 5 Rep. 109.

Felo de se.

Upon outlawry in treason or felony, the offender shall lose and forfeit as much as if he had appeared, and judgment had been given against him, as long as the outlawry is in force. *Wood's Inst.* b. 4. c. 5.

Forfeiture upon outlawry.

(a) It has been decided, that a chose in action accruing to a party after his being attainted for felony vests in the king. *Bullock v. Dodds*, 2 B. & A. 258.

And those that tarry till the exigent in treason, felony, or petit larceny, forfeit their goods, though they render themselves to justice, and are acquitted; for it was a flight in law. *Id.*

To what time the forfeiture shall relate.

It seems agreed that the forfeiture, upon an attainder, either of treason or felony, shall have relation to the time of the offence, for the avoiding of all subsequent alienations of the *land*, but to the time of the conviction or flight found only, as to *chattels*; unless the party were killed in flying or resisting, in which case it is said that the forfeiture of the chattels shall relate to the time of the offence. 2 *Haw. c. 49. § 30.*

What is to be done with the felon's goods before forfeiture.

But though the goods of an offender be not forfeited till the conviction or flight found by inquest, yet whether they may be seized upon the offence committed, hath been controverted; concerning which Lord *Hale* saith thus:—

It seemeth clear that at the common law, if a man had committed felony or treason, or though possibly he had committed none, yet if he had been indicted, the sheriff, coroner, or other officer could not seize and carry away the goods of the offender or party accused.

Again, he could not in that case have removed the goods out of the custody of the offender or party accused, and deliver them over to the constables, or to the *villata*, to answer for them.

Party being indicted, inventory and appraisement may be made of his goods;

But if the party were indicted, the sheriff or other officer might make a simple seizure of them, only to inventory and appraise them, and leave them to the custody of the servants or bailiff of the party indicted, in case he would give security against their being embezzled, or in default thereof he might deliver them to the constable or vill to be answerable for them, but yet so that the party accused and his family have sufficient out of them for their livelihood and maintenance.

or possibly, if not indicted;

And possibly the same law was, though he were not indicted, but *de facto* had committed a felony, but with this difference, if he had been indicted, this kind of seizure might have been made, whether he committed the felony or not.

but at peril of him who seizes.

But in case there were no indictment, then it is at the peril of him that seizeth, if he committed not the felony.

There is this advantage by the viewing and appraising, that thereby the king is ascertained what the goods are, and may pursue them that take or embezzle them by information (if the party happen to be convict), and try the property with them, whether they are really sold, or sold only fraudulently, without valuable consideration, to prevent the forfeiture. 1 *Hale*, 363, 4, 5, 6, 7.

II. Of Loss of Dower.

Forfeiture of dower in felony. In treason.

Albeit a person shall be attainted of felony, yet his wife shall not forfeit her dower. 1 *Ed. 6. c. 12. § 17.*

But on his attainder of treason she shall forfeit her dower. 5 & 6 *Ed. 6. c. 11. § 13.*

But in some kinds of treason, (particularly with regard to the coin,) there is a special saving of the wife's dower by statute.

III. Of Corruption of Blood.

Corruption of blood.

It is agreed that by an attainder of treason or felony, the blood is so far stained or corrupted, that the party loses all the nobility

or gentility he might have had before, and becomes ignoble. 2 *Haw. c. 49. § 47.*

Also, that he can neither inherit as heir to an ancestor, nor have an heir. *Id. § 48.* But see 54 *G. 3. c. 145. and, tit. Attainder.*

But the king's pardon, though it doth not restore the blood, yet as to issue born after, hath the effect of a restitution. 1 *Hale, 358.*

But restitution of blood, in its true nature and extent, can only be by act of parliament. 1 *Hale, 358. 2 Haw. c. 49. § 51.*

See *tit. Attainder.*

Forgery. (a)

I. Of Forgery at Common Law.

II. ————— by Statute.

[9 Ann. c. 21. — 9 G. 1. c. 12. — 42 G. 3. c. 63. — 46 G. 3. c. 45. — 54 G. 3. c. 151. c. 169. — 55 G. 3. c. 103. c. 184. c. 185. — 57 G. 3. c. 127. — 59 G. 3. c. 56. — 1 G. 4. c. 9. c. 92. — 3 G. 4. c. 51. — 4 G. 4. c. 41. — 5 G. 4. c. 113. — 6 G. 4. c. 78. — 7 G. 4. c. 16. — 7 & 8 G. 4. c. 28. — 10 G. 4. c. 24. c. 26. — 1 W. 4. c. 66. — 2 & 3 W. 4. c. 106. c. 123. — 3 & 4 W. 4. c. 44.]

III. Of the Indictment and Evidence.

[9 G. 4. c. 32. — 2 & 3 W. 4. c. 123.]

I. Of Forgery at Common Law.

THE crime of forgery is not of the class of offences which fall within the jurisdiction of justices for trial at their sessions; but magistrates may still be called upon to act in cases of forgery, in examining and committing the offender, taking depositions, &c. See *post, p. 254.*

Forgery cannot be tried at sessions.

Forgery is an offence at common law, and an offence also by statute.

Definition of offence.

Forgery at the common law is an offence in falsely and fraudulently making or altering any manner of record, or any other authentic matter of a public nature; as a parish register, or any deed, will, privy seal, certificate of holy orders, protection of a parliament man, and the like. 1 *Haw. c. 70. § 1.*

Mr. J. Blackstone says, that forgery is the fraudulent making or alteration of a writing, to the prejudice of another's right. 4 *Black. Com. 247.*

Mr. J. Grose, in delivering the opinion of the judges in *Reculist's* case, says, "The crime of forgery is a false making of any instrument, with intention to defraud." *O. B. May, 1796, 2 Lench, 707.*

The counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, (it is immaterial whether the party be actually injured or not,) is also a forgery at common law. 2 *East's P. C. 861.*

(a) See the Report from a Select Committee of the House of Commons on the Criminal Law of England, dated 2d April, 1824, which contains a most able and accurate statement of the then existing law upon this subject.

Fraudulent or false making or alteration of any writing.

Forgery at common law is also defined to be the fraudulent making or alteration of a writing to the prejudice of another man's right; and a false making, a making *malò animo*, of any written instrument for the purpose of fraud and deceit, within which word "making" must be included every alteration of, or addition to, a true instrument. 2 Russ. 317.

Forging an order from one to charge certain goods contained in a schedule to his account, and to appropriate part of the proceeds to defendant's own use, &c. with intent to defraud, is forgery at common law, though no fraud be effected.

R. v. Ward, 2 Stra. 747. 2 Ld. Raym. 1461. 2 East's P. C. 861. 2 Russ. 351. An information was filed by the attorney-general, charging that the defendant *Ward*, being bound to deliver 315 tons and a quarter of alum, of the value of 1000*l.*, to the Duke of Buckingham at a certain day then past, he, the defendant, wickedly contriving and intending the said duke of the said alum to deceive and defraud, and with a wicked and fraudulent intent to avoid the delivery of the said alum, on, &c. at, &c. with force and arms upon the back of a certain certificate in writing signed by one A. N. falsely forged and counterfeited and caused to be forged and counterfeited a certain writing, in the words and figures following:—

“Schedule	{	Tons. C.	Mr. John Ward, I do hereby order you
		660 5	to charge the quantity of 660 tons and
		315 5	1 quarter of alum to my account, part
		975 10	of the quantity here mentioned in this

certificate, and out of the money arising

by the sale of the alum in your hand to pay to Mr. *W. Ward* and yourself 10*l.* for every ton according to agreement; and for your so doing this shall be your discharge. *Buckingham, April 30th, 1706.*” To the evil example, &c. to the great damage of the said duke, and against the peace, &c. A second count charged him with publishing the same forged writing knowing it to be forged, &c. After conviction, it was moved in arrest of judgment that the instrument set forth was not the subject of forgery at common law; but at most the offence was only punishable as a cheat, and not in this form, being merely a thing of a private nature, and in effect nothing more than a letter; and if the counterfeiting a letter had been punishable as a forgery at common law, then the making the stat. 33 *H. 8. c. 1.*, to punish those who got money or goods of others under colour of false tokens or counterfeit letters, was nugatory; that it nowhere appeared that the duke had been prejudiced by this, which if he had, it might have been indictable as a cheat, but not as a forgery at common law. — But all the court held that this was indictable as a forgery at common law; that none of the books confine the offence to the particular kinds mentioned in 3 *Inst.* 169.; and that, as forging a writing not sealed, came within all the mischief of forging a deed, the maxim applied, *ubi eadem est ratio eadem est lex*; that this was recognised in the preamble of the stat. 5 *Eliz. c. 14.*, which recites, that the forging of writings “as well as of deeds” was punishable by law before that statute, but that offenders had been encouraged by the too great mildness of the punishments; and that the 33 *H. 8. c. 1.* did not create new offences, but only enhanced the penalty where the fraud was executed. They also referred to several instances of indictments at common law for forging instruments not under seal, as a bill of lading (5 *Mod.* 137.), and acquittance (1 *Sid.* 278.), a warrant of attorney (*T. Ray.* 81.), a marriage register (2 *Sid.* 71.), a bill of exchange (*Roll.* 35.), letters of credit to gather money

Motion in arrest of judgment.

Forgery at common law need not be of a public nature, nor of a writing under seal.

(*Sty.* 12.), and others of a similar kind; and they distinguished this offence from cheats at common law and upon the 33 H. 8. c. 1., where the party received an actual prejudice, which was not necessary to constitute forgery; it being sufficient if the party might be prejudiced by it.

Fawcett's case, *York Sp. Ass.* 1793, 2 *East's P. C.* 862. 2 *Russ.* 352. *Leander Fawcett*, who had been committed to the gaol at *York*, under an attachment sued out of the court of K. B. for a contempt in a civil suit, was indicted for forging a certain writing purporting to be signed in the name of *A. Dawson* (the party who had prosecuted the writ of attachment against him) and to contain the authority of *Dawson* to the sheriff for his discharge, in the following form:—"To the high sheriff of the county of *York*, his deputy, &c. and gaoler. As to any writ, attachment, or any other process or cause whatsoever, at the suit, instance, or promotion of me *A. Dawson*, by reason whereof *Leander Fawcett* is now detained a prisoner in your custody, you may forthwith discharge and set at liberty him the said *Leander Fawcett*, unless detained at the suit of some other person; and for so doing this shall be your warrant and indemnity. (Dated) 26th February, 1793. (Signed) *A. Dawson*, and witnessed by one *R. W.*" The defendant having been convicted, several questions were submitted to the consideration of the judges; and, amongst others, whether the order were a matter of such a public nature, that the counterfeiting of it would be a forgery at common law; and also, whether, as the attachment was for non-payment of money, the order, if genuine, would not have been a mere nullity, and the sheriff not authorised to discharge the prisoner under it. Lord *Kenyon* C. J. and *Eyre* C. J. said, that there was an injury to a third person, and that it was an interruption to public justice: but the latter thought it was not a forgery, but a cheat. The matter was adjourned to a subsequent term, when *Eyre* C. J. was still not satisfied as to the forgery; though he thought the indictment good as for a cheat. But all the judges concurred in holding that the offence was indictable as for a misdemeanor at common law; and a great majority also thought it was forgery at common law.

Prisoner was indicted for forgery at common law, for that being in gaol for want of sureties, he forged a letter from a magistrate to the gaoler, stating that sureties were entered, and authorising his discharge. The indictment set out the letter, and charged the intent to be to effect his escape.—It appeared that the prisoner, being in *Oxford* gaol for the cause stated, sent the letter forged in the name of a magistrate to a friend at *Chipping Norton*, who transmitted it by the post to the gaoler. The gaoler stated, that when a person was in custody for want of sureties, it was the course to discharge him on its being certified by a magistrate that sureties had been entered, the prisoner also entering into his own recognizance; but he added, that in this instance he should not have discharged the prisoner, as he did not believe the letter to be the hand-writing of the magistrate. On a doubt of *Tindal* C. J., who tried the prisoner, whether the counterfeiting this letter amounted to a forgery at common law judgment was respite, and a case reserved. *Fawcett's case*, 2 *Russ.* 352. was referred to. The judges (13) held unanimously that the conviction was right. *M. T.* 1833. *R. v. Robt. Harris*, *Sum. Ass.* for *Oxford*, 1833, *cor.* *Tindal* C. J.

Party need not actually be prejudiced.

The defendant having been committed to gaol under an attachment for a contempt in a civil cause, counterfeited a pretended discharge as from his creditor to the sheriff and gaoler, under which he obtained his discharge from gaol; and it was holden to be a misdemeanor at common law; although, as the attachment was not for the non-payment of money, the order was in itself a mere nullity, and no warrant to the sheriff for the discharge. A majority of the judges also thought that it was a forgery at common law.

Forged letter from a magistrate authorising the discharge of a person in prison for want of sureties is a forgery at common law.

2 Haw. c. 8.
s. 38.

Justices have no jurisdiction to try forgery, not being an offence having a direct tendency to breach of peace.

But as to the power of justices of the peace in this matter, Mr. *Hawkins* says it hath been settled of late that they have no jurisdiction over forgery at the common law; the principal reason of which resolution, he says, as he apprehended, was, that inasmuch as the chief end of the institution of the office of these justices was for the preservation of the peace against personal wrongs and open violence, and the word *trespass* in its most proper and natural sense is taken for such kind of injuries, it shall be understood in that sense only in the commission, or at the most to extend to such other offences only as have a direct and immediate tendency to cause such breaches of the peace, as libels, and such like, which on this account have been adjudged indictable before justices of the peace. And this was confirmed in the case of *Micah Gibbs*, 1 *East*, 173., where it was determined that the sessions have no jurisdiction over the offence of forgery at common law, nor can they take cognizance of it as a cheat.

But may examine, commit, &c.

But Mr. *Barlow* says nevertheless, that it seemeth clear that a justice of the peace may take an information thereof, bind over the informers, examine the offender, certify his examination to the proper judges, and commit him to prison, in order to abide his trial. *Barl.* 244.

II. Of Forgery by Statute.

Law of forgery modelled or consolidated by 1 W. 4. c. 66.

No forgeries, or other kindred offences, which are now capital, shall continue so, unless expressly made capital by this act.

By 11 G. 4 & 1 W. 4. c. 66. the law respecting the crime of forgery has been new-modelled and consolidated, and many of the previous statutes inflicting punishment for that offence have been repealed, either in the whole or in part.

By the 1st section it is enacted, "That where by any acts now in force any person falsely making, forging, counterfeiting, erasing, or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting away, or making use of any matter whatsoever, knowing the same to be falsely made, forged, counterfeited, erased, or altered, or any person demanding or endeavouring to receive or have any thing, or to do or cause to be done any act, upon or by virtue of any matter whatsoever, knowing such matter to be falsely made, forged, counterfeited, erased, or altered, would, according to the provisions contained in any of the said acts, be guilty of felony, and liable to suffer death as a felon; or where by any acts now in force any person falsely personating another, or falsely acknowledging any thing in the name of another, or falsely representing any other person than the real party to be such real party, or wilfully making a false entry in any book, account, or document, or in any manner wilfully falsifying any part of any book, account, or document, or wilfully making a transfer of any stock, annuity, or fund, in the name of any person not being the owner thereof, or knowingly taking a false oath, or knowingly making a false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have been false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation, would, according to the provisions contained in any of the said acts, be guilty of felony, and liable to suffer death as a felon; or where by any acts now in

force any person making or using, or knowingly having in his custody or possession any frame, mould, or instrument for the making of paper, with certain words visible in the substance thereof, or any person making such paper, or causing certain words to appear visible in the substance of any paper, would, according to the provisions contained in any of the said acts, be guilty of felony, and liable to suffer death as a felon; then, and in each of the several cases aforesaid, if any person shall, after the commencement of this act, be convicted of any such felony as is herein-before mentioned, or of aiding, abetting, counselling, or procuring the commission thereof, such person shall not suffer death for the same, unless the same shall be made punishable with death by this act; and if the same shall not be made punishable with death by this act, in such case every person who shall, after the commencement of this act, be convicted of any such felony, or of aiding, abetting, counselling, or procuring the commission thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years: Provided always, that nothing herein contained shall affect or alter any acts relating to the coin of this realm, or to any coin of any other realm lawfully current within this realm."

§ 2. "If any person shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited, the great seal of the United Kingdom, his majesty's privy seal, any privy signet of his majesty, his majesty's royal sign manual, any of his majesty's seals appointed by the twenty-fourth article of the Union to be kept, used, and continued in *Scotland*, the great seal of *Ireland*, or the privy seal of *Ireland*, every such offender shall be guilty of high treason, and shall suffer death accordingly: Provided always, that nothing contained in an act passed in the seventh year of the reign of king *William* the third, intituled 'An act for regulating of trials in cases of treason and misprision of treason,' or in an act passed in the seventh year of the reign of queen *Anne*, intituled 'An act for improving the union of the two kingdoms,' shall extend to any indictment, or to any proceedings thereupon, for any of the treasons herein-before mentioned."

§ 3. "If any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any exchequer bill or exchequer debenture, or any indorsement on or assignment of any exchequer bill or exchequer debenture, or any bond under the common seal of the united company of merchants of *England* trading to the *East Indies*, commonly called an *East India* bond, or any indorsement on or assignment of any *East India* bond, or any note or bill of exchange of the governor and company of the bank of *England*, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any indorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, or any will, testament, codicil, or testamentary writing, or any bill of exchange, or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, with intent, in any

1 W. 4. c. 66.

All forgeries heretofore capital, and not declared so by this act, shall be punished with transportation.

Saving of acts relating to coin.

Forging the great seal, privy seal, privy signet, royal sign manual, &c. treason, and capital. (a)

Forging an exchequer bill, exchequer debenture, *East India* bond, bank note, will, bill of exchange, promissory note, or warrant or order for payment of money, capital. (a)

1 W. 4. c. 66.

of the cases aforesaid, to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

If any instrument, however designated, is in law a bill of exchange, &c. the forger of such instrument may be indicted under this act.

§ 4. "Where by any act now in force any person is made liable to the punishment of death for forging or altering, or for offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any instrument or writing designated in such act by any special name or description, and such instrument or writing, however designated, is in law a will, testament, codicil, or testamentary writing, or a bill of exchange or a promissory note for the payment of money, or an indorsement on or assignment of a bill of exchange or promissory note for the payment of money, or an acceptance of a bill of exchange, or an undertaking, warrant, or order for the payment of money, within the true intent and meaning of this act, in every such case the person forging or altering such instrument or writing, or offering, uttering, disposing of, or putting off such instrument or writing, knowing the same to be forged or altered, may be indicted as an offender against this act, and punished with death accordingly."

Making false entries in the books in which the accounts of public stock are kept; or transfer of public stock in any other name than the true owner's, capital.

§ 5. "If any person shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the governor and company of the bank of *England*, or by the governor and company of merchants of *Great Britain* trading to the *South Seas* and other parts of *America*, and for encouraging the fishery, commonly called the *South Sea* company, in which books the accounts of the owners of any stock, annuities, or other public funds which now are or hereafter may be transferable at the bank of *England* or at the *South Sea* house shall be entered and kept, or shall in any manner wilfully falsify the accounts of such owners in any of the said books, with intent in any of the cases aforesaid to defraud any person whatsoever; or if any person shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the bank of *England* or at the *South Sea* house, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud any person whatsoever; every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

Forging a transfer of any public stock or of certain other stock; power of attorney to transfer the same, or to receive dividends thereon; transfer of stock or receipt of dividends by false personation, capital.

§ 6. "If any person shall forge or alter, or shall utter, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the bank of *England* or at the *South Sea* house, or of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter or act of parliament, or shall forge or alter, or shall utter, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock as is herein-before mentioned, or to receive any dividend payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend payable in respect thereof, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with intent in any of the several cases aforesaid to defraud any person whatsoever; or if any

person shall falsely and deceitfully personate any owner of any such share, interest, or dividend as aforesaid, and thereby transfer any share or interest belonging to such owner, or thereby receive any money due to such owner as if such person were the true and lawful owner; every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon." 1 W. 4. c. 66.

§ 7. "If any person shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the bank of *England* or at the *South Sea* house, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter or act of parliament, or any owner of any dividend payable in respect of any such share or interest as aforesaid, and shall thereby endeavour to transfer any share or interest belonging to any such owner, or thereby endeavour to receive any money due to any such owner as if such offender were the true and lawful owner, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years."

Personating the owner of any public stock or certain other stock, and endeavouring to transfer or to receive the dividends, transportation for life, &c.

§ 8. "If any person shall forge the name or handwriting of any person as or purporting to be a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock as is herein-before mentioned, or to receive any dividend payable in respect of any such share or interest, or shall utter any such power of attorney or other authority, with the name or handwriting of any person forged thereon as an attesting witness, knowing the same to be forged, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years nor less than one year."

Forging the attestation to any power of attorney for transfer of stock, &c., transportation for seven years, &c.

§ 9. "If any clerk, officer, or servant of, or other person employed or intrusted by, the governor and company of the bank of *England*, or the governor and company of merchants commonly called the *South Sea* company, shall knowingly make out or deliver any dividend warrant for a greater or less amount than the person or persons on whose behalf such dividend warrant shall be made out is or are entitled to, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years nor less than one year."

Clerks of the bank wilfully making out dividend warrants for a greater or less sum than what is really due, transportation for seven years, &c.

§ 10. "If any person shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed, bond, or writing obligatory, or any court roll or copy of any court roll relating to any copyhold or customary estate, or any acquittance or receipt either for money or goods, or any accountable receipt either for money or goods, or for any note, bill, or other security for payment of money, or any warrant, order, or request for the delivery or transfer of goods, or for the delivery of

Forging a deed, bond, receipt for money or goods, or an accountable receipt, or an order for delivery of goods, transportation for life, &c.

1 W. 4. c. 66.

any note, bill, or other security for payment of money, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years or less than two years."

Fraudulently acknowledging any recognizance, bail, fine, recovery, or judgment, in the name of another, transportation for life, &c.

§ 11. "If any person shall, before any court, judge, or other person lawfully authorised to take any recognizance or bail, acknowledge any recognizance or bail in the name of any other person not privy or consenting to the same, whether such recognizance or bail in either case be or be not filed; or if any person shall, in the name of any other person not privy or consenting to the same, acknowledge any fine, recovery, cognovit actionem, or judgment, or any deed to be enrolled; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years."

Knowingly purchasing or receiving, or having in possession forged bank notes, transportation for 14 years.

§ 12. "If any person shall, without lawful excuse, the proof whereof shall lie upon the party accused, purchase or receive from any other person, or have in his custody or possession any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same respectively to be forged, every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years."

Making or having, without authority, any mould for making paper with the words "Bank of England" visible in the substance, or for making paper with curved bar lines, &c., or selling such paper, transportation for 14 years.
See also
53 G. 3. c. 139.

§ 13. "If any person shall, without the authority of the governor and company of the bank of *England*, to be proved by the party accused, make or use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession any frame, mould, or instrument for the making of paper with the word '*Bank of England*' visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount, expressed in a word or words in Roman letters, visible in the substance of the paper; or if any person shall, without such authority, to be proved as aforesaid, manufacture, use, sell, expose to sale, utter, or dispose of, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper whatsoever with the words '*Bank of England*' visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount, expressed in a word or words in Roman letters, appearing visible in the substance of the paper; or if any person, without such authority, to be proved as aforesaid, shall, by any art or contrivance, cause the words '*Bank of England*' to appear visible in the substance of any paper, or cause the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed; every such offender shall be

guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years."

1 W. 4. c. 66.

§ 14. provides "that nothing herein contained shall prevent any person from issuing any bill of exchange or promissory note having the amount thereof expressed in guineas, or in a numerical figure or figures denoting the amount thereof in pounds sterling appearing visible in the substance of the paper upon which the same shall be written or printed, nor shall prevent any person from making, using, or selling any paper having waving or curved lines, or any other devices in the nature of watermarks, visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines or the watermarks of the paper used by the governor and company of the bank of *England*."

Proviso as to paper used for bills of exchange, &c.

§ 15. "If any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any promissory note or bill of exchange, or blank promissory note or bill of exchange, purporting to be a bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, without the authority of the governor and company of the bank of *England*, to be proved by the party accused; or if any person shall use such plate, wood, stone, or other material, or any other instrument or device, for the making or printing any bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, without such authority, to be proved as aforesaid; or if any person shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off any paper upon which any blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, shall be made or printed; or if any person shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any such paper; every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years."

Engraving on any plate, &c. any bank note, blank bank note, &c. or using or having such plate, &c. or uttering or having paper upon which a blank bank note, &c. shall be printed, without authority, transportation for 14 years.

§ 16. "If any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any word, number, figure, character, or ornament, the impression taken from which shall resemble, or apparently be intended to resemble, any part of a bank note, bank bill of exchange, or bank post bill, without the authority of the governor and company of the bank of *England*, to be proved by the party accused; or if any person shall use any such plate, wood, stone, or other material, or any other instrument or device, for the making upon any paper or other material the impression of any word, number, figure, character, or ornament which shall resemble, or apparently be intended to resemble, any part of a bank note, bank bill of ex-

Engraving on any plate, &c. any word, number, or ornament resembling any part of a bank note, &c., or using or having any such plate, &c., or uttering or having any paper on which there shall be an im-

1 W. 4. c. 66.

pression of any word, number, &c., transportation for 14 years.

And see

1 G. 4. c. 92.

Making or having in possession any mould for manufacturing paper, with the name of any bankers appearing in the substance; manufacturing or having such paper; or causing the name to appear in the substance of any paper, transportation for 14 years, &c.

Engraving on any plate, &c. any bill of exchange or promissory note of any bankers, or any words resembling the subscription subjoined thereto, or using any such plate, or uttering or having any paper upon which any part of any such bill or note shall be printed, trans-

change, or bank post bill, without such authority, to be proved as aforesaid; or if any person shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off any paper or other material upon which there shall be an impression of any such matter as aforesaid; or if any person shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper or other material upon which there shall be an impression of any such matter as aforesaid; every such offender shall be guilty of felony, and, being convicted thereof, shall be transported beyond the seas for the term of fourteen years."

§ 17. "If any person shall make or use any frame, mould, or instrument for the manufacture of paper, with the name or firm of any person or persons, body corporate, or company carrying on the business of bankers (other than and except the bank of *England*) appearing visible in the substance of the paper, without the authority of such person or persons, body corporate, or company, the proof of which authority shall lie on the party accused; or if any person shall, without lawful excuse, the proof whereof shall lie on the party accused, knowingly have in his custody or possession any such frame, mould, or instrument; or if any person shall, without such authority, to be proved as aforesaid, manufacture, use, sell, expose to sale, utter, or dispose of, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper in the substance of which the name or firm of any such person or persons, body corporate, or company carrying on the business of bankers, shall appear visible; or if any person shall, without such authority, to be proved as aforesaid, cause the name or firm of any such person or persons, body corporate, or company carrying on the business of bankers to appear visible in the substance of the paper upon which the same shall be written or printed; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year."

§ 18. "If any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange or promissory note for the payment of money, or any part of any bill of exchange or promissory note for the payment of money, purporting to be the bill or note, or part of the bill or note, of any person or persons, body corporate, or company carrying on the business of bankers (other than and except the bank of *England*), without the authority of such person or persons, body corporate, or company, the proof of which authority shall lie on the party accused; or if any person shall engrave or make upon any plate whatever, or upon any wood, stone, or other material, any word or words resembling, or apparently intended to resemble, any subscription subjoined to any bill of exchange or promissory note for the payment of money issued by any such person or persons, body corporate, or company carrying on the business of bankers, without such authority, to be proved

as aforesaid; or if any person shall, without such authority, to be proved as aforesaid, use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession any plate, wood, stone, or other material upon which any such bill or note, or part thereof, or any word or words resembling, or apparently intended to resemble, such subscription, shall be engraved or made; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper upon which any part of such bill or note, or any word or words resembling, or apparently intended to resemble, any such subscription, shall be made or printed; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year."

1 W. 4. c. 66.
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portation for
14 years, &c.

§ 19. "If any person shall engrave or in anywise make upon any plate whatever, or upon any wood, stone, or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any bill of exchange, promissory note, undertaking, or order for payment of money, in whatever language or languages the same may be expressed, and whether the same shall or shall not be or be intended to be under seal, purporting to be the bill, note, undertaking, or order, or part of the bill, note, undertaking, or order of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate, or body of the like nature, constituted or recognised by any foreign prince or state, or of any person or company of persons resident in any country, not under the dominion of his majesty, without the authority of such foreign prince or state, minister or officer, body corporate or body of the like nature, person or company of persons, the proof of which authority shall lie on the party accused; or if any person shall, without such authority, to be proved as aforesaid, use, or shall, without lawful excuse, to be proved by the party accused, knowingly have in his custody or possession any plate, stone, wood, or other material upon which any such foreign bill, note, undertaking, or order, or any part thereof, shall be engraved or made; or if any person shall, without such authority, to be proved as aforesaid, knowingly offer, utter, dispose of, or put off, or shall, without lawful excuse, to be proved as aforesaid, knowingly have in his custody or possession any paper upon which any part of such foreign bill, note, undertaking, or order shall be made or printed; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year."

Engraving
plates, &c. for
foreign bills or
notes; using or
having such
plates; or utter-
ing any paper
on which any
part of such
foreign bill or
note may be
printed, trans-
portation for 14
years, &c.

§ 20. "If any person shall knowingly and wilfully insert, or cause or permit to be inserted, in any register of baptisms, marriages, or burials, which hath been or shall be made or kept by the rector, vicar, curate, or officiating minister of any parish, district-parish, or chapelry in *England*, any false entry of any matter

Inserting any
false entry in
any register of
baptisms, mar-
riages, or
burials; forging

1 W. 4. c. 66.

or altering any such entry ; uttering any false or forged entry ; destroying, &c. the register ; forging any licence of marriage, transportation for life, &c.

relating to any baptism, marriage, or burial, or shall forge or alter in any such register any entry of any matter relating to any baptism, marriage, or burial ; or shall utter any writing as and for a copy of an entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such writing to be false, forged, or altered ; or if any person shall utter any entry in any such register of any matter relating to any baptism, marriage, or burial, knowing such entry to be false, forged, or altered, or shall utter any copy of such entry, knowing such entry to be false, forged, or altered, or shall wilfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any such register or any part thereof ; or shall forge or alter, or shall utter knowing the same to be forged or altered, any licence of marriage ; every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years."

Rector, &c. not liable to any penalty for correcting, in the mode prescribed, accidental errors in the register.

§ 21. provides, " that no rector, vicar, curate, or officiating minister of any parish, district-parish, or chapelry, who shall discover any error in the form or substance of the entry in the register of any baptism, marriage, or burial respectively by him solemnised, shall be liable to any of the penalties herein mentioned if he shall, within one calendar month after the discovery of such error, in the presence of the parent or parents of the child baptised, or of the parties married, or in the presence of two persons who shall have attended at any burial, or in the case of the death or absence of the respective parties aforesaid, then in the presence of the churchwardens or chapelwardens, correct the entry which shall have been found erroneous, according to the truth of the case, by entry in the margin of the register wherein such erroneous entry shall have been made, without any alteration or obliteration of the original entry, and shall sign such entry in the margin, and add to such signature the day of the month and year when such correction shall be made ; and such correction and signature shall be attested by the parties in whose presence the same are directed to be made as aforesaid : Provided also, that in the copy of the register which shall be transmitted to the registrar of the diocese, the said rector, vicar, curate, or officiating minister shall certify the corrections so made by him as aforesaid."

Inserting in any copy of a register of baptisms, marriages, or burials, transmitted to the registrar, any false entry ; or forging or verifying any copy knowing it to be false, transportation for 7 years, &c.

§ 22. " Whereas copies of the registers of baptisms, marriages, and burials, such copies being signed and verified by the written declaration of the rector, vicar, curate, or officiating minister of every parish, district-parish, and chapelry in *England* where the ceremonies of baptism, marriage, and burial may lawfully be performed, are directed by law to be made and transmitted to the registrar of the diocese within which such parish, district-parish, or chapelry may be situated ; be it therefore enacted, that if any person shall knowingly and wilfully insert, or cause or permit to be inserted, in any copy of any register so directed to be transmitted as aforesaid, any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, or shall utter knowing the same to be forged or altered, any copy of any register so directed to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed to be

transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years nor less than one year." 1 W. 4. c. 66.

§ 23. "Whereas by an act passed in the fifth year of the reign of queen *Elizabeth*, intituled 'An act against forgers of false deeds and writings,' it is, amongst other things, provided, that every person convicted of any of the offences first enumerated in that act shall pay to the party grieved his double costs and damages, and shall forfeit to the crown the whole issues of his lands and tenements during his life, and shall also suffer imprisonment during his life: and whereas there are certain acts by which persons convicted of certain offences, mentioned in those acts, are subjected to the same pains and penalties as are imposed by the said act of queen *Elizabeth* for the offences first enumerated in that act; and whereas the said act of *Elizabeth* is herein-after repealed; and it is expedient to substitute other punishments in lieu of the punishments of that act, so far as the same have been adopted by any other acts; be it therefore enacted, that every person who shall after the commencement of this act be convicted of any offence which is now subjected, by any act or acts, to the same pains and penalties as are imposed by the said act of queen *Elizabeth* for any of the offences first enumerated in that act, shall be guilty of felony, and shall, in lieu of such pains and penalties, be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years nor less than one year."

The punishments of 5 Eliz. c. 14. so far as they have been adopted by other acts, shall be repealed, and other punishments substituted.

§ 24. "If any person shall commit any offence against this act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law or by virtue of any statute or statutes made or to be made, the offence of every such offender may be dealt with, indicted, tried, and punished, and laid and charged to have been committed, in any county or place in which he shall be apprehended or be in custody, as if his offence had been actually committed in that county or place; and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, and his offence laid and charged to have been committed in any county or place in which the principal offender may be tried."

All forgers and utterers may be tried in the county where they are apprehended or are in custody.

§ 25. "In the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

As to principals in the second degree and accessories.

1 W. 4. c. 66.

The court may order hard labour or solitary confinement for offences against this act.

As to offences committed at sea.

Rule of interpretation as to criminal possession, and as to parties intended to be defrauded.

This act not to extend to Scotland or Ireland; but to apply to the forging or uttering in England documents purporting to be made, or actually made, out of England;

§ 26. "Where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, as to the court in its discretion shall seem meet."

§ 27. "Where any offence punishable under this act shall be committed within the jurisdiction of the admiralty, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other offence committed within that jurisdiction."

§ 28. "Where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in any dwelling house or other building, lodging, apartment, field, or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act; and where the committing any offence with intent to defraud any person whatsoever is made punishable by this act, in every such case the word 'person' shall throughout this act be deemed to include his majesty or any foreign prince or state, or any body corporate, or any company or society of persons not incorporated, or any person or number of persons whatsoever who may be intended to be defrauded by such offence, whether such body corporate, company, society, person, or number of persons shall reside or carry on business in *England* or elsewhere, in any place or country, whether under the dominion of his majesty or not; and it shall be sufficient in any indictment to name one person only of such company, society, or number of persons, and to allege the offence to have been committed with intent to defraud the person so named, and another or others, as the case may be."

§ 29. "This act shall not extend to any offence committed in *Scotland* or *Ireland*."

§ 30. provides, declares, and enacts, "that where the forging or altering any writing or matter whatsoever, or the offering, uttering, disposing of, or putting off any writing or matter whatsoever, knowing the same to be forged or altered, is in this act expressed to be an offence, if any person shall, in that part of the united kingdom called *England*, forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any such writing or matter, in whatsoever place or country out of *England*, whether under the dominion of his majesty or not, such writing or matter may purport to be made or may have been made, and in whatever language or languages the same or any part thereof may be expressed, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made or had been made in *England*; and if any person shall in *England* forge or alter, or offer, utter, dispose of, or put off, know-

ing the same to be forged or altered, any bill of exchange or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, or order for the payment of money, or any deed, bond, or writing obligatory for the payment of money (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose), in whatever place or country out of *England*, whether under the dominion of his majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, deed, bond, or writing obligatory may be or may purport to be payable, and in whatever language or languages the same respectively or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, or order be or be not under seal, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in *England*."

By 2 & 3 *W. 4. c. 123.*, where any person after the passing of this act shall be convicted of any offence whatsoever, which by 1 *W. 4. c. 66.* shall be punishable with death, or where any person, after the passing of this act, shall be convicted in *Scotland* or *Ireland* of any offence now punishable with death, which offence shall consist wholly or in part of forging or altering any writing, instrument, matter, or thing whatsoever, or of offering, uttering, or disposing of any writing, &c. knowing the same to be forged or altered, or of falsely personating another, then and in each of the cases aforesaid, the person so convicted of any such offence, or of procuring or aiding or assisting in the commission thereof, shall not suffer death, or have sentence of death awarded against him, but shall be transported beyond the seas for the term of his life.

By § 2. this act shall not be construed to effect or alter any act by which the punishment of death may be inflicted on any person convicted in *England*, *Scotland*, or *Ireland*, of forging or altering, or of offering, uttering, or disposing of, knowing the same to be forged or altered, any will, testament, codicil, or testamentary writing, with intent to defraud any body corporate or person whatsoever, or of forging or altering, or of uttering, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any stock, annuity, or other public fund, which now is or hereafter may be transferable at the bank of *England* or *South Sea* house, or at the bank of *Ireland*, or to receive any dividend payable in respect of any such share or interest, with intent to defraud any body corporate or person whatsoever, or of procuring, aiding, or assisting in the commission of any of the said offences, but that the punishment for each and every of the said offences, and for procuring, aiding, and assisting in the commission thereof, shall continue to be the same as if this act had not passed.

By 3 & 4 *W. 4. c. 44.* § 3., all persons punishable by transportation for life under 2 & 3 *W. 4. c. 123.* shall be liable, previously to their being transported, in case the court shall think fit, to be imprisoned with or without hard labour, in the gaol or house of

1 *W. 4. c. 66.*

and to the forging or uttering in *England* bills of exchange, promissory notes, bonds, &c. purporting to be payable out of *England*.

2 & 3 *W. 4. c. 123.*

Forgeries punishable with death made liable to transportation for life only.

Not to extend to forging or altering of wills, &c. nor to forging certain powers of attorney.

3 & 4 *W. 4. c. 44. s. 3.*

Persons punishable with transportation

for life for forgery liable to be previously imprisoned.

42 G. 3. c. 63.
Forged superscription of letter.

correction, or to be confined in the penitentiary for any term not exceeding four years nor less than one year.

By stat. 42 G. 3. c. 63. § 14. if any person shall forge or counterfeit the handwriting of any person whatsoever in the superscription of any letter or packet to be sent by the post, in order to avoid the payment of the duty of postage; or shall forge, counterfeit, or alter, or procure to be forged, &c. the date upon the superscription of any such letter or packet; or shall write and send by the post, or cause to be written and sent by the post, any letter or packet, the superscription or cover whereof shall be forged or counterfeited, or the date upon such superscription or cover altered, in order to avoid the payment of the duty of postage, knowing the same to be forged, counterfeited, or altered; every person so offending, and being thereof convicted in due form of law, shall be deemed guilty of felony, and shall be transported for seven years. 2 Russ. 433.

54 G. 3. c. 169. Forging post-office marks, to avoid payment of the postage, is punishable as a misdemeanor, by fine and imprisonment, by stat. 54 G. 3. c. 169. § 14.

55 G. 3. c. 103. Stat. 55 G. 3. c. 103., for regulating the postage of ship letters to and from *Ireland*, contains a similar enactment as to letters thereby authorised to be marked.

The following matters are also made the special subject of forgery by particular statutes.

9 G. 1. c. 12. Orders for payment of annuities at the exchequer, assignment thereof, letters of attorney for transferring, &c. 9 G. 1. c. 12.

10 G. 4. c. 24. Parochial registers, certificates, affidavits, &c. relating to government annuities. 10 G. 4. c. 24.

9 Ann. c. 21. Common seal of *South Sea* company, or bond under seal of the said company. 9 Ann. c. 21. § 57.

55 G. 3. c. 184. Stamps, &c. for paper, &c. Stamps or dies, or the impression thereof, or stamping paper, &c. with a forged stamp or die, or uttering or exposing such to sale, or using stamps a second time, &c. 55 G. 3. c. 184.

55 G. 3. c. 185. Mark, stamp, or die which shall have been provided with reference to the duties on gold or silver plate. 55 G. 3. c. 185.

57 G. 3. c. 127. Personation of a seaman for obtaining prize money, wages, &c., or forging letters of attorney, or by false oath obtaining probate or administration for the same purpose. 57 G. 3. c. 127. 59 G. 3. c. 56.

3 G. 4. c. 51. So as to military and naval pensions. 3 G. 4. c. 51.

10 G. 4. c. 26. False personation, &c., in order to receive *Greenwich* pensions and prize-money, &c. 10 G. 4. c. 26.

7 G. 4. c. 16. False or altered certificate or document or representation as to *Chelsea* pensioners: false personation of military persons entitled to pay, or forging their names or any letter of attorney, &c. 7 G. 4. c. 16.

46 G. 3. c. 45. Name or hand of treasurer of ordnance, or uttering his forged draft. 46 G. 3. c. 45.

54 G. 3. c. 151. Name of agent-general of volunteers and local militia, and uttering, &c. 54 G. 3. c. 151.

5 G. 4. c. 113. Documents relating to the slave-trade. 5 G. 4. c. 113.

6 G. 4. c. 78. Certificates of quarantine, &c. 6 G. 4. c. 78.

7 & 8 G. 4. c. 28. Certificate of a conviction of felony. 7 & 8 G. 4. c. 28.

4 G. 4. c. 41. Certificates of registry of shipping. 4 G. 4. c. 41.

1 G. 4. c. 92. By stat. 1 G. 4. c. 92. it is enacted, "that from and after the passing of this act [24th July 1820], if any person or persons

Punishment of

(other than the officers, workmen, servants, and agents for the time being of the said governor and company, to be authorised and appointed for that purpose by the said governor and company, and for the use of the said governor and company only) shall engrave, cut, etch, scrape, or by any other art, means, or device make, or shall cause or procure to be engraved, cut, etched, scraped, or by any other art, means, or device made, or shall knowingly aid or assist in the engraving, cutting, etching, scraping, or by any other art, means, or device, making, in or upon any plate of copper, brass, steel, iron, pewter, or of any other metal or mixtures of metal, or upon wood or other materials, or any plate whatsoever, for the purpose of producing a print or impression of all or any part or parts of a bank note, or of a blank bank note, of the said governor and company, of the description aforesaid, without an authority in writing from the said governor and company; or shall use any such plate so engraved, cut, etched, scraped, or by any other art, means, or device made, or shall use any other instrument or contrivance for the making or printing any such bank note or blank bank note, or part of a bank note of the description aforesaid; or if any person or persons shall, from and after the passing of this act, without such authority as aforesaid, knowingly and without lawful excuse have in his, her, or their custody any such plate or instrument, or without such authority as aforesaid, shall knowingly or wilfully utter, publish, dispose of, or put away any such blank bank note, or part of such bank note, of the description aforesaid, every person so offending in any of the cases aforesaid, and being thereof convicted according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years."

§ 2. "If any person or persons, from and after the passing of this act, shall engrave, cut, etch, scrape, or by any other art, means, or device make, or shall cause or procure to be engraved, cut, etched, scraped, or by any other art, means, or contrivance made, or shall knowingly aid or assist in the engraving, cutting, etching, scraping, or by any other art, means, or contrivance making, in or upon any plate of copper, brass, steel, iron, pewter, or of any other metal or mixture of metals, or upon wood, or any other materials, or upon any plate whatsoever, any line work, as or for the ground-work of a promissory note or bill of exchange, the impression taken from which line work shall be intended to resemble the ground-work of a bank note of the said governor and company of the description aforesaid, or any device the impression taken from which shall contain the words 'Bank of England,' in white letters upon a black, sable, or dark ground, either with or without white or other lines therein, or shall contain in any part thereof the numerical sum or amount of any promissory note or bill of exchange in black and red register work, or shall show the reversed contents of a promissory note or bill of exchange, or of any part of a promissory note or bill of exchange, or shall contain any word or words, figure or figures, character or characters, pattern or patterns, which shall be intended to resemble the whole or any part of the matter or ornaments of any bank note of the description aforesaid, or shall contain any word, number, figure, or character, in white on a black, sable, or dark ground, either with or without white or other lines therein, which shall be intended to

1 G. 4. c. 92.

persons engraving, &c. on any plate for producing an impression of all or any part of a bank note of the bank of England, without authority;

or using such plate;

or having such plate in custody; or uttering any impression from it;

transportation for 14 years.

Punishment of persons engraving, &c. on any plate any resemblance of the ground-work of a bank note of the bank of England, without the authority of the bank;

1 G. 4. c. 92.

or using such plate;

or having such plate in possession; or uttering any impression from it;

transportation for 14 years.

Bank may cause an impression to be made upon the notes by machinery in lieu of signatures.

2 & 3 W. 4. c. 106.

Forging certificates, &c. felony.

resemble the numerical sum or amount in the margin, or any other part of any bank note of the said governor and company, without an authority in writing for that purpose from the said governor and company, to be produced and proved by the party accused; or if any person or persons shall, from and after the passing of this act (without such authority as aforesaid), use any such plate, wood, or other material so engraved, cut, etched, scraped, or by any other art, means, or contrivance made, or shall use any other instrument, or contrivance for the making or printing upon any paper or other material any word or words, figure or figures, character or characters, pattern or patterns, which shall be intended to resemble the whole or any part of the matter or ornaments of any such note of the said governor and company, of the description aforesaid, or any word, figure, or character, in white on a black, sable, or dark ground, either with or without white or other lines therein, which shall be apparently intended to resemble the numerical sum or amount in the margin, or any other part of any bank note of the said governor and company; or if any person or persons shall, from and after the passing of this act, without such authority as aforesaid, knowingly have in his, her, or their custody or possession any such plate or instrument, or shall knowingly and wilfully utter, publish, or dispose of, or put away any paper or other material containing any such word or words, figure or figures, character or characters, pattern or patterns, as aforesaid, or shall knowingly or willingly have in his, her, or their custody or possession any paper or other material containing any such word or words, figure or figures, character or characters, pattern or patterns as aforesaid (without lawful excuse, the proof whereof shall lie upon the person accused), every person so offending in any of the cases aforesaid, and being convicted thereof according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years."

§ 3. All bank notes of the said governor and company of the description aforesaid, whereon the name or names of any person or persons intrusted or authorised to sign such notes on behalf of the said governor and company, shall or may be impressed by machinery provided for that purpose by the said governor and company, and with the authority of the said governor and company, shall be and be taken to be good and valid to all intents and purposes, as if such notes had been subscribed in the proper handwriting of the person or persons intrusted or authorised by the said governor and company to sign the same respectively, and shall be deemed and taken to be bank notes within the meaning of all laws and statutes whatsoever, and shall and may be described as bank notes in all indictments and other criminal and civil proceedings whatsoever.

By 2 & 3 W. 4. c. 106., entitled "An act to enable the officers in his majesty's army, and their representatives, and the widows of officers, and persons on the compassionate list, and also civil officers on retired or superannuation allowances payable by the paymaster-general of his majesty's forces, to draw for and receive their half-pay and allowances," it is enacted, § 3., "That if any person or persons shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly act or assist

in the false making, forging, or counterfeiting of any such authority or certificate, or bill of exchange (viz. such authority, certificate, or bill of exchange, as are required by §§ 1. and 2. to enable the respective parties to receive their half-pay and allowances), or shall utter as true any such false, forged, or counterfeited authority or certificate, or bill of exchange, knowing the same to be false, forged, or counterfeited, with intent to defraud any person or persons, body or bodies politic or corporate, every such person so offending shall be deemed guilty of felony, and being thereof lawfully convicted, shall be transported for seven years, or suffer imprisonment for any term not exceeding four years, as the court shall direct."

2 & 3 W. 4.
c. 106.

By 3 & 4 W. 4. c. 97. § 12., it is enacted, "that if any person shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument, resembling or intended to resemble, either wholly or in part, any die, plate, or other instrument, which at any time whatever hath been or shall or may be provided, made, or used, by or under the direction of the commissioners of stamps, for the purpose of expressing or denoting any stamp duty whatever; or if any person shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any vellum, parchment, or paper having thereon the impression of any such false, forged, or counterfeit die, plate, or other instrument, or part of any such die, plate, or other instrument as aforesaid, or having thereon any false, forged, or counterfeit stamp, mark, or impression resembling or representing, either wholly or in part, or intended or liable to pass or to be mistaken for the stamp, mark, or impression of any such die, plate, or other instrument, which hath been or shall or may be so provided, made, or used as aforesaid, knowing such false, forged, or counterfeit stamp, mark, or impression to be false, forged, or counterfeit; or if any person shall fraudulently use, join, fix, or place for, with, or upon any vellum, parchment, or paper any stamp, mark, or impression which shall have been cut, torn, or gotten off or removed from any other vellum, parchment, or paper; or if any person shall fraudulently erase, cut, scrape, discharge, or get out of or from any stamped vellum, parchment, or paper any name, sum, date, or other matter or thing thereon written, printed, or expressed, with intent to use any stamp or mark then impressed or being upon such vellum, parchment, or paper, or that the same may be used for any deed, instrument, matter, or thing in respect whereof any stamp duty is or shall or may be or become payable; or if any person shall knowingly use, utter, sell, or expose to sale, or shall knowingly and without lawful excuse (the proof whereof shall lie on the person accused) have in his possession any stamped vellum, parchment, or paper, from, off, or out of which any such name, sum, date, or other matter or thing as aforesaid shall have been fraudulently erased, cut, scraped, discharged, or gotten as aforesaid; then and in every such case every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person in committing any such offence, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the court, to be transported beyond the

3 & 4 W. 4. c. 97.

Persons knowingly having in their possession forged dies or stamps similar to those provided by commissioners of stamps;

or fraudulently affixing stamps, &c.;

or erasing names, dates, &c. with intent to use the stamps again;

or knowingly using any stamped vellum, &c. from which any name, date, &c. shall have been fraudulently erased;

guilty of felony.

3 & 4 W. 4. c. 97.

Punishment.

Houses of persons suspected of being concerned in forging of dies, &c., or in other specified offences relating thereto, may be searched.

seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, nor less than two years."

§ 13. "And be it enacted, that on any information given before any justice of the peace upon the oath of one or more credible person or persons (which oath such justice is hereby empowered to administer), that there is just cause to suspect any person of being or having been in any way engaged or concerned in making any false or counterfeit die, plate, or other instrument, or unlawfully making or impressing any stamp, mark, or impression on any vellum, parchment, or paper with any such die, plate, or instrument, or in the unlawful possession of any forged or counterfeit die, plate, or instrument, or of any vellum, parchment, or paper with any counterfeit stamp, mark, or impression thereon; or in unlawfully or fraudulently, or without due authority, marking or impressing any lawful stamp on any vellum, parchment, or paper, or in causing or procuring the same to be so marked or impressed, or in aiding, abetting, or assisting in so marking or impressing the same; or in the unlawful possession of any vellum, parchment, or paper, or other material, unlawfully or fraudulently or without due authority stamped or marked, contrary to any of the provisions or regulations contained in any act relating to stamp duties; or of being or having been in any way engaged or concerned in the fraudulent erasing, cutting, scraping, discharging, or getting out of or from or off any stamped vellum, parchment, or paper any matter or thing thereon written, printed, or expressed; or in the unlawful possession of any stamped vellum, parchment, or paper from or off or out of which any matter or thing shall have been fraudulently erased, cut, scraped, discharged, or gotten as aforesaid; then and in every or any of the said cases it shall be lawful for such justice, by warrant under his hand, to cause any and every dwelling house, room, workshop, outhouse, or other building, yard, garden, or other place belonging to such suspected person, or where any such person shall be suspected of being or of having been in any way engaged or concerned in the commission of any such offence as aforesaid, or of secreting any such die, plate, or instrument, or any such vellum, parchment, or paper, or any of the machinery, implements, or utensils necessary or applicable to the commission of any such offence as aforesaid, to be searched for any such stamped vellum, parchment, or paper, and for any such die, plate, or instrument, machinery, implement, or utensil, or other matter or thing as aforesaid; and if any of the said several matters and things shall be found in any place so searched, or in the custody or possession of any person whatsoever not having the same by some lawful authority, it shall be lawful for the person finding any such matters and things to seize the same respectively, and to carry the same forthwith to the justice by whom such warrant shall be granted, or to any other justice of the peace having jurisdiction where the same shall be seized, who shall cause the same to be secured and produced in evidence against any person who shall or may be prosecuted in any court of justice for any of the offences aforesaid; and afterwards the said matters and things so seized, whether produced in evidence or not, shall, by order of the court or judge before whom such offender shall be tried, or by order of some justice of the peace, in case there shall be no such

trial, be delivered over to the commissioners of stamps, to be defaced or destroyed, or otherwise disposed of, as the said commissioners shall think fit."

3 & 4 W. 4. c. 97.

§ 15. " And for the better preventing and detecting of felonies and frauds in relation to stamped vellum, parchment, or paper, be it enacted, that it shall be lawful for any justice of the peace having jurisdiction where any stamped vellum, parchment, or paper shall be or be supposed to be concealed or deposited, upon any reasonable suspicion that such stamped vellum, parchment, or paper has been stolen or fraudulently obtained, to issue his warrant for the seizing and detaining of such stamped vellum, parchment, and paper, and for apprehending and bringing before such justice or any other justice within the same jurisdiction the person in whose possession or custody such stamped vellum, parchment, or paper shall be found, to be dealt with according to law; and if such person shall omit or refuse to account for the possession of such stamped vellum, parchment, or paper, or shall be unable satisfactorily to account for the possession thereof, or it shall not appear that the same was or were purchased by him at the head office for stamps in *Westminster* or *Edinburgh*, or from some distributor or sub-distributor of stamps, or some vendor of stamps duly licensed under the authority of this act, then and in every such case such stamped vellum, parchment, and paper, or such part thereof of which no account or no satisfactory account shall be given, or which shall not appear to have been purchased at either of the said head offices, or from distributor or sub-distributor of stamps or licensed vendor as aforesaid, shall be forfeited to his majesty, and shall be accordingly condemned by such justice, and thereupon the same shall be delivered over to the commissioners of stamps, who shall keep the same for the space of six calendar months, and afterwards cancel and destroy the same, or dispose thereof for the use of his majesty's revenue, as they shall think fit: Provided always, that if at any time within six calendar months next after such condemnation any person shall make out to the satisfaction of such justice that the vellum, parchment, or paper so forfeited, or any part thereof, was or were stolen or otherwise fraudulently obtained from him, and it shall also appear that the same was or were purchased by him at either of the said head offices, or from some distributor or sub-distributor or licensed vendor of stamps as aforesaid, it shall be lawful for such person to have the same, or such part thereof as shall be so proved to have been stolen or fraudulently obtained from him, delivered up to him, on producing a certificate under the hand and seal of such justice that the right of such person therein hath been duly proved: Provided also, that no such certificate shall be given unless notice in writing under the hand of such justice shall be given to the solicitor of stamps seven clear days at the least previously to the day of hearing any claim, in respect of such stamped vellum, parchment, or paper, of the time and place appointed for such hearing."

Justices may issue warrants for seizing stamps suspected to be stolen or fraudulently obtained.

There are many other enactments respecting forgeries in particular departments and offices, by statutes which still continue unrepealed, but which it has not been considered important to notice.

What a false making or altering.

Before publication.

Publication with knowledge.

Fraudulent insertion, alteration, or erasure.

Expunging indorsement.

Altering figures.

Though the alteration make the instrument ungrammatical.

The very making, with a fraudulent intent and without lawful authority, of any instrument which at common law or by statute is the subject of forgery, is of itself a sufficient completion of the offence, even before publication, and of consequence before any actual injury sustained; for though publication be the medium by which the intent is usually made manifest, yet it may be proved as plainly by other evidence. And by the statute law the publication, with knowledge of the fact, is for the most part made a substantive offence. 2 *East's P. C.* 855.

Making a fraudulent insertion, alteration, or erasure, in any material part of a true instrument, although in a letter only, and even if it be afterwards executed by another person, he not knowing of the deceit; or the fraudulent application of a true signature to a false instrument for which it was not intended, or *vice versa*, are as much forgeries as if the whole instrument had been fabricated; for any such alteration gives it a new operation; as by altering the date of a bill of exchange after acceptance, whereby the payment was accelerated. 2 *East's P. C.* 855. *Master v. Miller*, 4 *T. R.* 320.

Expunging an indorsement on a bank note with a certain liquor (lemon juice) unknown to the jury, was holden to be a *rauing* within stat. 8 & 9 *W. 3. c.* 20. § 36. (now repealed). *R. v. Bigg*, 3 *P. Wms.* 419.

So is altering the amount of the sum for which a note, &c. is made (*e. g.* the figure of 2 to 5, or 10 to 50). *Dawson's case* and *Teague's case*, 2 *East's P. C.* 978, 979.

Even though the alteration be made by the addition of a cypher; as in *Elsworth's case*, where the 0 being added after the figure 8, the bill, which was for 8*l.*, became a bill for 80*l.* *Elsworth's case*, *York Lent Ass.* 1780, 2 *East's P. C.* 986.

Dyson Post's case, *C. C. R.* 101. *Dyson Post* was tried before *Grose J.* at *Bury Lent Assizes* 1806, upon an indictment for altering a banker's promissory note for one pound, into a promissory note for ten pound. It was proved that the note in question was a promissory note of the *Thetford* bank, dated 5th December, 1803, for one pound, and that the prisoner being in possession of it, got some thin paper, like paper on which bankers' notes are written, of the size of the note, and pasted it on the back of it with yeast, then cut out the word *one* in the body of the note, and the word *one* at the corner, and by removing the paper *pasted*, introduced into the place of the word *one*, the word *ten* at each part of the paper; by this means the note, which was a note for one pound, became a note importing to be a promissory note for ten pound, having in the body the word *ten pound*, and at the corner *£ ten*. It was then proved that on the same day, he being a butcher, paid it to a farmer, *Edward Hensby*, for some sheep he had purchased from him. Upon this proof, it was objected by the prisoner's counsel, that upon this indictment he could not be convicted, as this was not altering or adding to, or forging a promissory note for money, it being when altered not a promissory note to pay ten pounds, but ten pound in the singular number, which was ungrammatical, uncertain, and nonsense. — The learned judge left it to the jury to consider whether they believed the evidence given, and that the note was altered by the prisoner, and negotiated by him as a note for ten pounds, for the purpose

of defrauding either the bankers, or *Edward Hensby*, to whom it was paid, of that sum.—The prisoner was found guilty, and the question in *E. T. 1806* submitted to the judges, who (*absente* *Ld. Ellenborough C. J.*) held the conviction right.

And, upon the principle that the false making of any part of a genuine note, which may give it a greater currency, is forgery; it was holden in a modern case, that where a note of country bankers was made payable at their house in the country, or at their banker's in *London*, and the *London* banker had failed, it was forgery to alter the name of such *London* banker to the name of another *London* banker, with whom the country bankers had made their notes payable subsequently to the failure. The judges held that the act done by the prisoner was a false making, in a circumstance material to the value of the note, and its facility of transfer, by making it payable at a *solvent* instead of an *insolvent* house.—*N. B.* The alteration was effected by pasting a slip of paper, bearing the words "*Ramsbottom & Co.*" over the words "*Bloxam & Co.*" in the same manner as the prosecutors had altered their re-issuable notes after the failure of the first *London* bankers, *Bloxam & Co. R. v. Treble, 2 Taunt. 328. 2 Leach, 1040. C. C. R. 164.*

In *Kinder's case, Nottingham Sum. Ass. 1800, cor. Rooke J.*, it appeared that the prisoner procured a deed to be forged from *J. M.* and his son, conveying an estate for life to *Mary Kinder*, and that after the death of one of the supposed grantors, he procured the forged deed to be altered, by enlarging the grantee's estate to a fee: he was convicted of forging and uttering it in the state to which it was so altered; and it was holden by all the judges that the conviction was proper; for it was no less a forgery after than before such alteration. *MS. C. C. R. 2 East's P. C. 856. S. C.*

But it is not forgery to pass for the person whose indorsement is on the bill, and thereby to obtain credit in the name of another; for in such a case it is not a false making. It is, however, an indictable offence within stat. 30 G. 2. c. 24 (a), for using a false pretence. *Hevey's case, O. B. Jan. 1782, 2 East's P. C. 856.*

It is forgery, however, for a person, having the same name as the payee of a bill of exchange, and knowing that he is not the real person in whose favour it was drawn, to indorse it with intent to defraud, &c. *Mead v. Young, 4 T. R. 29. R. v. Parkes & Brown, 2 Russ. 321, et sequ.*

So, making a false instrument, which is the subject of forgery, though in the name of a non-existing person, is as much a forgery as if it had been made in the name of one who is known to exist, and to whom credit was due. *Anne Lewis's case, Fost. 116.; and G. Wilks's case, Bodmin, 1767, 2 East's P. C. 957, 958.; and Tafi's case, 2 East's P. C. 959.*

To *cause*, is to procure or counsel one to forge; to *assent*, is to give his assent or agreement afterwards to the procurement or counsel of another; to *consent*, is to agree at the time of the procurement of counsel, and such is in law a procurer. 3 *Inst. 169.*

In a country bank note, changing the name of the *London* banker.

Forgery, and a subsequent alteration.

Aliter, pretending to be a party named in instrument.

Indorsing in person's own name may be forgery.

So, accrediting an instrument with the name of a non-existing person.

Causing, assenting, and procuring.

(a) Or rather under 7 & 8 G. 4. c. 29., 30 G. 2. c. 24. being now repealed.

But *Ld. Hale* says, that an *assent* after the fact is committed makes not the party assenting guilty, or principal in the forging; but it must be a precedent or concomitant assent. 1 *Hale*, 684.

Instrument invalid, but seeming good.

It seems to be no way material, whether a forged instrument be made in such a manner as, were it true, it would be of validity or not. 1 *Haw. c.* 70. § 7. But *Mr. East*, 2 *P. C.* 948., is of opinion that this must be understood where the false instrument bears on the face of it the semblance of that for which it is counterfeited, and is not illegal in its very frame. Upon this ground it hath been adjudged that the forgery of a protection in the name of a member of parliament, who in truth at the time was not a member, is as much a crime as if he were. *R. v. Deakins*, 1 *Sid.* 142.

Will of a living person.

So it was held a capital offence within the stat. 2 *G. 2. c.* 25. (now repealed), to forge the last will of a person *who is living*, and yet such an instrument never could operate as a will in contemplation of law, during the lifetime of the supposed testator. *R. v. Coogan*, 2 *East's P. C.* 948. 1 *Leach*, 448.

Forgery of a bill of exchange on unstamped paper.

So forgery may be committed of a bill of exchange on unstamped paper. *Hawkeswood's case*, 1 *Leach*, 257. 2 *East's P. C.* 955. *Hawkeswood* being indicted for forgery of a bill of exchange, it was objected, that not being stamped it was no bill of exchange by the stat. 22 *G. 3. c.* 33., and prior acts; and that this was an objection apparent upon the face of it. But, as the stamp act was merely a revenue law, and did not profess in any way to alter the crime of forgery; and as the false instrument had the semblance of a bill of exchange, and was negotiated by the prisoner as such, *Buller J.*, before whom he was tried, overruled the objection, but respited judgment. And in *Easter term* 1783, all the judges were of opinion that the prisoner was properly convicted; for the stamp act, in saying that a bill without a stamp shall not be pleaded or given in evidence or be available in law or equity, means only that it shall not be made use of to recover the debt; and, besides, the holder might get it stamped after it was made.

R. v. Morton.
Same point.

The same point was afterwards ruled by all the judges in *R. v. Morton* (*York Sum. Ass.* 1795), 2 *East's P. C.* 955., after the passing of the stat. 31 *G. 3. c.* 25., which prohibits the affixing of the stamp afterwards.

Unstamped receipt not evidence to support a charge of embezzlement under 39 *G. 3. c.* 85., being a matter collateral to the crime.

R. v. Hall, *Lanc. Sum. Ass.* 1821, 3 *Stark. C. N. P.* 67. Indictment against *Hall*, under stat. 39 *G. 3. c.* 85., for feloniously embezzling six bank notes, which he had received into his possession as a clerk in the employment of Messrs. *H. and Co. of Liverpool*, for and on account of his masters. A debtor to the prosecutors having been called as a witness for the prosecution, evidence was offered of a receipt given by the prisoner on receiving this money from the debtor. The sum received exceeded 40s., and the receipt was on plain paper. It was objected for the prisoner that this receipt could not be given in evidence for want of a stamp; — for the crown it was insisted that the revenue laws had no application to criminal cases; and *R. v. Pooley*, *East's P. C. Add.* xvii., *R. v. Coogan*, *East's P. C.* 948., *R. v. Hawkeswood*, 1 *Leach*, *C. C.* 295. *East's P. C.* 955., *R. v. Morton*, *R. v. Reculst*, *R. v. Davis*, *ib.* were cited; but *Bayley J.* was of opinion that the receipt was not admissible in evidence for want of a stamp, and the evidence was rejected. *Mr. Starkie* (who was

of counsel for the prisoner) adds, the distinction between the present case, and those cited, seems to be, that in the former the offence of forgery was complete, whether the instrument was or was not stamped. No operation, therefore, was given to an unstamped instrument by receiving the forged bill or note in evidence; but in the present case the instrument offered in evidence was collateral to the principal felony, and was offered for the very purpose for which by the stamp laws it is made unavailable; *i. e.* to prove the payment and receipt of the money.

The forgery of a Prussian treasury note for the payment of a dollar was held to be within 43 G. 3. c. 139. § 1., the instrument purporting, on the face of it, to be an undertaking or order for the payment of money; and it was ruled, that it need not possess those technical properties required by our own municipal law.

Judgment was, however, arrested, because the note was set out in a foreign language, and the indictment contained no translation of it into English. *R. v. Goldstein, C. C. R. 473.*

N.B. 43 G. 3. c. 139. § 1. is now repealed. But see 1 W. 4. c. 66. § 30.

But in these cases it is necessary that the forged instrument should in all essential parts have upon the face of it the similitude of a true one; so that it be not radically defective and illegal in the very frame of it. 2 *East's P. C.* 952.

Therefore, where *T. Wall* was convicted upon an indictment for forging and knowingly uttering a will of land of one *J. S.*, attested by only two witnesses, and it did not appear in evidence what estate the supposed testator had in the land so devised, or of what nature it was; it was objected that *non constat* but that the land was freehold, and therefore the will void by the express words of the statute of frauds (29 Car. 2. c. 3. § 5.) for want of the attestation of three witnesses. The judges on a conference in *E. T. 1800*, held the conviction wrong; for as it was not shewn to be a chattel interest, it was to be presumed to be freehold. *Wall's case, Worcester Sp. Ass. 1800, cor. Thomson B., 2 East's P. C.* 953.

So in *R. v. Moffatt (O. B. Jan. 1787)* it was decided by all the judges, that forgery of a bill of exchange, as such, cannot be committed when it is drawn for more than 20s. and less than 5*l.* without mentioning the place of abode of the payee, and having a subscribing witness thereto; for want of which circumstances it is declared by stat. 17 G. 3. c. 30. § 1. (a) that such a note is absolutely void. *Moffatt's case, 2 East's P. C.* 954. 1 *Leach*, 431. *Bayl.* 439.

If any person which writeth the will of a sick man inserteth a clause therein concerning the devise of lands without any direction of the devisor, this is forgery, although he did not forge the whole will. 3 *Inst.* 170.

R. v. Japhet Crooke, 2 Str. 901. *Fitzg.* 57. 261. 2 *East's P. C.* 921. The defendant was convicted on an indictment which stated that *Garbut* and his wife were seised in fee of certain messuages, lands, and tenements called *Jawick*, in the parish of *Clacton*, in

Forgery of foreign government note.

Forged instrument to have similitude of true one.

A conviction for forging a will of land, attested by only two witnesses, holden wrong.

So an invalid bill of exchange.

17 G. 3. c. 30.

Inserting clause in a will.

Crooke's case. On an indictment for forgery of a deed of conveyance, it is sufficient if the party may be molested in his possession, though he be

(a) By stat. 48 G. 3. c. 88. all promissory or other notes, bills of exchange, or drafts, &c. being negotiable for less than 20*s.*, are declared absolutely void. See *tit. Promissory Notes.*

not evicted;
and a variance
of Jawick Park
for Jawick in
the forged deed
is not material.

Essex, and that the defendant, intending to molest them and their interest in the premises, forged a lease and release as from *Garbut* and his wife, whereby they are supposed for a valuable consideration to convey to him "all that park called *Jawick* park, in the parish of *Clackton* in *Essex*, containing eight miles in circumference, with all the deer, woods, &c. thereto belonging." It was moved in arrest of judgment, that the premises supposed to be conveyed were so materially different from those which were really the estate of *Garbut* and his wife, that it was impossible this conveyance ever could molest or disturb them. But the court held, that it was not necessary that there should be a charge or a possibility of a charge, and that it was sufficient if it were done with that intent, and the jury have found that it was done with intent to molest *Garbut* and his wife in the possession of their lands. Accordingly judgment was given for the king; and the defendant had sentence to undergo the punishment appointed by the act for forging a deed, and the same was executed upon him at *Charing Cross*.

Instrument
under seal held
a deed, though
containing
neither contract
nor grant.

Prisoner was indicted under 2 G. 2. c. 25. (now repealed) for uttering a false and counterfeited deed, and was convicted on proof of having made use of a forged power of attorney, which was signed, sealed, and delivered, for the transfer of government stock. Exception was taken that this instrument was not a deed, because it contained no matter of contract or grant, and further, that it was not a deed within the legislative meaning of 2 G. 2.: after argument on case reserved, the judges were unanimous that the conviction was right. *R. v. Fauntleroy*, 1 R. & M. 52. S. C. 2 B. 413. See 1 W. 4. c. 66. § 6., ante, p. 256.

A bill drawn
upon the com-
missioners of
the navy held
to be a bill of
exchange within
2 G. 2. c. 25.
(now repealed).

Josiah Chisholm was convicted for forging a certain bill of exchange in the following form:

"3d rate *Robert Gore*.

Entered 13th day of May 1814.

	£	s.	d.
Full pay from 13th day of May 1814, to 4th day of August 1814	25	4	0
Amount of deductions		2	17 3
Net pay	22	6	9

Gentlemen,

8th day of August 1814.

Ten days after sight, please to pay to Mrs. *Elizabeth Coall* or Order the sum of twenty-two pounds six shillings and ninepence, being the nett personal pay due to me as acts lieutenant of his Majesty's ship *Zealous*, between thirteenth day of May 1814 and fourth day of August 1814, for value received.

Robt. Gore.

Approved.

T. Boys, captain of H. M. S. *Zealous*.

To the commissioners of his Majesty's Navy, *London*."

With intent to defraud *Elizabeth Coall*, widow, against the statute, &c. The second count was for uttering, &c. with the like intention, and the third and fourth counts were similar; only laying the

intention to be to defraud his majesty. There were four other counts framed upon the statute 35 G. 3. c. 94. (a) § 3. & 34., but the counsel for the prosecution had admitted that those counts could not be supported; and they contended that the instrument was a bill of exchange within the 2 G. 2. c. 25. (a) It was urged, on behalf of the prisoner, that it appeared clearly, that the instrument was intended to be a bill under the 35 G. 3. c. 94. § 3.; that it was not drawn to be presented for acceptance or payment by the commissioners of the navy, as a bill of exchange, but in order to procure an assignment of it, according to the 15th section of that statute; that it was not a bill of exchange, because it was not drawn on any person bound to accept or pay it; and that the commissioners of the navy were removable at pleasure, and might be changed between the drawing and presenting of the bill. On the other hand, it was contended, that the intention with which this instrument was made was not material; and that it was not necessary, to constitute a bill of exchange for this purpose, that the parties on whom it was drawn should be liable to accept, or even be existing persons; and that it was enough if the instrument purported to be drawn on a person or persons to whom it might be presented. The learned judge respited sentence, in order that the question might be submitted to the judges, whether this instrument was properly described as a bill of exchange. The conviction was confirmed, and the prisoner afterwards received sentence of death, and was executed. *Chisholm's case*, *Exeter Sp. Ass.* 1815, cor. *Dampier J.*, C. C. R. 297. 2 Russ. 457.

It is not necessary that a promissory note should be in itself negotiable, in order to make it the subject of an indictment for forgery, within the 2 G. 2. c. 25. (repealed). This point was decided by the judges in the following case:

Box's case, O. B. Apr. Sess. 1815, cor. *Chambre J.*, C. C. R. 300. 6 Taunt. 325. 2 Russ. 460. *Bayley on Bills*, 29. *Josiah Box* was convicted on an indictment for forging a promissory note, which was as follows:

"On demand, we promise to pay Mesdames *Sarah Waller* and *Sarah Doubtfire*, stewardesses for the time being of the *Provident Daughters Society*, held at Mr. *Pope's*, the *Hope*, *Smithfield*, or their successors in office, sixty-four pounds, with five per cent. interest for the same; value received, this 7th day of *Febr.* 1815.

"For *Felix Calvert & Co.*
John Forster."

A promissory note may be a valid note and the subject of forgery, though not negotiable, and though it add to the names of the payees a description by a character to which they are not by law entitled.

£64.

It was objected, in arrest of judgment, that this was not a promissory note, and the case was argued before the twelve judges. Their opinion was delivered by *Le Blanc J.* at the O. B. May sess., 1815, to the following effect:—"An objection was taken in arrest of judgment, and argued before all the judges, that the instrument in question, such as it is stated in the indictment, was not a promissory note within the statute, so as to be the subject of an indictment for forging, or uttering it, knowing it to be forged. The objection to this instrument was founded on this circumstance,

(a) These statutes are now repealed.

that it appears to be made payable to two ladies, describing them as stewardesses of a provident society, or their successors in office; and that, this society not being enrolled according to the statute, this note was not capable to enure to their successors, and was not negotiable. The judges are of opinion that this is, as stated on the indictment, a valid promissory note within the statute of G. 2. *It is not necessary that such a note should be in itself negotiable; it is sufficient that it should be a note for the certain payment of a sum of money, whether negotiable or not.* And though these ladies were not at the time legally stewardesses, yet it was a description by which they were known at the time; and though they could not legally have successors in office, yet, in case of their decease, their executors and administrators might sue, and they themselves, during their life, might recover on it. Therefore, it is an instrument capable of being the subject of forgery, and there is no ground to arrest the judgment; and the judges are all of opinion that the conviction is right." The prisoner was executed.

Charge of uttering a forged bill not supported by proof of uttering a forged acceptance.

The uttering of the forged acceptance must be expressly averred.

In forgery, it appeared that the acceptance written across a bill of exchange was forged, and the prisoner was proved to have knowingly uttered it. It was held, on case reserved, that counts charging *the uttering a forged bill* were not proved by proof of uttering a forged acceptance; for, by 1 W. 4. c. 66. § 33., uttering a forged acceptance is made a distinct offence. Other counts charged, that prisoner having in his possession a certain bill (setting it out without the acceptance), with a certain forged acceptance on the said bill (setting out the acceptance), uttered, "then and there knowing the said last-mentioned acceptance to be forged," the said last-mentioned bill of exchange, with intent to defraud, &c. It was objected, that it was not expressly stated, that the prisoner uttered the forged acceptance, but only that he had in his possession a bill with the acceptance on it, and that he uttered the bill knowing the acceptance to be forged; and *non constat* but that he might have expunged by some means the forged acceptance before he uttered the bill. The judges held unanimously that the counts were bad, for the reasons assigned. *H. T. 1834. Rex v. Samuel Rodwell, cor. Gurney B., Stafford Sum. Ass. 1833. MS.*

Rex v. Watts. The prisoner having promised in payment for some goods an acceptance by a London banker, gave a bill addressed to, and purporting to be accepted by, Williams & Co., No. 3. Birchin-lane, London; it was proved that Williams, Burgess, & Co., of No. 20. Birchin lane, had not accepted the

Rex v. Thomas Watts. In the Exchequer Chamber, *H. 2 & 3 G. 4. 3 Brod. & Bing. 197. S. C. C. C. R. 436. 2 Russ. 325.* The prisoner was tried before *Best J.*, at the last assizes for *Devon*. The first count of the indictment was for forging, at *East Stonehouse*, on 6th April, 1821, an acceptance by Messrs. Williams & Co. to a certain bill of exchange, as follows; viz.

No. 117. £200.

Two Months after date pay to Mr. John Tipper, or order,
Two hundred Pounds,
To Messrs. Williams & Co.
Bankers, Birchin-lane,
3. London.

March 28th,
Swansea Bank, 1821.
for value received,
Hy. Williams & Co.

with intent to defraud one *Thomas Baylis*, *John Routledge*, and *Jonathan Ramsay*. The second count was for uttering and publishing, as true, the said forged acceptance on the said bill of exchange, knowing the same to be forged, with a like intent.

He was acquitted on the first, and convicted on the second count.

It was proved, that, in *April* last, the prisoner purchased of the prosecutors wheat to the amount of 240*l*. At the time he made the purchase, he agreed to pay by the acceptance of a *London banker*. Before the wheat was delivered to him, he produced to the prosecutors a bill in these words and figures:—

No. 117. £200.

March 28th,
Swansea Bank, 1821.

Two Months after date pay to	Mr. John Tipper, or order,	
Two hundred Pounds,		for value received,
To Messrs. Williams & Co.		
Bankers, 3, Birchin-lane,		H. Williams & Co.
3. London.	Accepted, Williams & Co.	

He was asked how he proposed to pay the remainder of the money, and said, he would draw on the same bankers for the balance. He then drew the following bill in the prosecutor's counting-house:—

£40.

South Tawton, April 6th, 1821.

Two Months after date, pay to our order	Forty Pounds,	
value received, as advised by		
Swansea Bank.		Thomas Watts,
To Messrs. Williams & Co.		
Bankers, Birchin-lane,	Accepted, Williams & Co.	for P. Watts & Co.
3. London.		

He said he would send this bill to *London*, to get it accepted. It was afterwards sent back to the prosecutors, accepted, as it now appears. Whilst he was drawing the bill, one of the prosecutors asked him if *Williams & Co.*, the acceptors, were *Williams, Burgess, & Co.* The prisoner said the acceptors were *Williams, Burgess, & Co.* Prosecutor said it was improbable there should be two firms of the same name in the same street, and prisoner answered it was improbable. The figure 3, which stands between the words *Bankers* and *Birchin-lane*, in the 200*l*. bill, was not then on the bill. The witnesses did not observe whether the small figure 3. in the corner, was on the bill at this time. It appeared to a witness acquainted with bills not to be a part of the address, but was like a figure that the holders of bills sometimes put on them before they leave them for acceptance. But the person who presented this bill had not observed whether it was on the bill when he presented it for payment, or not. A person to whom he presented the bill at the house, No. 3. *Birchin-lane*, took this bill behind a desk, and had an opportunity of writing on it one or both these figures. But the person who presented it did not observe, when he received the bill back, whether either of these figures were then on it. There are *London bankers* at No. 20. *Birchin-lane*, of the names of *Williams, Burgess, & Co.*, who usually accept bills in the form of *Williams & Co.* This bill was not accepted by that firm. No other bankers of the names of *Williams & Co.* were known to carry on business in *Birchin-*

Rex v. Watts.

bill, and that no other bankers of the name of *Williams & Co.* were known in *London*; but no evidence was adduced to show that *Williams & Co.* of No. 3. *Birchin-lane*, had not accepted the bill: Held, that there was no forgery proved against the prisoner, by ten judges against one; Bayley J. *absente*.

Forgery (Accept. to Bill of Exch.) [Criminal

lane, nor were there any other *London* bankers under that firm. The words "*Williams & Co.*" were on a brass plate, on the door of No. 3. There was no evidence to shew by whom these bills were accepted.

The prisoner proved that three bills, in the following form, had been paid at No. 3. *Birchin-lane*, viz.:

No. 345. £30.

South Tawton, March 5th, 1821.

Two months after date pay to our order Thirty Pounds, for value received.

Messrs. Williams & Co.

Bankers,

Swansea.

Accepted,
Messrs. Williams & Co.
Payable at No. 3,
Birchin-lane,
London.

Thomas Watts,

for P. Watts & Co.

Best J. left it to the jury to say, whether the acceptance of the 200*l.* bill was the acceptance of any *London* bankers.

The question for the opinion of the judges was, whether the prisoner was properly convicted? There was also a further question, (viz.) Whether, considering the manner in which the bill is stated in the indictment, it was necessary for the prosecutors to prove that the 3. in the corner was on the bill when it was tendered in payment?—*Williams C. F.* for the prisoner. No evidence has been adduced to shew that the acceptance which the prisoner is charged with having forged, was not the acceptance of those persons whose acceptance it purports to be; namely, the acceptance of *Williams & Co.*, of No. 3. *Birchin-lane*; if the acceptance was written by them, the circumstance of their not being bankers would not render the prisoner guilty of a forgery. The jury, indeed, have found that he did not forge the acceptance, and even wilful misrepresentation made after uttering a bill will not render that a forgery which was not so at the time the bill was drawn. *Rex v. Webb (a).* *Walker's case*, 2 *Russ.* 1420. *Hevey's case*, 2 *East's P. C.* 856.

Uttering a bill addressed to a man by a particular description and addition, with an acceptance thereon by a man of the same name, but not of that description or addition, will not be capital if there be no man answering that description or addition, and no false name be assumed.

(a) *Rex v. Webb*, in the *Exch. Chamb.* Nov. 13. 1819. *C. C. R.* 405. 3 *Brod. & Bing.* 228. *S. C.* The prisoner was tried before *Best J.* at the last *Wiltshire* Assizes. The indictment charged him with feloniously forging and counterfeiting a certain bill of exchange, as follows:—

£154 9*s.* Od.

Wilton, Wills, Dec. 21st, 1818.

Two Months after date, pay to my order one hundred and fifty-four pounds nine shillings, for value received and balance of account.

To Mr. *Thos. Bowden*,

Baize Manufacturer,

Romford, Essex.

Accepted, *Thos. Bowden*.
Payable, when due, at
No. 40, *Castle Street*,
Holborn, London.

John Webb.

Secondly, there is a variance in the setting out of the bill on record, no evidence having shewn that the bill, when uttered, contained the figure 3 stated on the record. Thirdly, it ought not, for the reason before stated, to have been left to the jury, whether or no this was an acceptance by London bankers. — For the crown, the cases of *Mead v. Young* (4 T. R. 28.), and *Parkes' and Brown's case* (2 Leach, 775. 2 East's P. C. 963.), were cited as in point. — No judgment was given, but the prisoner received a free pardon. Eleven judges were present, of whom ten were of opinion that this case did not amount to forgery. They gave no opinion upon the point as to the variance, their judgment on the first point rendering that unnecessary. Bayley J. was absent at chambers. 3 Brod. & Bing. 201.

W. Testick was indicted (*Bodmin Sum. Ass. 1774, 2 East's P. C. 925. 2 Russ. 362.*) for uttering and publishing as true a forged receipt for money, with the name *S. W., &c.*, for 1*l.* 4*s.* which was as follows; viz.

Receipts.

With intention to defraud *Wadham Lock, William Hughes, and Henry Saunders*, against the statute, &c. The second count was for feloniously uttering and publishing the same as true, with the like intention. The third count was for forging an acceptance (setting out the acceptance as above), with the like intention. And the fourth count was for uttering and publishing the said acceptance, with the like intention. It was proved, on the part of the prosecution, that no *Thomas Bowden* (the person appearing on the bill to be the acceptor) lived at No. 40. *Castle Street, Holborn*; and that no such person ever resided or carried on business, or was ever heard of at *Romford, in Essex*; and that there is no baize manufactory in *Romford*. On the part of the prisoner, it was proved by a witness, who stated himself to have been a partner in business with *Thomas Bowden* (the acceptor), that the acceptance was the hand-writing of *Thomas Bowden*. This witness, on his cross-examination, said, that *Bowden* never carried on the business of a baize manufacturer at *Romford*, and that the prisoner had known *Bowden* many years. Another witness said he knew *Bowden*, and that the acceptance was his hand-writing. This second witness said, that he kept the house, No. 40. *Castle Street, Holborn* (the place where the bill is made payable), and that he was surprised at *Bowden's* accepting the bill made payable at No. 40. *Castle Street, Holborn*, as he did not reside there, and had no authority from the witness to make any bill payable at that house. *Best J.* desired the jury, first, to consider whether there was any such person as *Thomas Bowden*, and if there was, whether the acceptance was his. The learned judge told them, if there was no such person, or the acceptance was not his, and the prisoner, at the time he offered the bill to the prosecutors, knew either that there was no such person, or, if there was, that he had not accepted it, they should find him guilty, and further directed the jury, if they thought the acceptance was *Bowden's* writing, to find whether he ever lived at *Romford*, or carried on the business of a baize manufacturer there; and told them that, if they thought *Bowden* never lived at *Romford*, or carried on any manufactory there, and that the prisoner, who appeared from the evidence to be acquainted with him, knew that, on addressing the bill to *Bowden*, as baize manufacturer, at *Romford*, he was giving him a false description, for the fraudulent purpose of giving credit to the bill, they should find him guilty; and that the judge would submit the propriety of the conviction under these circumstances to the judges. The jury found, that there was no such person as *Thomas Bowden*. *Best J.* thought that there was such a person, and that the acceptance was his hand-writing, and wished therefore for the opinion of the judges, whether, assuming that the acceptance was the hand-writing of *Bowden*, the prisoner, by the giving, on the face of the bill, *Bowden* a false description, and uttering the bill after it was accepted by *Bowden* with this false description, with intent to defraud, brought himself within any of the counts of the indictment against him. Eleven of the judges (*Best J.* being at chambers) were of opinion, that this case did not fall within the decision of *Parkes' and Brown's case* (a), 2 East's P. C. 963. S. C. 2 Leach, 775.; but that, though a gross fraud, it was no forgery.

(a) See ante, p. 279.

"Received the contents above, by me," &c. is a sufficient statement of a receipt in an indictment.

"18th March, 1773.

"Received the contents above, by me,
"Stephen Withers."

With intent to defraud *R. Goadby, &c.* It appeared that the prisoner was employed by *Goadby*, who sold lottery tickets and shares, and paid the money for prizes, to settle an account with *S. Withers*; that a precise account in writing was given by *Goadby* to the prisoner, in which there was a balance of 1*l.* 4*s.* due to *Withers*, with the money to pay that balance; that the prisoner afterwards, on settling his accounts with *Goadby*, produced this very account, together with the receipt stated in the indictment, which was not signed by *Withers*, and took credit for the amount, knowing that *Withers* had not been paid. It was objected that this receipt did not correspond with the indictment, which should have contained the bill as well as the receipt; and that the receipt, as set forth, of "the contents above" did not appear to be a receipt for the bill in question, or to be a receipt for money. After conviction, judgment was respited; but in *Mich. T. 1774*, the judges were of opinion that the indictment was sufficient, for it was, "Received the contents above," which shewed it to be a receipt for something, though the particulars were not expressed; it was laid to be a *forged receipt for money* under the hand of *S. W.* for 1*l.* 4*s.* 0*d.*, and the bill itself was only evidence of the fact, and shewed it to be a receipt for money as charged.

Receipt to a navy bill assignment.

But in the case of *W. Hunter* (E. T. 1796), who was indicted for forging a receipt to an assignment for payment of a certain sum in a navy bill, the judgment was arrested, because it did not appear on the face of the instrument, nor was shewn by any averment, that the instrument was a receipt for money. *R. v. Hunter*, 2 *Leach*, 624. 2 *East's P. C.* 928.

Scrip receipt.

In *Lyon's case* it was ruled by all the judges, that a scrip receipt not filled up with the name of the subscriber, or person from whom the money was received, is not a receipt for money within the statutes. *Lyon's case*, 2 *East's P. C.* 933.

Alteration in copy.

A person who makes a copy of a receipt, interpolating the words "in full of all demands," and produces such false copy upon a suggestion of the loss of the original, is guilty of forgery. *Upfold v. Leit*, *Sitt. after H. T. 1804, cor. Ld. Ellenborough C. J.*, 5 *Esp.* 100.

Initials, &c. on a receipt must be explained.

The indictment charged the prisoner with publishing the following forged receipt to an account for money, "1825. Received, *H. H.*," which had been given by *Henry Hargreaves* as a receipt for other money, but which prisoner had annexed to the account in question, and had published it for a genuine and true receipt for the sum in account, with intent to defraud said *H. Hargreaves*: after conviction, judgment was arrested, on the ground that the indictment ought to have shewn what "*H. H.*" meant, and what connection *Hargreaves* had with the receipt. *E. T. 1826, R. v. Barton*, 1 *R. & M.* 141.

As to producing unstamped receipts in support of a charge of felony founded thereon, see *R. v. Hall*, 3 *Stark.* 67., *ante*, p. 274.

Order for payment of money or delivery of goods, must appear to be the

If the warrant or order, mentioned in stat. 7 *G. 2. c. 22.* (now repealed), do not purport, on the face of it, nor be shewn by a proper averment, to be made by a person having authority to command the payment of the money, or direct the delivery of the

goods, but only amounts to a request to advance the money or supply the goods on the credit of the party applying, it is not a warrant or order within the statute. 2 East's P. C. 936. 2 Leach, 597. See also *Reeves's case*, 2 Leach, 808.

Mary Mitchell was indicted for publishing and uttering this forged warrant and order: "Mr. *Jeffereys*, I desire you to let this woman have six yards of ordinary stuff, one pair of stockings, one shift, one apron, one handkerchief, and I will see it all paid for. Witness my hand, *G. May*:" with intent to defraud *W. Jeffereys*. The prisoner pretending to be entitled to parochial relief, went to *Jeffereys's* shop with the order, saying she had brought it from *May*, the overseer of the poor, and desiring him to let her have the articles on the credit of it. After conviction, judgment was respited; and nine of the judges, on a conference in July, 1754, were clearly of opinion that the writing was not a warrant or order for the delivery of goods within the statute; considering that the words "warrant or order," as they stand in the act, are synonymous, and import that the person giving such warrant or order has or at least claims an interest in the money or goods which are the subject-matter of it, and has or at least assumes to have a disposing power over them, and takes on him to transfer the property, or at least the custody of them, to the person in whose favour such warrant is made. And though this case must fall within the mischief, yet in the construction of an act so penal, the strict letter of it ought not to be departed from. *Mitchell's case*, *Fost.* 119. 2 East's P. C. 936. 2 Russ. 470.

On the authority of *Mitchell's case*, it was determined in *Williams's case* that a note to a tradesman, requesting him to let the bearer have certain goods, is not within the statute, though most of the judges said they should have doubted the propriety of the former case, had it been *res integra*; but it having been so long acquiesced in, they thought it could not be departed from. *Williams's case*, 1775, 1 Leach, 114. 2 East's P. C. 937. S. P.

Accordingly, in *Ellor's case*, a note in the following form, — "Messrs. *Songer*, please to send 10*l.* by the bearer, as I am so ill, I cannot wait on you, *Eliz. Wery*," was holden not to be an order within the statute. The prisoner was therefore acquitted of the felony, but detained, and at a subsequent sessions convicted of a misdemeanor. *Ellor's case*, *O. B.* 1784, 1 Leach, 923. 2 East's P. C. 938. S. P.

Prisoner was indicted for forging an order for the payment of money; viz. "Mr. *T. Sir*, you will please to pay *R. P.* 3*l.* for three weeks due to him, a country member, *J. B.*" It appeared that *J. B.* was the secretary of a friendly society, and that there was usually money in *T.'s* hands to pay any demands made by *J. B.'s* orders, but there was no member of the name of *R. P.* No evidence was given that *J. B.* had any disposing power over the money, which could be shewn only by the production of the rules and regulations. After conviction, the judges thought that this was not an order on the face of it, and that the conviction was therefore wrong. *E. T.* 1829, *R. v. Baker*, 1 R. & M. 231.

In *Clinch's case* it was holden, that an order of this kind ought to be directed to some person in particular, and it ought to appear that the person, whose name is subscribed to the order, had

order of a person entitled to make it.

It must appear that the person whose order, &c. was forged had a disposing power.

A forged order on a banker for payment of money, purporting to be made by one who kept cash with him, is within the statute, though made in a fictitious name, or in the name of one who had no authority to draw on him.

an authority to make it. *Clinch's case*, O. B. 1791, 1 *Leach*, 540. 2 *Russ.* 473, 4.

But if it purport to be an order which the party has a right to make, although in truth he has no such right, and though no such person exists as he who is supposed to have made it, it comes within the statute.

C. Locket was convicted of knowingly uttering a forged order for the payment of money in these words: "Messrs. *Neale, For-dyce, and Down*, pay to *Wm. Hopwood*, or bearer, 16*l.* 10*s.* 6*d.* *R. Vennest*;" with intent to defraud *John Scoles*. The prisoner applied to *Scoles*, a colourman, and agreed to purchase goods to the amount of 10*l.* 0*s.* 6*d.* which he was to send for; and he took away with him a little *Prussian blue*. He came again, pretending to be in a hurry, and presented this note, which he said was a good one; and *Scoles* gave him 6*l.* 10*s.*, being the difference. No such person as *R. Vennest* kept cash at Messrs. *Neale and Co.'s*, nor did it appear that there was any such man existing. The question submitted to the judges was, whether this were an order within the statute, being the name of a fictitious person? the doubt arising on what is said in *Mitchell's case*. (See *supra*.) The judges, after very long consideration, at last agreed in *Trin. T.* 1774, that this was forgery. They thought it quite immaterial whether such a man as *Vennest* existed or not; or if he did, whether he had kept cash at the banking house of Messrs. *Neale and Co.'s*; it was sufficient that the order assumed those facts, and imported a right on the part of the drawer to direct such a transfer of his property. *Lockett's case*, O. B. June, 1772, 2 *East's P. C.* 940. 1 *Leach*, 94. S. C. 2 *Russ.* 474.

The expressions in § 10. of 1 *W. 4. c.* 66. are "any warrant, order, or request for the delivery or transfer of goods." See *antè*.

A request (under 11 *G. 4. & 1 W. 4. c.* 66. § 10.) must import on the face of it to be a request. *E. T.* 1831.

And if the words have not necessarily that effect, but are so understood in trade, &c., there must be an innuendo to explain them. *E. T.* 1831.

A request need not be addressed to any particular person. *Semb. E. T.* 1831.

Request, if ambiguous, must be explained. Need not be particularly addressed to any one.

On indictment for uttering a forged request, the request was stated to be "*per bearer* two 11*s.* 4*d.* counterpanes, *J. Davies, E. Twell*, 88. *Aldgate*:" this was explained to mean in the trade in which *J. Davies* dealt at 88. *Aldgate*, to be a request from *Twell, D.'s* foreman, to any person in the trade, to supply the counterpanes. Objection was made, that the request was not addressed to any person in particular, and *ca. saved*. On consideration, the judges (twelve) seemed to think the address not necessary; but they thought the words "*per bearer*" did not necessarily import "send *per bearer*," they might have meant "I have sent *per bearer*;" and that there ought to have been an innuendo to explain them. *E. T.* 1831, *R. v. Cullen*, *MS. Bayley B. S. C.* 1 *M.* 300.

In these cases it is not necessary to specify the particular goods in the order, provided it be conceived in terms intelligible to the parties themselves to whom it is addressed. 2 *East's P. C.* 941. *Jones's case*, 1 *Leach*, 204. 2 *Russ.* 475.

In *R. v. M'Intosh*, 2 East's P. C. 942., an order for payment of prize-money, and in *R. v. Graham*, 2 East's P. C. 945., a forged order of a magistrate upon the high constable of a division, or the treasurer of the county, to pay a reward of 10s. to the prisoner for apprehending a vagrant under stat. 17 G. 2. c. 5. § 5. (a), were holden to be orders within the meaning of the 7 G. 2.; though in the latter case, the 18th section of the act subjects the party forging such order to a penalty of 50*l*. See 2 Russ. 471. n.

Not confined to dealings in trade.

Benjamin Rushworth was indicted at York Sum. Ass. 1816, for forging an order for the purpose of obtaining the sum of 4*l*. 10s. for apprehending and conveying certain vagrants: but the order not being under hand and seal, as required by 17 G. 2. c. 5. § 5., and being addressed to the county treasurer instead of to the high constable, as that statute also requires, *Bayley J.* thought it was not such an order for payment of money as was within the statute, and directed an acquittal. *Rushworth's case*, C. C. R. 317. 2 Russ. 471.

A forged order for obtaining the reward, &c. for apprehending a vagrant, not under hand and seal, &c. not within the statute.

A bill of exchange may be stated as an order for payment of money. In *Shepherd's case*, O. B. Sept. 1781, 2 East's P. C. 944., the forged instrument, which was set out, was precisely in the form of a bill of exchange, and in the indictment it was stated to be an order for payment of money. It was objected, that it ought to have been laid to be a bill of exchange. But in *Mich. T. 1781*, the judges were unanimously of opinion that it was properly laid. It was observed that the indictment and the draft were the same as in *Lockett's case*, (*suprà*.) where all the judges held the conviction proper; and that every bill of exchange seemed to be an order for payment of money, though not *vice versâ*.

A bill of exchange may be laid as an order for payment of money.

Uttering a forged note was within the forgery acts prior to 1 W. 4., though it was on the face of it payable in Ireland only. *Tr. T. 1831*.

Promissory note payable in Ireland.

Indictment for uttering here in *April*, 11 G. 4., a note for 30s. payable to bearer on demand in *Dublin*. Case upon the question whether the uttering an Irish note was within the then existing statutes, and the judges (fourteen) were unanimous it was. *Tr. T. 1831*, S. C. 1 M. 311. *R. v. Kirkwood*, MS. *Bayley B.*

If several make distinct parts of a forged instrument, each is a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others. *Tr. T. 1831*.

Principals in forgery.

On an indictment against *Dade*, *Kirkwood*, and *Stansfield*, for forging a note, and against *Collins* and *Campbell* as accessaries before the fact, it appeared that *Stansfield* made the paper, *Kirkwood* engraved the plate, and struck off the impression, and *Dade*, in the absence of *Stansfield* and *Kirkwood*, filled up and finished the note. *Stansfield*, when he made the paper, did not know that *Kirkwood* or *Dade* were to have any thing to do with the forgery; nor did *Kirkwood* know, when he engraved the plate and made the impression, that *Dade* or *Stansfield* were, or were to be, concerned. *Collins* and *Campbell* were the movers, and through them all the parties were set to work. The object was, to pass off notes of the *Wirksworth* bank. *Dade* was not upon his trial, and *Collins* and *Campbell* could not properly be tried unless *Stansfield* and *Kirk-*

Actors in the transaction of the forgery, but unknown as such to each other.

wood were to be deemed principals. The four were convicted, but case for the judges upon the question whether *Stansfield* and *Kirkwood* were principals and rightly convicted; and, on consultation, the judges (fourteen) were unanimous that they were, that *R. v. Bingley* was rightly decided, and that the ignorance of *Stansfield* and *Kirkwood*, who were to effect the other parts of the forgery, was immaterial: it was sufficient if they knew it was to be executed by somebody. *Tr. T. 1831, R. v. Kirkwood, MS. Bayley B. S. C. 1 M. 307.* by the name of *R. v. Dade and others.*

S. P.

There was another indictment against *Dade* and *Kirkwood*, for forging a note of *Heywood's* bank at *Manchester*, and against *Collyer* and *Calvert*, as accessaries before the fact. *Kirkwood* engraved the plate, and worked off the impression from it; and *Dade*, in his absence, filled up the note. *Dade* not being in custody, *Kirkwood*, *Collyer*, and *Calvert*, were alone tried, and upon their conviction the point was also saved, whether *Kirkwood* was a principal, and the judges were unanimous that he was. *Tr. T. 1831, R. v. Kirkwood, MS. Bayley B. S. C. 1 M. 304.*

Using a second
time a stamp
detached from
parchment.
55 G. 3. c. 184.

On indictment against prisoner for getting off from a certain piece of parchment the impression of a die, made and used in pursuance of the statute in that case made and provided, for denoting a stamp duty of 25*l.*, with intent to use the same upon another piece of parchment, it appeared that the prisoner was ordered by the commissioners of stamps to cut off from an instrument brought to have a spoiled stamp allowed, that part upon which the stamp was; that he did so, and afterwards detached from the parchment so cut off the blue paper upon which the stamp was impressed, and affixed it to another piece of parchment, and offered it for sale. The impression was made by a die used by direction of the commissioners before and after 55 G. 3. The jury found, 1st, that they could not say whether the impression was made before or after 55 G. 3.; 2dly, that when the prisoner cut the piece from the instrument, he had no fraudulent intention; 3dly, that he had, when he detached the stamp from the parchment he had cut off with it; and, 4thly, that he intended to use it upon other parchment destined for indentures; and, upon this finding, the judges thought the prisoner rightly convicted. *Tr. T. 1831, R. v. Smith, MS. Bayley B. S. C. 1 M. 314.*

Forged stamps
on plate.
55 G. 3. c. 185.

Prisoner was indicted on 55 G. 3. c. 185. § 7., for selling plate with the king's mark forged upon it, knowing, &c. Previous acts, viz. 24 G. 3. sess. 2. c. 53. § 16., and 52 G. 3. c. 143. § 7., had contained similar provisions. By 55 G. 3. it is made a capital offence. After conviction, judgment was respited, on a doubt whether the punishment of death was taken away by subsequent statutes; and, if it was, whether the punishment was transportation for life absolutely, or discretionary in the court. 11 G. 4. & 1 W. 4. c. 66. § 1., repeals the punishment in very many forgeries, and gives the court discretion: § 31. repeals many former acts, but does not specify the above acts: 2 & 3 W. 4. c. 123., takes away the punishment of death from many other forgeries which were made capital by 11 G. 4. & 1 W. 4. c. 66., and enacts transportation for life.

Punishment
discretionary.

The judges held that the punishment of death is taken away by 11 G. 4. & 1 W. 4. c. 66. § 1., and that the punishment is discretionary under that section. *M. T. 1833, R. v. William Hope, Sum. Devon Ass. 1833, cor. Patteson J. MS.*

It appeared that the prisoner was in the habit of putting off bad notes through the agency of *S. H.*, a female; and it being proved that she had given a 2*l.* note at a shop, which note prisoner claimed to be his, he was found guilty; and on *ca. res.* a majority of the judges were of opinion that the conviction was right on the count for disposing and putting away. *R. v. Palmer, C. C. R. 72.*

N. B. This was under 13 *G. 2. c. 13. § 11.*, now repealed; but see 1 *W. 4. c. 66. § 3.*

But where the prisoners, having agreed with *A.* to sell him some forged notes, met him by appointment, and pointed out to him a woman who would deliver him the notes, and from whom *A.* received them, but it did not appear that the prisoners were present at the delivery, it was held that the prisoners were only accessories before the fact. *R. v. Stewart and another, C. C. R. 365.*

Where it was proved that the prisoner delivered a forged note to an agent for the purpose of passing it, which the agent endeavoured to do, the judges held that, assuming the agent knew the note to be forged, the delivery of it to him by the prisoner was a disposing of it within the statute, and that the conviction was right. *E. T. 1827, R. v. Giles, 1 R. & M. 166.*

Semb. also, that if the agent was an innocent instrument, and employed as such, his act would be the act of the principal, for which the principal might be convicted. *Per Vaughan B., ib. 169.*

Where the prisoner left a forged bill, payable to himself or order, and not indorsed by him, in the hands of his landlady as a pledge for the payment of his bill, the judges held that, having been delivered for the purpose of obtaining credit, it was a guilty uttering. *R. v. Birkett, C. C. R. 86.*

But where, on a charge for uttering and publishing, it appeared that prisoner had delivered the notes to the innkeeper where he was lodging, to take care of them for him, and to shew that he was a man of substance, the judges held the conviction wrong, and that it did not amount to an uttering, unless the note was used in some way to obtain money or credit upon it. *R. v. Shuckard, C. C. R. 200.*

Delivery of forged note to an agent to dispose of.

Agreement for sale of forged notes, and pointing out the person who is to deliver them.

Delivery to agent, being an accomplice.

Delivery to an innocent agent

Delivering a forged note by way of pledge is an uttering.

Alter, if it be delivered for safe custody.

III. Indictment and Evidence.

The rule was formerly well established with respect to the competency of witnesses in cases of forgery, that no one was allowed to give evidence for the prosecution who was interested, at the time of his examination, in setting aside the instrument alleged to be forged, if, in case of its being genuine, he would either be liable to be sued upon it, or be deprived by it of a legal claim against another; and he was also held to be equally incompetent to prove any other fact which contributed to establish the forgery. 2 *East. P. C. 993. 1 Phill. Evid. 113. 2 Russ. 374.*

Old rule as to competence of witnesses whose names are forged.

But, now, by 9 *G. 4. c. 32. § 2.*, on any prosecution by indictment or information, either at common law or by statute, against any person for forging a deed, writing, instrument, or other matter whatsoever, or for uttering or disposing of any deed, writing, instrument, or other matter whatsoever, knowing the same to have been forged, or for being accessory before or after the fact to any such offence, if the same be a felony, or for aiding, abetting, or counselling the commission of any such offence, if the same be a

9 *G. 4. c. 32. s. 2.* Rendering them competent in support of the prosecution.

misdeemeanor, no person shall be deemed to be an incompetent witness, in support of any such prosecution, by reason of any interest which such person may have or be supposed to have, in respect of such deed, writing, instrument, or other matter.

It is not, however, indispensable, that the party whose hand-writing has been forged, should be the witness to prove the forgery.

In a prosecution for the forgery of a bank note, it was ruled, that the hand-writing of the cashier of the bank might be disproved by any other person who was acquainted with his hand-writing. *Hughes's case*, 2 *East. P. C.* 1002.

On points reserved from cases on bank prosecutions, it was resolved by the judges, that it was unnecessary to produce the signing clerk, to shew that he never signed the note, if the same is established by the evidence of persons acquainted with his hand-writing. *C. C. R.* 380.

It is an established rule of evidence, that hand-writing cannot be proved by comparing the paper in dispute with any other papers acknowledged to be genuine. *Phill. Evid.* 430. 2 *Russ.* 379.

Questions, however, have arisen, whether the evidence of persons of skill and experience, and whose business it was to inspect franks and detect forgeries at the post-office, was admissible to shew whether certain writings were in a natural or in an imitated hand. *Goodtill v. Braham*, 4 *T. R.* 497. *Cary v. Pitt*, *Peake's Evid.* 85. *Phil. Evid.* 430. *R. v. Cator*, 4 *Esp.* 117.

In the latest of the cases, where an inspector of franks of the post-office was not allowed to state his opinion whether the hand-writing in question was a genuine signature or an imitation, on the trial of a feigned issue to try a question of forgery, the court of *B. R.* expressed doubts of the admissibility of the evidence, and refused to disturb the verdict, on the ground of its being rejected. *Gurney v. Longlands*, 5 *B. & A.* 330.

In *R. v. Wylie* and another, at the *O. B. Apr. 14. 1804*, the prisoners were indicted for disposing of and putting away a forged bank-note for 1*l.*, knowing the same to be forged. In order to shew the knowledge of the prisoners that the note was forged, evidence was offered that the prisoners had passed other forged notes to other persons: And to this evidence the counsel for the prisoners objected, as being inadmissible; because, they said, upon indictments for burglary or robbery, previous offences were not allowed to be given in evidence to prove the *quo animo*; nor upon an indictment for uttering bad money; and they said that the prisoners ought to have had notice of the several utterings intended to have been proved against them. Lord *Ellenborough C. J.* said, that in *R. v. Tattershall* (tried at *Lancaster*, 1801, by Mr. *J. Chambre*) it was held by all the judges, that the jury might, from the conduct of the prisoner on one occasion, infer his knowledge on another. And he said, "I remember a case in which a person came to *Manchester* with a large parcel of forged notes; his whole demeanour afforded pregnant evidence of the mind and purpose for which he came; and a question was made, whether that evidence should be received; for it was said, that it would be trying the prisoner for other utterings. But if crimes do so intermix, the court must go through the detail. I remember a case where a man committed three burglaries in one night; he took a shirt at one

Other evidence admissible to prove forgery than that of the person whose signature is forged.

S. P.
Bank prosecutions.

Comparison of hand-writing not allowed.

Evidence of persons of experience in hand-writings.

Semb. that they are not evidence.

Upon an indictment for uttering a forged bank-note, knowing it to be forged, evidence may be given of other forged notes having been uttered by the prisoner, in order to shew his guilty knowledge.

place, and left it at another; and they were all so connected that the court went through the history of the three burglaries. The more detached in point of time the previous utterings are, the less relation they will bear to that stated in the indictment. But in such case, the only question would be, whether the evidence was sufficient to warrant the inference of knowledge from such particular transactions? It would not make the evidence inadmissible. Such evidence may come out from these circumstances, as may leave no doubt that the prisoners must have known what sort of paper they were passing. Under the authority therefore of the decision which has already taken place, I think that it is competent for us to go into and receive evidence of another offence, and of the demeanour of the prisoners on other occasions, from which knowledge may be inferred."—*Heath J.* agreed, and said he remembered a case where several persons were tried for a conspiracy to raise wages, and evidence was received of circumstances amounting to substantive felonies, such circumstances being material to the point in issue.—*Thomson B.* agreed, and said, that as to uttering of bad money, the prosecutor could give evidence of another uttering on the same day, in order to prove the knowledge. The evidence was received, and the prisoners were found guilty. *Wylie's case*, 1 N. R. 92. 2 *Leach*, 983.

Edward Ball was tried before *Heath J.* at *Lewes Sum. Ass.* 1807, on an indictment, charging him in the first count with forging a bank of *England* promissory note for the payment of 5*l.*, with an intent to defraud the governor and company of the bank of *England*, and on another count for uttering the same, &c. The prisoner uttered the note in question on the 11th of June, 1807, and there was circumstantial evidence of his having actually forged it, which might induce an intelligent jury to find him guilty on the first count. The note was forged with a camel-hair pencil. The company's notes are struck off a copper plate, and so are most of the forged notes that have been circulated. Evidence was then offered and admitted, that the prisoner had uttered another note forged in the same manner, by the same hand, and with the same materials, on the 20th of March, 1807, and that two ten-pound notes, and thirteen one-pound notes of the same fabrication had been found on the files of the company, on the back of which there was the prisoner's hand-writing, which was evidence of their having been in his possession, but it did not appear when the company received them. The prisoner was found guilty, but sentence was respite for the purpose of taking the opinion of the judges as to the admissibility of this evidence. On the 14th November, 1807, all the judges (except *Rooke J.*) met, and the majority were of opinion that the evidence was admissible, subject to observation as to its weight, which would be more or less considerable according to the number of the other notes, the distance of time at which they were put off, and the situation in life of the prisoner, as to make it more or less probable that so many notes should pass through his hands in the course of business. *Ball's case*, C. C. R. 132. 1 *Campb.* 324. S. C.

Upon an indictment for uttering a forged bank note, knowing it to be forged, evidence is admissible of the prisoner having some time before uttered another forged note of the same manufacture, and also of a number of others having been in circulation with the prisoner's hand-writing on the back.

In another case, where the prisoner was indicted for forging a promissory note (not a note of the bank of *England*), and also for uttering it, evidence was given that, in the same pocket-book belonging to the prisoner in which the forged note was found, on

Other forged note found in possession of prisoner.

which the indictment proceeded, there was also found another promissory note for 100*l.*, payable to the prisoner's order, appearing to be signed by one *Wm. Gapper*, which *Wm. Gapper* proved not to be his hand-writing, and that he never owed the prisoner 100*l.* This evidence of *Gapper's* note was objected to by the prisoner's counsel, but admitted; and on reference to the judges, a majority were of opinion that *Gapper* (a) was not a competent witness. The prisoner was pardoned. *Crocker's case, Salisbury Sum. Ass.* 1805, cor. *Le Blanc, J.*, 2 N. R. 87. 2 Russ. 373. 375. 385. & *n. ibid.*

Evidence of guilty knowledge.

Where it appeared that the prisoner, who was charged with knowingly uttering a forged promissory note of which he was payee, stated at time of uttering it, that the drawer (*W. H.*) was a respectable man, keeping a public-house at *T.*; it was held, on *ca. res.*, that *W. H.* having been called to shew that it was not his note, it lay on the prisoner to disprove the forgery, or his guilty knowledge of it. *E. T.* 1830, *R. v. Hampton*, 1 R. & M. 255.

Judgment for forgery disqualifies as a witness.

It was formerly a consequence of the judgment for forgery, that the defendant was rendered incapable of being a witness, as having been convicted of a *crimen falsi*, until restored to competency by the king's pardon. 2 Russ. 385.

9 G. 4. c. 32. s. 3, 4.

Restoration of competency after suffering the punishment.

Intent to defraud.

But now, by 9 G. 4. c. 32. §§ 3, 4., after any conviction for felony or misdemeanor (except perjury and the subornation of perjury), the offender having endured the punishment to which he has been adjudged, shall no longer be an incompetent witness in any court or proceeding, civil or criminal.

The intent to defraud and the party to be defrauded must be stated in the indictment; and the proof must agree with such allegation. But it need not state the manner in which the party is to be defrauded; for that is matter of evidence. *R. v. Powell*, 2 Blac. Rep. 787. 2 East's P. C. 976. 1 Leach, 77.

Stat. 7 G. 2. c. 22. was confined to those cases where the forgery was committed with intent to defraud *individuals*, and not corporate bodies. *R. v. Harrison*, O. B. 1777, 2 East's P. C. 988.; and therefore stat. 18 G. 3. c. 18. was passed to remedy this defect. (b)

Forged instrument, description of.

It was formerly necessary to set forth in the indictment the instrument forged, in words and figures. *R. v. Mason*, 2 East's P. C. 975.

Not necessary to set out copy or *fac simile* of forged instrument.

By 2 & 3 W. 4. c. 123. § 3., in order to prevent justice from being defeated by clerical or verbal inaccuracies, it is enacted, that in all informations or indictments for forging or in any manner uttering any instrument or writing, it shall not be necessary to set forth any copy or *fac simile* thereof; but it shall be sufficient to describe the same in such manner as would sustain an indictment for stealing the same.

The following decisions have taken place as to variances between the instrument or writing as described by averment in the indictment, and the evidence produced in support of it.

Purport, its meaning.

The word *purport* imports what appears on the face of the instrument; and, therefore, if it be stated in the indictment that the instrument *purports* to be so and so, and the instrument when set forth does not accord with what it is said to *purport*, it is bad.

(a) It does not appear that the judges gave any opinion that *G.* was incompetent as a witness; it is said that it was understood that they thought so: there were, however, several other objections taken to the conviction. 2 Russ. 385. n.

(b) Now repealed, but see § 28. of 1 W. 4. c. 66.

In *Jones's case*, in 1779, the instrument was described to be a paper writing purporting to be a bank note; but the court were of opinion, that as it did not purport on the face of it to be a bank note, the indictment could not be supported; and that this defect could not be supplied by the representations made by the party when he passed off the note. *Jones's case*, Dougl. 300. 2 East's P. C. 883.

So in *J. Reading's case*, 1793, where the indictment charged that the prisoner being possessed of a bill of exchange, purporting to be directed to *J. King*, by the name, &c. of *J. Ring*, forged the acceptance of the said *J. King*, judgment was arrested, because the bill did not purport to be drawn on *J. King*, as stated in the indictment. And *Buller J.*, in delivering the opinion of the judges at the O. B., observed, that the indictment, as drawn, was absurd and repugnant in itself; for the name and description of one person or thing could not purport to be another. *Reading's case*, O. B., Sept. 1793, 2 Leach, 590. 2 East's P. C. 981. S. P.

Again, in *Gillchrist's case*, the indictment was for forging "a paper writing, purporting to be an order for payment of money, dated, &c. with the name of *Thos. Exon* thereunto subscribed, purporting to have been signed by *Thos. Exon*, clerk, and to be directed to *George Lord Kinnaird*, *Wm. Moreland*, and *Thomas Hammersley*, of, &c. bankers and partners, by the name and description of *Messrs. Ransom*, *Moreland*, and *Hammersley*, for the payment of the sum of 10*l.*, &c.;" the tenor of which said false writing, &c. is as follows; viz. "*Messrs. Ransom*, *Moreland*, and *Hammersley*, please to pay to *Mr. Brooks*, or bearer, the sum of ten pounds for *Thos. Exon*; Sept. 11th, 1794;" with intent to defraud the said *George Lord Kinnaird*, &c. A motion was made in arrest of judgment; and upon a conference with the judges in *Easter term*, 1795, it was resolved by ten judges present, that the judgment should be arrested, because the word purport imports what appears on the instrument itself. It means the apparent and not the legal import; and that this bill of exchange could not purport to be directed to *Lord Kinnaird*, because his name did not appear on the face of the bill. *Gillchrist's case*, O. B. 1795, 2 East's P. C. 982. 2 Leach, 657.

Purport is the apparent and not the legal import.

And these determinations have been acted upon in various subsequent cases.

A merely literal variance is not fatal; as in *Hart's case*, where the word was written in the indictment "received," and it was "reicevd" in the bill of exchange itself. 2 East's P. C. 977.

Variance of a word or letter.

So where the prisoner was indicted for uttering a bill of exchange directed to *Messrs. Masterman, Peters*, and *Co.*, with a forged indorsement thereon; and it was objected that there was a variance in the indictment, which imported to set out the bill according to its tenor, inasmuch as the letter *r* in *Messrs.* was omitted, and the abbreviation *Messs.* might stand for words which *Messrs.* could not; the objection was overruled, and the judges, upon the point being referred to them, held the indictment sufficient. *Oldfield's case*, *Durham Sum. Ass.* 1811, cor. *Bayley J.*, MS. 2 Russ. 360.

But, if by addition, omission, or alteration, the word is so changed as to become another word, the variance will be fatal. 2 Russ. 360. *R. v. Beach*, 1 Cowp. 229. *Reg. v. Drake*, Salk. 661.

Form of Commitment for Felony in uttering a forged Bank Note, under stat. 1 W. 4. c. 66. § 3.

County of } Sir G. C. baronet, one of the justices of our lord the
Warwick, } king, assigned to keep the peace within the said county.
to wit. } To the constable of _____ in the said county, and to
the keeper of the common gaol at Warwick, in the said county.

THESE are to command you the said constable, in his said majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said common gaol the body of A. O., charged this day before me the said justice, upon the oaths of A. I., A. W., and others, with feloniously uttering, publishing, disposing of, and putting away at Birmingham, in the said county, on the _____ day of _____ now last past, a certain false, forged, and counterfeited bank note, purporting to be a note of the governor and company of the bank of England, for the payment of one pound, he the said A. O. at the time of uttering, &c. [or, as the case may be], well knowing the same to be false, forged, and counterfeited, with intent to defraud the said governor and company, contrary to the form of the statutes in such case made and provided.

And you the said keeper are hereby required to receive the said A. O. into your custody in the said common gaol, and him there safely keep, until he shall be from thence discharged by due course of law. Hereof fail you not. Given under my hand and seal, the _____ day of _____, in the year of our Lord one thousand eight hundred and _____.

Fornication. See Lewdness.

Game.

[7 & 8 G. 4. c. 29. — 9 G. 4. c. 69. — 1 & 2 W. 4. c. 32.]

UNDER this head, such illegal acts relating to game will be treated of as are made by law the subject of indictment, or are rendered liable to other penal enactments.

9 G. 4. c. 69.
Persons taking
or destroying
game by night
to be commit-
ted, for the first
offence for three
months, and
kept to hard
labour, and to
find sureties.

By 9 G. 4. c. 69. § 1., reciting the 57 G. 3. c. 90., and repealing the same except so far as the same repeals any other acts; "if any person shall, after the passing of this act, by night unlawfully take or destroy any game, or any rabbits in any lands, whether open or enclosed, or shall by night unlawfully enter or be upon the land, whether open or enclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game, such offender shall, upon conviction thereof before two justices of the peace, be committed for the first offence to the common gaol or house of correction for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance, or in Scotland by bond of caution, of himself in 10*l.* and two sureties in 5*l.* each, or one surety in 10*l.* for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such

person shall so offend a second time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance or bond as aforesaid, himself in 20*l.* and two sureties in 10*l.* each, or one surety in 20*l.* for his not so offending again for the space of two years next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in *Scotland*, if any person shall so offend a first, second, or third time, he shall be liable to be punished in like manner as is hereby provided in each case."

§ 2. "Where any person shall be found upon any land, committing any such offence as is herein-before mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever towards any person hereby authorised to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in *Scotland*, whenever any person shall so offend, he shall be liable to be punished in like manner."

§ 3. "Where any person shall be charged on the oath of a credible witness, or in *Scotland* on the application of the procurator fiscal of court, before any justice of the peace, with any offence punishable upon summary conviction by virtue of this act, the justice may issue his warrant for apprehending such person, and bringing him before two justices of the peace, to be dealt with according to law."

§ 4. "The prosecution for every offence punishable upon summary conviction by virtue of this act, shall be commenced within six calendar months after the commission of the offence; and the prosecution for every offence punishable upon indictment or otherwise than upon summary conviction by virtue of this act, shall be commenced within twelve calendar months after the commission of such offence."

9 G. 4. c. 69.

Second offence, six months and kept to hard labour, and to find sureties;

third offence, to be liable to transportation.

Scotland.

Owners or occupiers of land, lords of manors, or their servants, may apprehend offenders.

Offenders assaulting or offering violence deemed guilty of misdemeanor, and liable to be transported for seven years, or imprisoned for two years.

Scotland.

Power to issue a warrant for apprehension of offenders.

Limitation of time for proceedings under this act.

Form of Commitment for Felony in uttering a forged Bank Note, under stat. 1 W. 4. c. 66. § 3.

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And you the said keeper are hereby required to receive the said A. O. into your custody in the said common gaol, and him there safely keep, until he shall be from thence discharged by due course of law. Hereof fail you not. Given under my hand and seal, the _____ day of _____, in the year of our Lord one thousand eight hundred and _____.

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labour, and to
find sureties.

By 9 G. 4. c. 69. § 1., reciting the 57 G. 3. c. 90., and repealing the same except so far as the same repeals any other acts; "if any person shall, after the passing of this act, by night unlawfully take or destroy any game, or any rabbits in any lands, whether open or enclosed, or shall by night unlawfully enter or be upon the land, whether open or enclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game, such offender shall, upon conviction thereof before two justices of the peace, be committed for the first offence to the common gaol or house of correction for any period not exceeding three calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance, or in Scotland by bond of caution, of himself in 10*l.* and two sureties in 5*l.* each, or one surety in 10*l.* for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found; and in case such

person shall so offend a second time, and shall be thereof convicted before two justices of the peace, he shall be committed to the common gaol or house of correction for any period not exceeding six calendar months, there to be kept to hard labour, and at the expiration of such period shall find sureties by recognizance or bond as aforesaid, himself in 20*l.* and two sureties in 10*l.* each, or one surety in 20*l.* for his not so offending again for the space of two years next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in *Scotland*, if any person shall so offend a first, second, or third time, he shall be liable to be punished in like manner as is hereby provided in each case."

§ 2. "Where any person shall be found upon any land, committing any such offence as is herein-before mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right or reputed right of free warren or free chase thereon, or for the lord of the manor or reputed manor wherein such land may be situate, and also for any gamekeeper or servant of any of the persons herein mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever towards any person hereby authorised to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond seas for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years; and in *Scotland*, whenever any person shall so offend, he shall be liable to be punished in like manner."

§ 3. "Where any person shall be charged on the oath of a credible witness, or in *Scotland* on the application of the procurator fiscal of court, before any justice of the peace, with any offence punishable upon summary conviction by virtue of this act, the justice may issue his warrant for apprehending such person, and bringing him before two justices of the peace, to be dealt with according to law."

§ 4. "The prosecution for every offence punishable upon summary conviction by virtue of this act, shall be commenced within six calendar months after the commission of the offence; and the prosecution for every offence punishable upon indictment or otherwise than upon summary conviction by virtue of this act, shall be commenced within twelve calendar months after the commission of such offence."

9 G. 4. c. 69.

Second offence, six months and kept to hard labour, and to find sureties;

third offence, to be liable to transportation.

Scotland.

Owners or occupiers of land, lords of manors, or their servants, may apprehend offenders.

Offenders assaulting or offering violence deemed guilty of misdemeanor, and liable to be transported for seven years, or imprisoned for two years.

Scotland.

Power to issue a warrant for apprehension of offenders.

Limitation of time for proceedings under this act.

9 G. 4. c. 69.

Form of conviction.

§ 5. "The justices of the peace before whom any person shall be summarily convicted of any offence against this act, may cause the conviction to be drawn up in the following form of words, or in any other form of words to the same effect, as the case may require; that is to say,

BE it remembered, that on the ——— day of ——— in the year of our Lord ———, at ———, in the county of ———, [or riding, division, liberty, city, &c. as the case may be,] A. O. is convicted before us [naming the justices], two of his majesty's justices of the peace for the said county [or riding, &c.], for that he the said A. O. did [specify the offence, and the time and place when and where the same was committed, as the case may be, and on a second conviction state the first conviction]; and we the said justices adjudge the said A. O. for his said first offence to be imprisoned in the ———, and there kept to hard labour for the period of ———, and at the expiration of such period to find sureties by recognizance or bond of caution in Scotland, himself in the sum of 10l. and two sureties in the sum of 5l. each, or one surety in the sum of 10l., conditioned that he the said A. O. shall not so offend again for the space of one year next following; and we further adjudge the said A. O. in case he shall not find such sureties as aforesaid, to be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties shall be sooner found. Given under our hands the day and year first above mentioned."

Notice of appeal and recognizance.
Costs.

§ 6. "Any person who shall think himself aggrieved by any such summary conviction may appeal to the next court of general or quarter sessions, which shall be holden not less than twelve days after the day of such conviction for the county, riding, or division wherein the cause of complaint shall have arisen; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or within such three days enter into a recognizance, or bond of caution in Scotland, with a sufficient surety, before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be awarded by the court; and upon such notice being given, and such recognizance or bond being entered into, the justice before whom the same shall be entered into shall liberate such person if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be dealt with and punished according to the conviction, and to pay such costs as shall be awarded; and shall, if necessary, issue process for enforcing such judgment."

No certiorari, &c.

§ 7. "No such conviction or adjudication made on appeal therefrom shall be quashed for want of form, or be removed by certiorari or otherwise into any of his majesty's superior courts of record, or in Scotland by advocacy or suspension, into any superior court; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party

has been convicted, and there be a good and valid conviction to sustain the same."

§ 8. "On every conviction under this act for a first or second offence, the convicting justices shall return the same to the next quarter sessions for the county, riding, division, city, or place wherein such offence shall have been committed; and the record of such conviction, or any copy thereof, shall be evidence in any prosecution to be instituted against the party thereby convicted for a second or third offence; and the clerk of the peace shall immediately on such return make or cause to be made a memorandum of such conviction in a register to be kept by him of the names and places of abode of the persons so convicted, and shall state whether such conviction be the first or second conviction of the offending party."

§ 9. "If any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, cross-bow, firearms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and being convicted thereof before the justices of gaol delivery, or of the court of great sessions of the county or place in which the offence shall be committed, shall be liable, at the discretion of the court, to be transported beyond seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years; and in *Scotland* any person so offending shall be liable to be punished in like manner."

§ 10. enacts, "that in *Scotland* the sheriff of the county within which the offence shall have been committed, shall have a cumulative jurisdiction with the justices of the peace in regard to the same; and the conviction in *Scotland* may be proved in the same manner as a conviction in any other case according to the law of *Scotland*."

§ 11. enacts, "that in all cases in *Scotland* of a third offence, or in other cases in *Scotland* where a sentence of transportation may, by the provisions of this act, be pronounced, the offender shall be tried before the high court or circuit court of judicature."

§ 12. "For the purposes of this act the night shall be considered, and is hereby declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise."

§ 13. "For the purposes of this act the word 'game' shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards."

In a prosecution under 57 G. 3. c. 90. (now repealed), for being found armed by night in a close for the purpose of destroying game, it appeared that one of the two persons so found had a loaded pistol with him, but it did not appear that the other knew it; on ca. res. it was held that the latter was not liable to be convicted under the act. *R. v. Southern, C. C. R.* 444.

Defendant being indicted under 9 G. 4. c. 69. § 9. for being out at night for the purpose of taking game, armed with a bludgeon, it appeared that the prisoner had with him a stick of the size of a bludgeon, but that he was lame, and was in the habit of using it as a crutch. *Taunton J.* told the jury, that though it

9 G. 4. c. 69.

Convictions to be returned to the quarter sessions registered, and may be given in evidence.

Clerk of peace to keep a register.

If persons to the number of three, being armed, enter any land for the purpose of taking or destroying game, &c. they shall be deemed guilty of a misdemeanor.

To be tried at assizes.

Jurisdiction of sheriffs in *Scotland*.

Proving of convictions in *Scotland*.

Third offences, &c. to be tried in certain courts.

What shall be deemed night.

What shall be deemed game.

One of several being armed without the knowledge of the others.

Prisoner having a bludgeon at night, when in pursuit of game, is not within 9 G. 4. c. 69., if it

appears he had it for some other purpose than as an offensive weapon.

Offenders against § 9. of 9 G. 4. c. 69. may be apprehended.

Murder, though the keeper, &c. have previously struck in self-defence.

might have been used as an offensive weapon, yet unless defendant had it with him for the purpose of so using it, it was not a case for conviction. Prisoner was acquitted. *R. v. Palmer, Exeter Spring Assizes, 1831, 2 M. & M. 71.*

Under 9 G. 4. c. 69. § 2., a keeper, &c. may apprehend poachers though there are three or more, and found armed; for though § 2. only authorises apprehending for what are offences under § 1., and where there are three or more armed, they are punishable under § 9.; yet what is punishable under § 9. is, nevertheless, an offence under § 1., though the circumstances of aggravation make it liable to a heavier punishment. *E. T. 1832.*

And if the keeper, &c. be killed in an attempt to apprehend, the offender will be guilty of murder, though the keeper had previously struck the offender, or any of the party, if he struck in self-defence only, to diminish the violence illegally used against him, and not vindictively to punish. *E. T. 1832.*

Prisoner and twenty-one others were found armed by night in a wood with intent to destroy game: the keepers came up, avowed the intent of taking them, and followed them for that purpose four hundred yards, till they got into a turnpike road: the twenty-two then formed, swore the keepers should follow them no further, and rushed upon the keepers: one keeper knocked three of the twenty-two down; but the jury found that he acted not vindictively, or to punish, but simply in his own defence, and to diminish the violence which was illegally brought into operation against him; another of the twenty-four (*qu.?*) then fired a gun at and wounded one of the keeper's men. On indictment, inde, for maliciously shooting, &c., the jury found that he fired to prevent his legal apprehension, and for that purpose to do grievous bodily harm; and on case, the judges (fourteen) were unanimous that the keepers had power to apprehend, and that, notwithstanding the blows by the keeper, it would have been murder had the keeper's man died. Conviction right. *E. T. 1832, R. v. Ball, MS. Bayley B. S. C. 1 M. 330. 333.*

Offenders under 9 G. 4. c. 69. may be apprehended without special notice being given to them.

Indictment for malicious shooting at prosecutor with intent to murder, &c., and with a count stating the intent to be to resist lawful apprehension; it appeared that the prosecutor, who was the keeper's assistant, was shot at and wounded by one of a gang of poachers who had just left a game preserve, as he was going up to the poacher to seize him, without having said any thing to him. After conviction, on *ca. res.*, the judges held that, under the stat. 9 G. 4. c. 69., the prosecutor had a right to apprehend in such a case without giving notice, for that the circumstances constituted sufficient notice, and that the conviction was right. *R. v. Payne and others, 1 M. 378.*

Under 57 G. 3. it was necessary in some way to specify the close.

An indictment under 57 G. 3. c. 90. (*a*), charged defendant with having entered a certain close, &c.; but there was nothing in the indictment to shew what particular close; it was not described by name, ownership, occupation, or abutments. On *ca. res.*, a majority of the judges thought that this was substantially a local offence, and that the defendant was entitled to know to

(a) By 57 G. 3. c. 90., if any person having entered into any forest, chase, &c. with intent illegally to kill game, rabbits, &c. or to abet, &c. shall be found at night armed with any gun, &c., every person so offending shall be guilty of a misdemeanor. This statute is repealed.

what specific place the evidence was to be directed. *R. v. Ridley*, C. C. R. 515.

The prisoners were indicted under 57 G. 3. c. 90., for unlawfully entering a certain wood called the *Old Walk*, belonging to and being in the occupation of *J. J. Earl of Waldegrave*; it appeared that the property and occupation were rightly stated, but that the name of the wood was the *Long Walk*, and that it was never called the *Old Walk*. *Hullock B.*, at the trial, thought that these words might be rejected as surplusage, inasmuch as there was an ample description of the wood in a subsequent part of the allegation. On ca. res., however, the judges held that the variance was fatal, and the conviction wrong. *H. T. 1826, R. v. Owen and Prickett*, 1 R. & M. 118.

A false name given to a wood is a fatal variance.

Where an indictment under 57 G. 3. c. 90. stated defendant to have entered into a specified close, with intent then and there to kill, &c. and having so entered into said close, was in the night, between the hours, &c. found in said close, armed with a gun, &c. It appeared that defendant was seen coming along a field, in which was a footpath into the close, in which he was taken with game in his possession; but he was going homewards, and away from the woods, which were game preserves. The judges held him to be wrongly convicted, as the intent to kill game ought to have been proved in the close specified. *H. T. 1827, R. v. Barham*, 1 R. & M. 151.

So, trespass with such intent must be shewn in such close.

Defendant was convicted of having entered a specified wood with intent, &c. and of being found in the night in said wood armed, &c. There was no evidence of his being actually seen in the wood; but as there was enough to satisfy the jury that he had been in the wood armed, the judges held the conviction right. *R. v. Worker*, 1 R. & M. 165.

Evidence of defendant being actually seen on the land is not necessary.

Prisoners were convicted on an indictment under 57 G. 3. c. 90. which charged them with being found armed in a wood, at night, having gone there for the purpose of killing game. It appeared that the prisoners had been shooting in the wood, and the flash of one of their guns was seen; but before the men were seen, they had left their guns in the wood, and were creeping away upon their knees: on ca. res., the judges considered the conviction right, being of opinion that the prisoners were found armed within the meaning of the statute. *R. v. Nash and another*, C. C. R. 386.

Persons shooting at game are within the stat., though they have laid down their guns before they are seen.

In a prosecution under 9 G. 4. c. 69., the indictment stated that *A. B. C.*, &c. did by night unlawfully enter divers closes, situate, &c. in the occupation, &c. and were then and there in the said closes, &c. armed with guns, &c. for the purpose of destroying game: held, that this allegation was not sufficient; for that the two members of the sentence were distinct, and that the first, stating the entry by night, did not allege that the defendants were armed, or the intent with which they entered; and the second stated them to be armed, and that they were in the closes for the purpose of destroying game, but not that they were there by night: that as neither of the branches, therefore, contained all that the statute required to make the offence complete, the indictment was insufficient. *Davies v. R.*, 10 B. & C. 89.

9 G. 4. c. 69. The complete offence must be stated together.

Ld. Tenterden, in delivering his judgment, expressed himself as follows:—"The phrase used is, that the defendants 'did by night

unlawfully enter divers closes, and were then and there in the said closes,' &c.; not that they 'by night did unlawfully enter, and,' &c. If the words 'by night' had occurred at the beginning of the sentence, they might have governed the whole, or if they had been at the end of the sentence, they might have referred to the whole; but here they are in the middle of the sentence, and are applied to a particular branch of it, and cannot be extended to that which follows. The two members of the sentence are distinct: the first states the entry into the closes by night, but does not state that the defendants were armed, or the intent with which they entered; the second branch states that they were in the closes armed for the purpose of destroying game, but not that they were there by night. Neither of those branches of the sentence contains all that is requisite to constitute an offence within the statute, and the two being distinct, the indictment is bad, and the judgment must be reversed." *Ib.*

Deer. The following enactments respecting the hunting and taking of deer may fitly be inserted in this place, though deer, perhaps, cannot be said to fall strictly within the modern appellation of game.

Hares and rabbits. An enactment by the same statute is also subjoined, respecting the taking of hares and rabbits in warrens or breeding grounds.

7 & 8 G. 4. c. 29.
Stealing, &c.
deer in any en-
closed ground,
felony.

By 7 & 8 G. 4. c. 29. § 26., "If any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land wherein deer shall be usually kept, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and if any person shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, he shall for every offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding 50*l.*, as to the justice shall seem meet; and if any person who shall have been previously convicted of any offence relating to deer for which a pecuniary penalty is by this act imposed, shall offend a second time, by committing any of the offences herein-before last enumerated, such second offence, whether it be of the same description as the first offence or not, shall be deemed felony, and such offender, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

The like in cer-
tain unenclosed
ground punish-
able summarily.

Deer steal-
ing in unin-
closed ground
after any other
offence as to
deer, felony.

Suspected per-
sons, found in
possession of
venison, &c.
and not satis-
factorily ac-
counting for it.
(a)

§ 27. "If any deer, or the head, skin, or other part thereof, or any snare or engine for the taking of deer, shall by virtue of a search-warrant, to be granted as herein-after mentioned, be found in the possession of any person or on the premises of any person with his knowledge, and such person, being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by such deer, or the head, skin, or other part thereof, or had a lawful occasion for such snare or engine, and did not keep the same for any unlawful purpose, he shall, on conviction by the justice, forfeit

(a) See § 63. as to the apprehension of offenders without a warrant, and as to justice granting such warrant. And §§ 66, 67. as to application of forfeitures and penalties on summary convictions, and power of justice to imprison in case of non-payment. See tit. *Larceny*.

and pay any sum not exceeding 20*l.*; and if any such person shall not under the provisions aforesaid be liable to conviction, then, for the discovery of the party who actually killed or stole such deer, it shall be lawful for the justice, at his discretion, as the evidence given and the circumstances of the case shall require, to summon before him every person through whose hands such deer, or the head, skin, or other part thereof, shall appear to have passed; and if the person from whom the same shall have been first received, or who shall have had possession thereof, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, be liable to the payment of such sum of money as is herein-before last mentioned."

§ 28. "If any person shall unlawfully and wilfully set or use any snare or engine whatsoever, for the purpose of taking or killing deer, in any part of any forest, chase, or purlieu, whether such part be inclosed or not, or in any fence or bank dividing the same from any land adjoining, or in any inclosed land where deer shall be usually kept, or shall unlawfully and wilfully destroy any part of the fence of any land where any deer shall be then kept, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money, not exceeding 20*l.*, as to the justice shall seem meet."

§ 29. "If any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into any inclosed land where deer shall be usually kept, with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, it shall be lawful for every person entrusted with the care of such deer, and for any of his assistants, whether in his presence or not, to demand from every such offender any gun, fire-arms, snare, or engine in his possession, and any dog there brought for hunting, coursing, or killing deer, and in case such offender shall not immediately deliver up the same, to seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer; and if any such offender shall unlawfully beat or wound any person entrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this act, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny."

§ 30. "If any person shall unlawfully and wilfully in the night-time take or kill any hare or coney in any warren or ground lawfully used for the breeding or keeping of hares or conies, whether the same be inclosed or not, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly; and if any person shall unlawfully and wilfully in the day-time take or kill any hare or coney in any such warren or ground, or shall at any time set or use therein any snare or engine for the taking of hares or conies, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money, not exceeding 5*l.*, as to the justice shall seem meet: Provided always, that nothing herein-contained shall affect any person taking or killing in the day-time any conies on any sea bank or river bank in the county of *Lincoln*, so far as the tide shall extend, or within one furlong of such bank."

7 & 8 G. 4. c. 29.

In case they cannot be convicted, how the justice may proceed.

Setting engines for taking deer, or pulling down park fences.

Deer keepers, &c. may seize the guns, &c. of offenders who, on demand, do not deliver up the same.

Resistance to keepers, &c. in the execution of their duty.

Punishment.

Killing, &c. hares or conies in a warren in the night-time.

The like in the day-time.

Proviso.

Held an offence within 5 G. 3. c. 14. to take rabbit in a wire, though not killed, and not taken away.

Prisoner was indicted under 5 G. 3. c. 14. (a) (now repealed), for entering a warren by night, and taking one coney. It appeared that the prisoner, having set his wires, came between five and six o'clock on December 18., and finding a live rabbit caught in one of them, was just going to take it up, when the warrener surprised and apprehended him. Afterwards, being found guilty, the judges held, on ca. res., that taking, in the statute, meant catching, and not taking away, as in larceny, and that the conviction was right. *R. v. Glover, C. C. R.* 269.

The same statute contains the following enactment as to pigeons:—

Killing pigeons.

§ 33. "And be it enacted, that if any person shall unlawfully and wilfully kill, wound, or take any house-dove or pigeon, under such circumstances as shall not amount to larceny at common law, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the bird, any sum not exceeding 2*l*."

1 & 2 W. 4. c. 32.

The stat. 1 & 2 W. 4. c. 32. has fundamentally changed the law of *England* in relation to game, the particulars of which are fully set out in another part of this work. The penal enactments alone are here subjoined.

What shall be deemed game.

By 1 & 2 W. 4. c. 32. § 2., "the word 'game' shall, for all the purposes of this act, be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards; and the words 'lord of a manor, lordship, or royalty, or reputed manor, lordship, or royalty,' shall throughout this act be deemed to include a lady of the same respectively."

Days and seasons during which game shall not be killed.

§ 3. "If any person whatsoever shall kill or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of killing or taking any game, on a *Sunday* or *Christmas-day*, such person shall, on conviction thereof before two justices of the peace, forfeit and pay for every such offence such sum of money, not exceeding 5*l*., as to the said justices shall seem meet, together with the costs of the conviction; and if any person whatsoever shall kill or take any partridge between the first day of *February* and the first day of *September* in any year, or any pheasant between the first day of *February* and the first day of *October* in any year, or any black game (except in the county of *Somerset* or *Devon*, or in the *New Forest* in the county of *Southampton*) between the tenth day of *December* in any year and the twentieth day of *August* in the succeeding year, or in the county of *Somerset* or *Devon*, or in the *New Forest* aforesaid, between the tenth day of *December* in any year and the first day of *September* in the succeeding year, or any grouse, commonly called red game, between the tenth day of *December* in any year and the twelfth day of *August* in the succeeding year, or any bustard between the first day of *March* and the first day of *September* in any year, every such person shall, on conviction of any such offence before two justices of the peace, forfeit and pay for every head of game so killed or taken such sum of money, not exceeding 1*l*., as to the said justices shall seem meet, together with the costs of the conviction; and if any person, with intent to destroy or injure any game, shall at any

Penalty for laying poison to kill game.

(a) Which made it an offence subject to transportation, if any person should, by night, enter any warren, &c. and wrongfully take or kill any coney, &c.

time put or cause to be put any poison or poisonous ingredient on any ground, whether open or inclosed, where game usually resort, or in any highway, every such person shall, on conviction thereof before two justices of the peace, forfeit and pay such sum of money, not exceeding 10*l.*, as to the said justices shall seem meet, together with the costs of the conviction." 1 & 2 W. 4. c. 32.

§ 4. "If any person licensed to deal in game by virtue of this act as herein-after mentioned shall buy or sell, or knowingly have in his house, shop, stall, possession, or control, any bird of game after the expiration of ten days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid; or if any person, not being licensed to deal in game by virtue of this act as herein-after mentioned, shall buy or sell any bird of game after the expiration of ten days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid, or shall knowingly have in his house, possession, or control any bird of game (except birds of game kept in a mew or breeding place) after the expiration of forty days (one inclusive and the other exclusive) from the respective days in each year on which it shall become unlawful to kill or take such birds of game respectively as aforesaid; every such person shall, on conviction of any such offence before two justices of the peace, forfeit and pay for every head of game so bought or sold, or found in his house, shop, possession, or control, such sum of money, not exceeding 1*l.*, as to the convicting justices shall seem meet, together with the costs of the conviction."

Possession of game illegal after ten days in dealers, and forty days in other persons, from the expiration of the season.

§ 5. "Nothing in this act contained shall in anywise affect or alter (except as herein-after mentioned) any act or acts now in force by which any persons using any dog, gun, net, or other engine for the purpose of taking or killing any game whatever, or any woodcock, snipe, quail, or landrail, or any conies, are required to obtain and have annual game certificates; but that all persons who before the commencement of this act were required to obtain and have such certificates shall after the commencement of this act be required from time to time to obtain and have the like certificates; and all the powers, provisions, and penalties contained in such act or acts shall continue in as full force and effect as if this act had not been made; and all regulations and provisions contained in any act or acts relative to game certificates, so far as they relate to gamekeepers of manors, and to the amount of duty for game certificates to be charged upon or in respect of gamekeepers of manors in the cases specified in such act or acts, shall extend and apply to all gamekeepers of lands appointed under this act as fully and effectually as if they were gamekeepers of manors, and were expressly mentioned in and charged by such act or acts."

This act not to affect the existing laws respecting game certificates.

§ 12. "Where the right of killing the game upon any land is by this act given to any lessor or landlord, in exclusion of the right of the occupier of such land, or where such exclusive right hath been or shall be specially reserved by or granted to, or doth or shall belong to, the lessor, landlord, or any person whatsoever other than the occupier of such land, then and in every such case, if the occupier of such land shall pursue, kill, or take any game

Where the landlord, &c. has the right to the game, in exclusion of the occupier, the occupier shall be liable to a penalty for killing it.

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upon such land, or shall give permission to any other person so to do, without the authority of the lessor, landlord, or other person having the right of killing the game upon such land, such occupier shall, on conviction thereof before two justices of the peace, forfeit and pay for such pursuit such sum of money not exceeding 2*l.*, and for every head of game so killed or taken such sum of money not exceeding 1*l.*, as to the convicting justices shall seem meet, together with the costs of the conviction."

Penalty for killing game without a certificate.

§ 23. "If any person shall kill or take any game, or use any dog, gun, net, or other engine or instrument for the purpose of searching for, or killing or taking game, such person not being authorised so to do for want of a game certificate, he shall, on conviction thereof before two justices of the peace, forfeit and pay for every such offence such sum of money, not exceeding 5*l.*, as to the said justices shall seem meet, together with the costs of the conviction: Provided always, that no person so convicted shall by reason thereof be exempted from any penalty or liability under any statute or statutes relating to game certificates, but that the penalty imposed by this act shall be deemed to be a cumulative penalty."

This penalty to be cumulative.

Penalty for destroying or taking the eggs of game, &c.

§ 24. "If any person not having the right of killing the game upon any land, nor having permission from the person having such right, shall wilfully take out of the nest or destroy in the nest upon such land the eggs of any bird of game, or of any swan, wild duck, teal, or widgeon, or shall knowingly have in his house, shop, possession, or control any such eggs so taken, every such person shall, on conviction thereof before two justices of the peace, forfeit and pay for every egg so taken or destroyed, or so found in his house, shop, possession, or control, such sum of money, not exceeding 5*s.*, as to the said justices shall seem meet, together with the costs of the conviction."

Penalty for selling game without licence, and on certificated persons selling to unlicensed persons.

§ 25. "If any person not having obtained a game certificate (except such person be licensed to deal in game according to this act) shall sell or offer for sale any game to any person whatsoever; or if any person authorised to sell game under this act by virtue of a game certificate shall sell or offer for sale any game to any person whatsoever, except a person licensed to deal in game according to this act; every such offender shall, on conviction of any such offence before two justices of the peace, forfeit and pay for every head of game so sold or offered for sale such sum of money, not exceeding 2*l.*, as to the said justices shall seem meet, together with the costs of the conviction."

Exceptions as to innkeepers.

§ 26. "Provided, that it shall be lawful for any innkeeper or tavernkeeper, without any such licence for dealing in game as aforesaid, to sell game for consumption in his own house, such game having been procured from some person licensed to deal in game by virtue of this act, and not otherwise."

Penalty on persons buying game, except from licensed dealers.

§ 27. "If any person, not being licensed to deal in game according to this act, shall buy any game from any person whatsoever, except from a person licensed to deal in game according to this act, or *bond fide* from a person affixing to the outside of the front of his house, shop, or stall a board purporting to be the board of a person licensed to deal in game, every such offender shall, on conviction thereof before two justices of the peace, forfeit and pay for every head of game so bought such sum of money, not ex-

ceeding 5*l.*, as to the said justices shall seem meet, together with the costs of the conviction."

§ 28. "If any person being licensed to deal in game according to this act shall buy or obtain any game from any person not authorised to sell game for want of a game certificate, or for want of a licence to deal in game; or if any person, being licensed to deal in game according to this act, shall sell or offer for sale any game at his house, shop, or stall, without such board as aforesaid being affixed to some part of the outside of the front of such house, shop, or stall, at the time of such selling or offering for sale, or shall affix or cause to be affixed such board to more than one house, shop, or stall, or shall sell any game at any place other than his house, shop, or stall, where such board shall have been affixed; or if any person not being licensed to deal in game according to this act shall assume or pretend, by affixing such board as aforesaid, or by exhibiting any certificate, or by any other device or pretence, to be a person licensed to deal in game; every such offender, being convicted thereof before two justices of the peace, shall forfeit and pay such sum of money, not exceeding 10*l.*, as to the said justices shall seem meet, together with the costs of the conviction."

§ 29. "Provided, that the buying and selling of game by any person or persons employed on the behalf of any licensed dealer in game, and acting in the usual course of his employment, and upon the premises where such dealing is carried on, shall be deemed to be a lawful buying and selling in every case where the same would have been lawful if transacted by such licensed dealer himself: Provided also, that nothing herein contained shall prevent any licensed dealer in game from selling any game which shall have been sent to him to be sold on account of any other licensed dealer in game."

§ 30. Reciting, that "whereas after the commencement of this act game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide some more summary means than now by law exist for protecting the same from trespassers; if any person whatsoever shall commit any trespass by entering or being, in the day-time, upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 2*l.*, as to the justice shall seem meet, together with the costs of the conviction; and if any persons to the number of five or more together shall commit any trespass, by entering or being, in the day-time, upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, each of such persons shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 5*l.*, as to the said justice shall seem meet, together with the costs of the conviction: Provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass; save and except that the leave and licence of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor, or other person shall have the right of killing the game upon such land by virtue of any reserv-

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Penalty on licensed dealers buying game from uncertificated persons, or otherwise offending.

As to buying and selling game by the servants of a licensed dealer.

Penalty on persons trespassing in the day-time upon lands in search of game.

Where the occupier of the land, not being entitled to the

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game, allows any person to kill it, the party entitled to the game may enforce the penalty.

Trespassers in search of game may be required to quit the land, and to tell their names and abodes, and in case of refusal may be arrested.

Penalty.

Party arrested must be discharged, unless brought before a justice within 12 hours.

Penalty on persons found armed using violence, &c.

ation or otherwise, as herein-before mentioned ; but such landlord, lessor, or other person shall, for the purpose of prosecuting for each of the two offences herein last before mentioned, be deemed to be the legal occupier of such land, whenever the actual occupier thereof shall have given such leave or licence ; and that the lord or steward of the crown of any manor, lordship, or royalty, or reputed manor, lordship, or royalty, shall be deemed to be the legal occupier of the land of the wastes or commons within such manor, lordship, or royalty, or reputed manor, lordship, or royalty."

§ 31. " Where any person shall be found on any land, or upon any of his majesty's forests, parks, chases, or warrens, in the day-time, in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, it shall be lawful for any person having the right of killing the game upon such land, by virtue of any reservation or otherwise as herein-before mentioned, or for the occupier of the land (whether there shall or shall not be any such right by reservation or otherwise), or for any gamekeeper or servant of either of them, or for any person authorised by either of them, or for the warden, ranger, verderer, forester, master-keeper, under-keeper, or other officer of such forest, park, chase, or warren, to require the person so found forthwith to quit the land whereon he shall be so found, and also to tell his christian name, surname, and place of abode ; and in case such person shall, after being so required, offend by refusing to tell his real name or place of abode, or by giving such a general description of his place of abode as shall be illusory for the purpose of discovery, or by wilfully continuing or returning upon the land, it shall be lawful for the party so requiring as aforesaid, and also for any person acting by his order and in his aid, to apprehend such offender, and to convey him or cause him to be conveyed as soon as conveniently may be before a justice of the peace ; and such offender (whether so apprehended or not), upon being convicted of any such offence before a justice of the peace, shall forfeit and pay such sum of money, not exceeding 5*l.*, as to the convicting justice shall seem meet, together with the costs of the conviction : Provided always, that no person so apprehended shall, on any pretence whatsoever, be detained for a longer period than twelve hours from the time of his apprehension until he shall be brought before some justice of the peace ; and that if he cannot, on account of the absence or distance of the residence of any such justice of the peace, or owing to any other reasonable cause, be brought before a justice of the peace within such twelve hours as aforesaid, then the person so apprehended shall be discharged, but may nevertheless be proceeded against for his offence by summons or warrant, according to the provisions herein-after mentioned, as if no such apprehension had taken place."

§ 32. " Where any persons, to the number of five or more together, shall be found on any land, or in any of his majesty's forests, parks, chases, or warrens, in the day-time, in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, any of such persons being then and there armed with a gun, and such persons or any of them shall then and there, by violence, intimidation, or menace, prevent or endeavour to prevent any person authorised as herein-before mentioned from approaching

such persons so found, or any of them, for the purpose of requiring them or any of them to quit the land whereon they shall be so found, or to tell their or his christian name, surname, or place of abode respectively, as herein-before mentioned, every person so offending by such violence, intimidation, or menace as aforesaid, and every person then and there aiding or abetting such offender, shall, upon being convicted thereof before two justices of the peace, forfeit and pay for every such offence such penalty, not exceeding 5*l.*, as to the convicting justices shall seem meet, together with the costs of the conviction; which said penalty shall be in addition to and independent of any other penalty to which any such person may be liable for any other offence against this act."

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§ 33. "If any person whatsoever shall commit any trespass, by entering or being, in the day-time, upon any of his majesty's forests, parks, chases, or warrens, in search or pursuit of game, without being first duly authorised so to do, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 2*l.*, as to the justice shall seem meet, together with the costs of the conviction."

Penalty for
trespass in day-
time in his ma-
jesty's forests.

§ 34. "For the purposes of this act the day-time shall be deemed to commence at the beginning of the last hour before sunrise, and to conclude at the expiration of the first hour after sunset."

What to be
deemed day-
time.

§ 35. "Provided, that the aforesaid provisions against trespassers and persons found on any land shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of any deer, hare, or fox already started upon any other land, nor to any person *bonâ fide* claiming and exercising any right or reputed right of free warren or free chase, nor to any gamekeeper lawfully appointed within the limits of any free warren or free chase, nor to any lord or any steward of the crown of any manor, lordship, or royalty, or reputed manor, lordship, or royalty, nor to any gamekeeper lawfully appointed by such lord or steward within the limits of such manor, lordship, or royalty, or reputed manor, lordship, or royalty."

The provisions
as to trespassers
not to apply to
persons hunt-
ing, &c.

§ 36. "When any person shall be found by day or by night upon any land, or in any of his majesty's forests, parks, chases, or warrens, in search or pursuit of game, and shall then and there have in his possession any game which shall appear to have been recently killed, it shall be lawful for any person having the right of killing the game upon such land, by virtue of any reservation or otherwise, as herein-before mentioned, or for the occupier of such land (whether there shall or shall not be any such right by reservation or otherwise), or for any gamekeeper or servant of either of them, or for any officer as aforesaid of such forest, park, chase, or warren, or for any person acting by the order and in aid of any of the said several persons, to demand from the person so found such game in his possession, and in case such person shall not immediately deliver up such game to seize and take the same from him, for the use of the person entitled to the game upon such land, forest, park, chase, or warren."

Game may be
taken from
trespassers
not delivering
up the same
when de-
manded.

§ 37. "Every penalty and forfeiture for any offence against this act (the application of which has not been already provided for) shall be paid to some one of the overseers of the poor, or to some

Application of
penalties for
offences against
this act.

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other officer (as the convicting justice or justices may direct) of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division in which such parish, township, or place shall be situate, whether the same shall or shall not contribute to such general rate; and no inhabitant of such county, riding, or division shall be deemed an incompetent witness in any proceeding under this act by reason of the application of such penalty or forfeiture to the use of the said general rate as aforesaid."

Time for payment of penalties, and scale of imprisonment for non-payment.

§ 38. "The justice or justices of the peace by whom any person shall be summarily convicted and adjudged to pay any sum of money for any offence against this act, together with costs, may adjudge that such person shall pay the same either immediately or within such period as the said justice or justices shall think fit, and in default of payment at the time appointed such person shall be imprisoned in the common gaol or house of correction (with or without hard labour), as to the justice or justices shall seem meet, for any term not exceeding two calendar months where the amount to be paid, exclusive of costs, shall not amount to 5*l.*, and for any term not exceeding three calendar months in any other case, the imprisonment to cease in each of the cases aforesaid upon payment of the amount and costs."

Form of conviction.

§ 39. "The justice or justices of the peace (as the case may require) before whom any person shall be summarily convicted of any offence against this act, may cause the conviction to be drawn up according to the following form of words, or in any other form of words to the same or the like effect; (that is to say,)

——— } *BE it remembered, that on the ——— day of ———, to wit. } in the year of our Lord ———, at ——— in the county of ——— [or, riding, division, franchise, liberty, city, &c. as the case may be], A. O. is convicted before me J. P. one [or, as J. P. and J. J. P. two, as the case may require] of his majesty's justices of the peace for the said county [or, riding, &c.], for that he the said A. O. did, on ——— at ——— kill [or, take] game [or, did use a dog, &c. for the purpose of killing game], he the said A. O. not being authorised so to do for want of a game certificate, contrary to the statute in such case made and provided; [or, did, here specify any other offence, and the time and place when and where the same was committed, as the case may be:] and I [or, we] do adjudge that the said A. O. shall for the said offence forfeit the sum of ——— [or, we do adjudge that the said A. O. shall for the said offence forfeit the sum of ———, being after the rate of ——— for every head of game so, &c. or for every egg so, &c.], and shall forthwith pay the said sum, together with the sum of ——— for costs; and that in default of immediate payment of the said sums, he the said A. O. shall be imprisoned [or, imprisoned and kept to hard labour] in the ——— of ——— for the space of ——— unless the said sums shall be sooner paid; [or, and I [or, we] order that the said sums shall be paid by the said A. O. on or before the ——— day of ———, and in default of payment on or before that day I [or, we] adjudge the said A. O. to be imprisoned [or, imprisoned and kept to hard labour] in the ——— of ——— for the space of ——— unless the said sums shall be sooner paid;] and I [or, we]*

direct that the said sum of ——— (i. e. the penalty) shall be paid to ———, being one of the overseers of the poor of, &c. to be by him applied according to the directions of the statute in such case made and provided; and I [or, we] order that the said sum of ——— for costs shall be paid to ——— (the complainant.) Given under my hand [or, our hands] the day and year first above mentioned.

J. P.

[or, J. P. and J. J. P.]"

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§ 40. "It shall be lawful for any justice of the peace to issue his summons requiring any person to appear before himself, or any one or two justices of the peace, as the case may require, for the purpose of giving evidence touching any offence against this act; and if any person so summoned shall neglect or refuse to appear at the time and place appointed by such summons, and no reasonable excuse for his absence shall be proved before the justice or justices then and there present, or if any person appearing in obedience to such summons shall refuse to be examined on oath touching any such offence by the justice or justices then and there present, every person so offending shall, on conviction thereof before the said justice or justices, or any other justice or justices of the peace, forfeit and pay such sum of money, not exceeding five pounds, as to the convicting justice or justices shall seem meet."

Power to summon witnesses.

Penalty for disobedience of summons, &c.

§ 41. "The prosecution for every offence punishable upon summary conviction by virtue of this act shall be commenced within three calendar months after the commission of the offence; and where any person shall be charged on the oath of a credible witness with any such offence before a justice of the peace, the justice may summon the party charged to appear before himself, or any one or two justices of the peace, as the case may require, at a time and place to be named in such summons; and if such party shall not appear accordingly, then (upon proof of the due service of the summons, by delivering a copy thereof to the party, or by delivering such copy at the party's usual place of abode to some inmate thereat, and explaining the purport thereof to such inmate), the justice or justices may either proceed to hear and determine the case in the absence of the party, or may issue his or their warrant for apprehending and bringing such party before him or them, as the case may be; or the justice before whom the charge shall be made may, if he shall have reason to suspect from information upon oath that the party is likely to abscond, issue such warrant in the first instance, without any previous summons."

Time for proceedings, and mode of enforcing the appearance of offenders.

§ 42. declares and enacts "that it shall not be necessary, in any proceeding against any person under this act, to negative by evidence any certificate, licence, consent, authority, or other matter of exception or defence; but that the party seeking to avail himself of any such certificate, licence, consent, authority, or other matter of exception or defence, shall be bound to prove the same."

Prosecutor not required to prove a negative.

§ 43. "The justice or justices of the peace before whom any person shall be convicted of any offence punishable upon summary conviction under this act shall transmit every such conviction to the next court of general or quarter sessions of the peace for the county, riding, division, liberty, franchise, city, or town wherein

Convictions to be returned to sessions.

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Appeal.

the offence shall have been committed, there to be kept by the proper officer among the records of the court."

§ 44. "Any person who shall think himself aggrieved by any summary conviction in pursuance of this act may appeal to the justices at the next general or quarter sessions of the peace, to be holden, not less than twelve days after such conviction, for the county, riding, division, liberty, franchise, city, or town wherein the cause of complaint shall have arisen, provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or within such three days enter into a recognizance, with a sufficient surety, before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into shall liberate such person, if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the offender to be dealt with and punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment."

No certiorari,
&c.

§ 45. "No summary conviction in pursuance of this act, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by certiorari or otherwise into any of his majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that it is founded on a conviction, and there be a good and valid conviction to sustain the same."

This act not to
preclude actions
for trespass, but
no double pro-
ceedings for the
same trespass.

§ 46. "Provided, that nothing in this act contained shall prevent any person from proceeding by way of civil action to recover damages in respect of any trespass upon his land, whether committed in pursuit of game or otherwise, save and except that where any proceedings shall have been instituted under the provisions of this act against any person for or in respect of any trespass, no action at law shall be maintainable for the same trespass by any person at whose instance or with whose concurrence or assent such proceedings shall have been instituted; but such proceedings shall in such case be a bar to any such action, and may be given in evidence under the general issue."

Venue, &c. in
proceedings
against persons
acting under
this act.

§ 47. "For the protection of persons acting in the execution of this act, all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be

had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought by or on behalf of the defendant."

Tender of
amends.

§ 48. "Nothing in this act contained shall extend to *Scotland or Ireland*."

Act not to ex-
tend to Scotland
or Ireland.

For Form of Conviction by two justices under 9 G. 4. c. 69. § 1., see § 5. *ante*, p. 294.

Indictment for a Misdemeanor under 9 G. 4. c. 69. § 1. for a third Offence after two prior Convictions.

THE jurors for our lord the king upon their oath present, that C.D., late of, &c. on, &c. at, &c. was duly convicted before L.M. and J.N., esquires, two of his majesty's justices of the peace for the county of——, for that he the said C.D., on, &c. [here set out the first conviction at length in the past tense.] And the jurors aforesaid, on their oath aforesaid, do further present that the said C.D., being so convicted as aforesaid, afterwards, on, &c. at, &c. was again duly convicted before J.P. and R.S., esquires, two of his majesty's justices of the peace for the county of——, for that he the said C.D., on, &c. [here set out the second conviction in like manner]. And the jurors aforesaid, on their oath aforesaid, do further present, that the said C.D., late of, &c. having been so twice convicted as aforesaid, and the said convictions being and remaining in full force, after the said convictions, and within twelve calendar months now last past, to wit, on, &c. at and about the hour of—— in the night of the same day, at, &c. aforesaid, did by night, as last aforesaid, unlawfully take and destroy certain game, to wit, [two pheasants,] [or, certain rabbits, to wit, six rabbits,] in certain inclosed [or, open] land, there situate, the property of one A.B. [describe the offence according to the fact, if it be the entering only the land to destroy game,] against the form of the statute in that case made and provided, and against the peace of our said lord the king, his crown and dignity.

Indictment for a Misdemeanor on 9 G. 4. c. 69. § 2. against an Offender under § 1. for assaulting a Gamekeeper, &c.

THE jurors for our lord the king upon their oath present, that C.D., late of, &c. before the commission of the offence herein-after mentioned, on, &c. at and about the hour of—— in the night of the same day, at the parish aforesaid, in the county aforesaid, did by night as aforesaid unlawfully enter certain land of one A.B., [owner or occupier, &c.] there situate, and was then and there during the said night unlawfully in the said land, with a certain gun, [net, engine, or instrument, to wit, an instrument called a ——] for the purpose then and there of taking and destroying game, contrary to the form of the statute in such case made and provided; and he the said C.D. then and there upon the said land, in the night-time as aforesaid, with the gun, [net, engine, or instrument,] aforesaid, for the purpose aforesaid, was found by one E.F., [or by one G.H. who was then and there assisting one E.F.,] which said E.F. was then and there the gamekeeper [or, servant] of

the said A. B., and had then and there lawful authority to seize and apprehend the said C. D., and was about to do so, and (a) that the said E. F., being then and there about to seize and apprehend the said C. D. for the said offence, he the said C. D., with a gun, [cross-bow, fire-arms, bludgeon, stick, club, or offensive weapon, to wit, an offensive weapon called a ———] which the said C. D. in both his hands then and there had and held, did then and there unlawfully assault and offer violence towards the said E. F., he the said E. F. then and there being lawfully authorised to seize and apprehend the said C. D. as aforesaid, against the form of the statute in that case made and provided, and against the peace of our said lord the king, his crown and dignity.

If the assault were committed off the land, in case of pursuit, proceed to (a) in the above, and then add—“*the said C. D. from the said land escaped into a certain close there situate, and the said E. F. then and there pursued the said C. D. into the said close, for the purpose of so seizing and apprehending him the said C. D. as aforesaid, he the said E. F., as such gamekeeper as aforesaid, having then and there lawful right so to do as aforesaid, and, &c.*”—concluding as in the above form after (a).

Indictment for a Misdemeanor on 9 G. 4. c. 69. § 9. against three or more for entering Land by Night, armed, for the purpose of taking or destroying Game, &c.

THE *jurors for our lord the king upon their oath present, that A. O., late of, &c. [labourer], C. D., late of the same place [labourer], and E. F., late of the same place [labourer], (together with divers other evil-disposed persons, to the number of three and more, to the jurors aforesaid unknown,) [if they be all known omit the latter words,] on, &c. at and about the hour of ——— in the night of the same day, with force and arms, at the parish aforesaid, in the county aforesaid, being then and there respectively armed with guns, [cross-bows, fire-arms, bludgeons, or certain offensive weapons, to wit, [three] offensive weapons, respectively called ———] then and there together, by night as aforesaid, and armed as aforesaid, did unlawfully enter certain inclosed [or, open] land of one A. B., there situate, and were then and there together so armed unlawfully in the said land, for the purpose then and there of taking and destroying game, against the form of the statute in that case made and provided, and against the peace of our said lord the king, his crown and dignity.*

For the Form of Conviction by a justice under 7 & 8 G. 4. c. 29. see § 71. of the said stat. see tit. Larceny.

Indictment for Felony under 7 & 8 G. 4. c. 29. § 29. against Person entering Forest, &c. with intent to hunt, &c. Deer, and beating or wounding a Keeper, &c.

THE *jurors for our lord the king upon their oath present, that C. D., late of, &c. on, &c. at, &c. with force and arms, into certain inclosed land then belonging to E. F., where deer had been and then were usually kept [or, into a certain forest, chase, or park called ———], there situate, did unlawfully enter, with intent then and there unlawfully and feloniously to hunt, kill, snare, and carry*

away deer, and that one A. B., then and there being a person intrusted with the care of the deer in the said inclosed land [or, forest, &c.], then and there being, then and there [or, then and there being an assistant of E. F., then and there being a person intrusted, &c.], after the said C. D. had so entered into the said inclosed land as aforesaid [forest, &c.], and whilst the said C. D. there remained, did demand of the said C. D. an engine, to wit, [a gun,] then and there in the possession of the said C. D., and that upon the said C. D. then and there failing to deliver up the said engine, and altogether refusing to do so, he the said A. B. did then and there attempt to seize and take the same from the said C. D., for the use of the owner of the said deer, as was the duty of the said A. B. so to do, and as he lawfully might for the cause aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. D. then and there, with force and arms, in and upon the said A. B., the said A. B. then being a person having been intrusted with the care of the deer within the said inclosed land as aforesaid [or, then and there being such assistant as aforesaid], and then and there being in the due execution of his said duty as aforesaid, and of the powers given to him in that behalf by the statute in that case made and provided, unlawfully and feloniously did make an assault, and him the said A. B., so being in the execution of the said duty and of the powers aforesaid, then and there unlawfully and feloniously did beat and wound; against the form of the statute in such case made and provided, and against the peace of our lord the king, his crown and dignity.

Indictment for Misdemeanor under 7 & 8 G. 4. c. 29. § 30. for taking or killing, by Night, Hares or Rabbits in a Breeding Ground.

THE jurors for our lord the king upon their oath present, that C. D. late of, &c. on, &c. in the night-time, that is to say, about the hour of [eleven] o'clock in the night of the same day, at, &c. in a certain warren and ground of A. B. there situate, then lawfully used for the breeding and keeping of conies [or, hares], two conies [or, hares] then and there being found then and there in the said warren and ground, unlawfully and wilfully did take and kill; against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown and dignity.

Gaming.

I. Of Gaming in general, and the statutable Provisions respecting it.

[33 H. 8. c. 9.—31 El. c. 5.—9 Ann. c. 14.—2 G. 2. c. 28.—18 G. 2. c. 34.—25 G. 2. c. 36.—58 G. 3. c. 70.—3 G. 4. c. 114.]

II. Of Wagers and Losses at Play.

[16 C. 2. c. 7.—9 Ann. c. 14.—18 G. 2. c. 34.]

III. *Of Lotteries.*

[10 & 11 W. 3. c. 17. — 9 Ann. c. 6. — 10 Ann. c. 26. — 8 G. 1. c. 2. — 9 G. 1. c. 19. — 6 G. 2. c. 35. — 12 G. 2. c. 28. — 13 G. 2. c. 19. — 18 G. 2. c. 34. — 27 G. 3. c. 1. — 34 G. 3. c. 40. — 42 G. 3. c. 119.]

Gaming not an offence at common law.

MR. Dalton says that playing at cards and dice, and the like, are not prohibited by the common law; neither are they *mala in se* of their own nature, but only prohibited by statute. *Dalt.* c. 46.

Gaming-houses nuisances.

But it is clearly agreed, that all common gaming-houses are nuisances in the eye of the law, being detrimental to the public, as they promote cheating and other corrupt practices; and incite to idleness, and avaricious ways of gaining property, great numbers whose time might otherwise be employed for the good of the community. 1 *Haw.* c. 25. § 6. 1 *Russ.* 299.

The keeping of a common gaming-house, and for lucre and gain unlawfully causing and procuring divers idle and evil disposed persons to frequent and come to play together at a game called "Rouge et noir," and permitting the said idle and evil-disposed persons to remain playing at the said game for divers large and excessive sums of money, is an indictable offence at common law. *Semle*, that an indictment would be good merely charging the defendant with keeping a common gaming-house. *Per Holroyd J.*

R. v. Rogier and Humphrey, H. 3 & 4 G. 4. 1 B. & C. 272. This was an indictment against the defendants, and charged, that they unlawfully did keep and maintain a certain common gaming-house; and in the said common gaming-house, for lucre and gain, unlawfully and wilfully did cause and procure divers idle and evil-disposed persons to frequent and come to play together, at a certain unlawful game at cards, called "*Rouge et Noir*;" and in the said common gaming-house unlawfully and wilfully did permit and suffer the said idle and evil-disposed persons to be and remain playing and gaming at the said unlawful game, called "*Rouge et Noir*," for divers large and excessive sums of money, to the great damage and common nuisance of all the liege subjects of our lord the king. Plea, not guilty. A verdict having been found against the defendants, *Curwood* and *Platt* now moved to arrest the judgment. The keeping of a common gaming-house is not an offence at common law: it is not necessarily a nuisance; but may, like a playhouse, become so, if it draw together such numbers of people as to become inconvenient to the places adjacent. In 1 *Hawk.* c. 75. § 6., 7th edit., there is this passage: "Also it has been said, that all common stages for rope-dancers, and also all common gaming-houses, are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood." This indictment does not shew that any inconvenience had accrued to the neighbourhood, by numbers of disorderly persons collected together; and, therefore, it does not come within the reason, in respect of which *Hawkins* states, that it had been said that a gaming-house was a nuisance. At common law gaming is not any offence. In *Bell v. The Bishop of Norwich* (*Dyer*, 254. b.) it was held, that it was not sufficient cause for a bishop to refuse to admit a presentee to a living, that he was a haunter of taverns and unlawful games. Besides, the legislature have, by different statutes, 33 H. 8. c. 9. §§ 11. and 12., 12 G. 2. c. 28. §§ 2. and 3., 13 G. 2. c. 19. § 9., and 18 G. 2. c. 34. §§ 1. and 2., declared certain specified games to be unlawful, and *rouge et noir* is not one of them; and, in several of these statutes, royal palaces, during the residence of the sovereign, are exempted from the operation of the acts. Now, if gaming were an offence at common law, the

legislature would not have given such a sanction to the commission of that offence, by exempting persons residing in the royal palaces from the penalties imposed by statutes. Inasmuch, then, as gaming is not *per se* an offence at common law, and the game of *rouge et noir* has not been declared illegal by the legislature, this indictment is bad, and the judgment must be arrested.—*Abbot C. J.* I have no doubt that the facts stated in this indictment constitute an offence at common law. *Hawkins*, in the passage which has been cited, observes, “It has been said that common gaming-houses are nuisances in the eye of the law;” and then he assigns the reason, viz. that they tend to produce certain evil consequences, which is not very different from saying, that they are nuisances if those consequences are produced. Since his time many parties have been convicted upon indictments, in which the keeping of such a house has been charged to be an offence at common law. If any confirmation of the authority of *Hawkins* were wanting, it is to be found in the enactments of the legislature. The 25 G. 2. c. 36. § 5., after reciting that, in order to encourage prosecutions against persons keeping bawdy-houses, gaming-houses, or other disorderly houses, enacts, “That if any two inhabitants of any parish give notice in writing to a constable, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, the constable shall go with such inhabitants to a justice of the peace, and shall, upon such inhabitants making oath that they believe the contents of the notice to be true, enter into a recognizance to prosecute such offence, and the constable is to be allowed the expenses of the prosecution, and each of the inhabitants is to receive 10*l.*” And section 8. recites, “That by reason of many subtle and crafty contrivances of persons keeping bawdy-houses, gaming-houses, or other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment;” and then enacts, “That any person who shall appear, act, or behave himself as master, or as the person having the care or management of any such house, shall be deemed to be the keeper thereof, and shall be liable to be prosecuted as such, although he be not the real owner.” These provisions are a legislative declaration that the keeping of a gaming-house is an indictable offence. Besides, the 9 Ann. c. 14. § 2. makes playing at any game unlawful, if more than 10*l.* shall be lost. Now in this case the indictment states, not only that the defendants kept a common gaming-house, but that they permitted persons to play there for divers large and excessive sums of money. The playing for large and excessive sums of money would of itself make any game unlawful; and if so, there can be no doubt that this is an offence at common law.—*Bayley*, *Holroyd*, and *Best Js.* concurred, and *Holroyd J.* further added, that in his opinion it would have been sufficient merely to have alleged, that the defendants kept a common gaming-house.—R. R. (a)

R. v. Rogier
and Humphrey.

(a) In *Rex v. Dixon*, 10 Mod. 336., it was held that the keeping of a gaming-house was an offence at common law as a nuisance. In *Rex v. Mason*, *Leach's C. C.* p. 548. *Grose J.* seemed to be of opinion, that the keeping of a common gaming-house might be described generally. See also 2 Hawk. c. 25. § 59.

Persons convicted of keeping a gaming-house may be sentenced to hard labour.

By stat. 3 G. 4. c. 114. persons convicted of keeping a common gaming-house may be sentenced to imprisonment, with hard labour, for any term not exceeding that for which such court may now imprison for such offence, either in addition to, or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before the passing of this act (5th Aug. 1822), and every such offender shall thereupon suffer such sentence, in such place, and for such time as aforesaid, as such court shall think fit to direct.

33 H. 8. c. 9.
Gaming-houses
prohibited by
the 33 H. 8.

By stat. 33 H. 8. c. 9. § 11., no person shall, for his gain, lucre, or living, keep any common house, alley, or place of bowling, coyting, cloysh, cayls, half-bowl, tennis, dicing-table, carding, or any unlawful game then or thereafter to be invented, on pain of forfeiting 40s. a day.

Does not extend to private play.

But it was resolved upon this clause, in the third year of J. 1., that if the guests in an inn or tavern call for a pair of dice or tables, if the house be not kept for gaming, lucre, or gain, but they play only for recreation, and for no gain to the owner of the house, this is not within the statute, nor is such person that plays in such house, that is not kept for lucre or gain, within the penalty of that law. *Dalt. c. 46.*

Haunting gaming-houses.

And moreover, by the same stat., § 12., it is further enacted, that every person using and haunting any of the said houses and plays, and there playing, shall forfeit 6s. 8d.

Power of the justices as to the keepers of such houses, and those found there.

§ 14. And all justices of the peace in every shire, mayors, sheriffs, bailiffs, and other head officers in every city, town, and borough, may enter all such houses, places, and alleys, where such games shall be suspected to be holden, exercised, used, or occupied, and as well the keepers of the same, as also the persons there haunting, resorting, and playing, may take, arrest, and imprison, and keep in prison until the keepers and maintainers of the said plays and games have found sureties to the king's use, to be bound by recognizance or otherwise, no longer to use, keep, or occupy any such house, play, game, alley, or place; and also that the persons there so found be in like case bound by themselves, or with sureties, no more to play, haunt, or exercise from thenceforth, in, at, or to any of the said places, or at any of the said games.

And of officers in cities and towns.

§ 15. And the mayors, sheriffs, bailiffs, constables, and other head officers, within every city, borough, or town, shall make due search weekly, or at the furthest once a month, in all places where any such houses, alleys, plays or places shall be suspected to be had, kept, and maintained; and if they shall not make such search at the furthest once a month, if the case so require, every such person offending shall forfeit 40s. for each month.

Artificers and servants.

§ 16. By the same act, no manner of artificer, or craftsman of any handicraft or occupation, husbandman, apprentice, labourer, servant at husbandry, journeyman, or servant of artificer, mariners, fishermen, watermen, or any serving man, shall play at the tables, tennis, dice, cards, bowls, clash, coyting, logating, or any other unlawful game, out of *Christmas (a)*, on pain of 20s. for every time; and in *Christmas* to play at the said games in their masters' houses, or in their masters' presence; and also no person shall at any time

(a) See *R. v. Clarke*, 1 *Cowp.* 35.

play at bowl or bowls in open places out of his garden or orchard, on pain of 6s. 8d. for every time of offending. And all justices of peace, mayors, bailiffs, sheriffs, and other head officers, and every of them *finding or knowing* any person using unlawful games, contrary to this act, may commit every such offender to ward, there to remain without bail or mainprize till he be bound by obligation to the king's use, in such sum as by the discretion of the said justices, mayors, bailiffs, or other head officers, shall be thought reasonable, that they shall not from thenceforth use such unlawful games.

Punishing offenders using unlawful games.

§ 22. But any master may license his servant to play at cards, dice, or tables, with himself, or with any other gentleman repairing to his said master openly in his house, or in his presence.

Masters may license such.

§ 23. And any nobleman or other person having manors, lands, tenements, or other yearly profits for life, in his own or his wife's right, of 100*l.* a year, may command or license his servants, or family of his house, to play within the precinct of his house, garden, or orchard, at cards, dice, tables, bowls, or tennis, as well among themselves as others repairing to the same house.

Also certain persons may.

By stat. 2 G. 2. c. 28. § 9., where it shall be *proved on the oath of two witnesses* before any justice of the peace, as well as where he shall find upon his own view, that any person hath used any unlawful game contrary to the said statute of H. 8., the said justice shall have power to commit him to prison without bail, unless and until he shall enter into one or more recognizance or recognizances with sureties, or without, at the discretion of the justice, that he shall not from thenceforth play at or use such unlawful game.

2 G. 2. c. 28. Justices may commit, unless parties give security pursuant to 33 H. 8.

And by stat. 33 H. 8. c. 9. § 18., where any of the forfeitures above mentioned shall be found within the precinct of any franchise or leet, the lord shall have one half, and the other half shall be to him that shall sue in any of the king's courts; and elsewhere they shall be half to the king, and half to him that shall sue in like manner.

33 H. 8. c. 9. Application of the penalties.

But by stat. 31 El. c. 5. § 7., all suits to be pursued upon any statute (that is, any statute then force) for using any unlawful game shall be sued and prosecuted, or otherwise heard and determined, in the general quarter sessions or assizes of the county where the offence shall be committed, or in the leet within which it shall happen, and not in anywise out of the county.

31 El. c. 5. How to be recovered.

And by stat. 18 G. 2. c. 34. § 7., no privilege of parliament shall be allowed to any person, against whom a prosecution shall be commenced for keeping any public or common gaming-house, or any house, room, or place for playing at any before or now prohibited game.

18 G. 2. c. 34. No privilege of parliament.

By stat. 25 G. 2. c. 36. § 2., any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind in *London* and *Westminster*, or within 20 miles thereof, without licence from the last preceding *Michaelmas* quarter sessions, under the hands and seals of four or more justices there assembled (except the theatres of *Drury-lane*, *Covent-garden* and *Haymarket*, and other entertainments exercised by letters patent or licence of the crown, or of the lord chamberlain, § 4.), shall be deemed a disorderly house or place; and the keeper thereof shall forfeit 100*l.* with full costs to him who shall sue (in six months) in any of the courts at *Westminster*, and be otherwise

25 G. 2. c. 36. Houses of public amusement within London and 20 miles thereof to be licensed.

25 G. 2. c. 36.

The person acting as master to be deemed the keeper.

punishable as in cases of disorderly houses. And the person who shall appear to act as master, or as having the management of such gaming-house or other disorderly house, shall be deemed a keeper thereof, and liable as such. And it shall be lawful for any constable, or other person being authorised by warrant under the hand and seal of one justice, to enter such house or place, and to seize every person found therein, that they may be dealt with according to law.

Licence.

§ 3. Which said licence shall be granted at the last preceding *Michaelmas* sessions, and shall be signed and sealed by four justices in open court, and afterwards be publicly read by the clerk of the peace, with the names of the justices subscribing the same; and no such licence shall be granted at any adjourned sessions; nor shall any fee be taken for the same. And there shall be affixed and kept up in some notorious place, in large capital letters over the door or entrance of every such licensed house or place, *Licensed pursuant to act of parliament of the twenty-fifth of king George the second*; and it shall not be opened for such purposes before five in the afternoon. And the affixing and keeping up such inscription, and the said limitation in point of time, shall be inserted in and made conditions of such licence; and in case of a breach of either of the said conditions, the licence shall be forfeited and revoked by the justices at the next sessions, and shall not be renewed; nor shall any new licence be granted.

Constable's duty upon notice of gaming-houses, &c.

§ 5. "And in order to encourage prosecutions against persons keeping bawdy-houses, gaming-houses, or other disorderly houses," it is enacted, "That if any two inhabitants of any parish or place paying scot and bearing lot therein, do give notice in writing to any constable (or other peace officer of the like nature, where there is no constable) of such parish or place, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, in such parish or place, the constable or such officer as aforesaid, so receiving such notice, shall forthwith go with such inhabitants to one of H. M.'s justices of the peace of the county, city, riding, division, or liberty in which such parish or place does lie; and shall upon such inhabitants making oath before such justice, that they do believe the contents of such notice to be true, and entering into a recognizance in the penal sum of 20*l.* each, to give or produce material evidence against such person for such offence, enter into a recognizance in the penal sum of 30*l.* to prosecute with effect such person for such offence at the next general or quarter session of the peace, or at the next assizes to be holden for the county in which such parish or place does lie, as to the said justice shall seem meet; and such constable or other officer shall be allowed all the reasonable expenses of such prosecution, to be ascertained by any two justices of the peace (F.) of the county, city, riding, division, or liberty where the offence shall have been committed, and shall be paid the same by the overseers of the poor of such parish or place; and in case such person shall be convicted of such offence, the overseers of the poor of such parish or place shall forthwith pay the sum of 10*l.* to each of such inhabitants; and in case such overseers shall neglect or refuse to pay to such constable or other officer such expenses of the prosecution as aforesaid, or shall neglect or refuse to pay upon demand the said sums of 10*l.* and 10*l.*, such overseers, and each of them, shall forfeit to the person en-

Recognizance.

Charges of prosecution.

(F.)

Reward.

titled to the same double the sum so refused or neglected to be paid."

§ 6. Provided, "that upon such constable or other officer entering into such recognizance to prosecute as aforesaid, the said justice of the peace shall forthwith make out his warrant, to bring the person so accused of keeping a bawdy-house, gaming-house, or other disorderly house, before him, and shall bind him or her over to appear at such general or quarter session or assizes, there to answer to such bill of indictment as shall be found against him or her for such offence; and such justice shall and may, if in his discretion he thinks fit, likewise demand and take security for such person's good behaviour in the mean time, and until such indictment shall be found, heard, and determined, or be returned by the grand jury not to be a true bill."

And by stat. 58 G. 3. c. 70. § 7., after reciting the above provision of 25 G. 2. c. 36. § 5., and that it is expedient that when any two inhabitants of any parish or place, paying scot and bearing lot therein, shall give notice in writing to any constable of such parish or place of any person keeping a bawdy-house, gaming-house, or any other disorderly house, in such parish or place, that the overseers of the poor of such parish or place shall have notice thereof; it is enacted, that a copy of the notice (A.) which shall be given to such constable shall also be served on or left at the places of abode of the overseers of the poor of such parish or place, or one of them, and such overseers or overseer of the poor shall be summoned or have reasonable notice to attend before such justice of the peace before whom such constable shall have notice to attend; and if such overseers or overseer of the poor shall then and there enter into such recognizance to prosecute such offender as the constable is in and by the said act required to enter into, then it shall not be necessary for, nor shall such constable be required to enter into such recognizance; but if such overseers or overseer of the poor shall neglect to attend such justice on having such notice, or shall attend, and shall decline or refuse to enter into such recognizance to prosecute, then such constable shall enter into the same, and shall prosecute, and shall be entitled to his expenses, to be allowed as in and by the said act is directed.

By stat. 25 G. 2. c. 36. § 7., if the constable shall neglect or refuse, upon such notice, to go before a justice, or to enter into a recognizance, or shall be wilfully negligent in carrying on the prosecution, he shall forfeit 20*l.* to each of the said inhabitants.

§ 8. The person appearing or acting as master, or as having the care and management of any gaming-house, shall be taken to be the keeper thereof, and liable as such.

§ 9. And on trial, any person may give evidence against the defendant, notwithstanding his being a parishioner, or having entered into such recognizance.

§ 10. And no indictment for such offence shall be removed by *certiorari*.

By stat. 9 Ann. c. 14. § 2., any person who shall at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides of such as do play, lose to any one or more persons so playing or betting in the whole the sum or value of 10*l.*, and shall pay or deliver the same, or any part thereof; the person so losing and paying or delivering the same

25 G. 2. c. 36.

Penalty.

Person keeping bawdy-houses, &c. to be bound over.

58 G. 3. c. 70. Notices directed by 25 G. 2. c. 36. to be given to constables in certain cases, to be given also to the overseers of the poor; who are to prosecute.

(A.)

25 G. 2. c. 36. Penalty.

Who shall be deemed master.

Parishioner may give evidence.

9 Ann. c. 14. Losing 10*l.* or upwards at a time.

shall be at liberty in three months then next to sue for and recover the same with costs in any court of record; and if he shall not *bond fide* sue in three months, it shall be lawful for any person to sue for and recover the same and treble value, with costs; half to such person who shall sue, and half to the poor.

Under 9 Ann. c. 14. defendant may be convicted of winning less than the sum laid in the indictment.

In a prosecution on 9 Ann. c. 14., the indictment charged defendants with winning from prosecutor, at one sitting, more than 10*l.*, viz., a certain specified sum; and it was objected, that it was necessary to prove the loss of the precise sum laid. *Ld. Ellenborough* held, that as a sum of money was averred to be lost, which was laid under a viz., the prosecutor might prove the winning of a smaller sum, and defendants were convicted of winning a smaller sum than that alleged in the indictment. *R. v. Darley and others*, 1 Stark. N. P. C. 357.

9 Ann. c. 14.
18 G. 2. c. 34.

By stats. 9 Ann. c. 14. § 3. and 18 G. 2. c. 34. § 3. every person who shall be so liable to be sued for the same shall be obliged and compellable to answer on oath such bill as shall be preferred against him, for discovering the sum of money or other thing so won at play.

The stat. of Anne is a remedial act.

This is a remedial act; and there is a clear distinction between remedial and penal acts, that in the former, a debt is due to the party grieved before the commencement of the action; but not in the latter.

The assignees of a bankrupt may recover from the winner money lost at play by the bankrupt before his bankruptcy, in an action of debt on the stat. 9 Ann. c. 14.; the meaning of the act being, that the money lost and paid to the winner is part of the property of the loser. *Brandon v. Pate*, 2 H. Blac. 308. See also 2 Ves. jun. 514.

9 Ann. c. 14.
Justices may call before them suspected gamblers.

By stat. 9 Ann. c. 14. § 6., any two justices may cause to come before them any person whom they shall have just cause to suspect to have no visible estate, profession, or calling to maintain themselves by, but do for the most part support themselves by gaming; and if such persons shall not make it appear that the principal part of his expenses is not maintained by gaming, they shall require of him sufficient securities for his good behaviour for twelve months, and in default thereof shall commit him to the common gaol, there to remain till he find such securities.

What is a losing at one time, and what a losing at one sitting.

At any time or sitting.] *Bones v. Booth*, 2 Blac. Rep. 1226. Two persons played at cards from Monday evening to Tuesday evening without any interruption, except for an hour or two at dinner, and one of them won a balance of seventeen guineas: this was held to be won at one sitting within the statute. *Per Blackstone J.* To lose 10*l.* at one time is to lose it by a single stake or bet; to lose at one sitting is to lose it in a course of play where the company never parts, though the person may not be actually gaming the whole time. — *Nares J.* the statute is remedial where the action is brought by the party injured, but penal where brought by a common informer.

18 G. 2. c. 34.
Gaming houses.

By 18 G. 2. c. 34. § 1., no person shall keep any house, room, or place for playing, or permit any person within any such house, &c. to play at the game of roulet (or roly-poly), or at any other game with cards or dice, already prohibited by law; and if any person shall keep such house, &c. for playing, or permit any per-

son to play as aforesaid, he shall incur the penalties of stat. 18 G. 2. c. 34.
12 G. 2. c. 28.

By § 2, if any person shall play at roulette (or roly-poly), or at any game with cards or dice already prohibited by law, he shall also incur the pains and penalties of stat. 12 G. 2. c. 28. Playing at roly-poly.

By § 4., persons having jurisdiction to hear and determine informations upon the statutes against excessive gaming, may, upon any information exhibited before them for offences against this act, summon any person (other than the party accused) to appear before them at a certain day, time, and place; and to give evidence for the discovery of the truth of the matter in the said information contained; in case of neglect and refusal to appear, or if on appearing, such person shall refuse to give evidence, or shall give false evidence, he shall forfeit 50*l.*, to be levied by distress and sale; and in default of sufficient distress, he shall be committed to the common gaol for six months. Power of justices under 18 G. 2. c. 34.

By § 5., persons may be witnesses, though they have played, betted, or staked, at any such prohibited games. Witnesses.

And by § 8., if any person shall win or lose at play, or by betting, at any one time, the sum or value of 10*l.*, or within twenty-four hours the sum or value of 20*l.*, he shall be liable to be indicted for such offence within six months after it is committed, before the justices of the king's bench, assize, gaol delivery, or grand sessions; and on conviction shall be fined five times the value of the sum so won or lost; which fine (after charges as the court shall adjudge reasonable are allowed to the prosecutors and evidence) shall go to the poor where the offence was committed. See 1 *Russ.* 407. Persons winning or losing certain sums liable to be indicted, &c.

By § 10., this act is not to invalidate stat. 9 *Ann.* c. 14.

Gaming in public-houses. See stat. 3 G. 4. c. 77. § 9., scheds. A. and B., tit. *Alc-houses*.

By § 4. c. 83. (Vagrant Act) § 4., it is enacted (*int. al.*), that every person playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming at any game or pretended game of chance, shall be deemed a rogue and vagabond, and any justice may commit such offender, on conviction, to the house of correction, there to be kept to hard labour, for any time not exceeding three calendar months. Gambling when an act of vagrancy.

By § 6., it shall be lawful for any person whatsoever to apprehend any person who shall be found offending against this act, and forthwith to take or convey him before some justice, to be dealt with as is before directed, or to deliver him to a constable or peace-officer of the place where he shall have been apprehended, so to be taken and conveyed as aforesaid; and in case any constable or peace-officer shall refuse or wilfully neglect to take such offender into his custody, and to take and convey him before some justice, or shall not use his best endeavours to apprehend and convey before some justice any person that he shall find offending against this act, it shall be deemed a neglect of duty in such constable or peace-officer, and he shall, on conviction, be punished in such manner as is herein-after directed. See *R. v. Gardener, post*, tit. *Malicious Injuries*. Power of apprehension, &c.

By § 11., if any constable or peace-officer shall neglect his duty in any thing required of him by this act, he is made liable, Constable neglecting his duty

therein, how
punishable.

on conviction before one or more justice, where such offence shall be committed, to forfeit for every such offence any sum not exceeding 5*l.*; the same, in case of non-payment, forthwith to be levied by distress and sale of offender's goods; and if sufficient distress cannot be found, one or more justice may commit him to the house of correction, there to be kept for any time not exceeding three calendar months, or until such fine be paid. See tit. Magrant.

II. Of Wagers, and Losses at Play.

9 Ann. c. 14.
Horse-racing is
within the stat.

It has been holden, that laying above 10*l.* on a horse-race is an illegal bet within the statute of *Anne*, on the ground that the statute ought to be extended to all sports as well as games, in order to prevent excessive betting. *Goodburn v. Marley*, 2 Str. 1159. *Blaxton v. Pye*, 2 Wils. 309.

And also foot-
racing.

And in *Lynall v. Longbotham*, 2 Wils. 36., the court of C. P. were of opinion, that a foot-race, whether the race be upon a given distance, or against a certain time, is a game prohibited by 9 Ann. c. 14.

And a wager that a person did not find, within such a time, a man who should carry on foot 24 stone weight ten miles in fifteen hours, has been holden to be within the same principle. *Brown v. Beckley*, 1 Cowp. 282.

It has been determined that a wager of 10*l.* to 5*l.* upon a horse-race is within this statute; although the race was for a legal plate. *Clayton v. Jennings*, 2 Blac. Rep. 706.

Cricket.

In *Jeffreys v. Walter*, 1 Wils. 220., the court inclined to think, that cricket was a game within the meaning of stat. 9 Ann. c. 14.

As to losing by betting, see 18 G. 2. c. 34. and 9 Ann. c. 14. *ante*, p. 317, 318.

17 C. 2. c. 7.
Losing above
100*l.* at a time.

By stat. 16 C. 2. c. 7. § 3., if any person shall play at cards, dice, tables, tennis, bowls, skittles, shovelboard, or any other pastime or game whatsoever, (other than for ready money,) or bet on the sides of such as shall play, and shall lose any sum or other thing, exceeding 100*l.*, at any one time or meeting, upon ticket, or credit, or otherwise, and shall not pay down the same at the time when he shall lose the same, in such case he shall not be bound to make it good, but the contract for the same and for every part thereof and all assurances and securities for the same shall be void; and the winner shall forfeit treble value of all such sums as he shall so win above 100*l.*, half to the king, and half to him that shall sue in one year in any of the courts of record at Westminster, with treble costs.

Relief may be
had in equity.

In the case of *Humphries v. Rigby*, 2 Eq. Ab. 184., a bill was brought, to be relieved against a bond for money won at all-fours. The plaintiff was a distiller, and the defendant a tapster at a bowling-green. And it appearing that the defendant laid the cards, and turned up the knave of clubs, which was jack, several times together, and it being an unreasonable sum for such persons to venture, the plaintiff was relieved, and the bond ordered to be delivered up, although this case was not within the statute, the bond being for less than 100*l.* For equity always relieved, before the statute, where any fraud appeared.

By 9 Ann. c. 14. § 1., all notes, bills, bonds, judgments, mortgages, or other securities, where the whole or any part of the consideration shall be for money or any other valuable thing won by playing at cards, dice, tables, tennis, bowls, or other game whatsoever, or by betting on the sides of such as do game, or for the reimbursing or repaying any money knowingly lent or advanced at the time and place of such play to any person so gaming or betting, or that shall (during such play) so play or bet, shall be void; and where such securities shall be of lands, or such as incumber or affect the same, they shall enure and be to the sole use and benefit of and devolve upon such person as might have such lands, in case the said grantor, or person so incumbering the same, had been dead; and all conveyances to hinder them from devolving on such person shall be void.

9 Ann. c. 14.
Securities to be
void.

In *Bowyer v. Bampton*, 2 Str. 1155., it was holden, that an innocent indorsee for a valuable consideration, without notice, could not maintain an action on a promissory note given for money knowingly lent to game with at dice.

In an action on a bill by an indorsee against defendant, who was the acceptor, it appeared that it had been accepted in payment of a bet for more than 100*l.* which defendant had lost at Doncaster, on a race, which being for more than 50*l.*, was legal. There had been several indorsements. The plaintiff had given full consideration for it, and had no notice under what circumstances it was accepted. The court held that the bet, being for more than 100*l.* was illegal, though the race itself was lawful, and consequently that under 16 Car. 2. c. 7. § 3. the plaintiff could not recover. *Shillito v. Theed*, 7 B. 405.

Indorsee,
though for a
full consideration
and without notice,
cannot recover on
a bill given for
an illegal bet.

The statute only avoids securities for money won or lost at play, and does not extend to cases of mere loans, without any security taken. *Barjeau v. Walmesley*, 2 Str. 1249.

Edwards v. Dick, H. 1 & 2 G. 4. 4 B. & A. 212. Assumpsit by plaintiff, as indorsee, against the defendant, as drawer and indorser, of a bill of exchange. The bill was dated December 1st, 1819, and was drawn by defendant upon, and accepted by, Lord R., for the sum of 240*l.*, payable at three months, at Mr. Newland's chambers, New Inn. Plea, general issue. At the trial before Bayley J., it appeared that the bill had been duly presented and dishonoured; but no notice had been given to the acceptor of its dishonour. It was also proved that it had been drawn and accepted in discharge of a debt for money won at play, but that the plaintiff had received it from the drawer in payment of a *bonâ fide* debt. The learned judge was of opinion, that neither of these circumstances formed any defence to the present action, and the plaintiff obtained a verdict. On motion to enter a nonsuit, the court held, that the stat. 9 Ann. c. 14. § 1. did not extend to this case, and therefore refused the rule. Abbott C. J. said, For the purpose of preventing fraud we cannot permit the defendant to set up his own gaming as a defence.

In an action
against the
drawer of a bill
payable at a
particular place,
it is no defence
that no notice of
the dishonour
has been given
to the acceptor;
nor that the
bill was accepted
for a gaming
debt, if it be indorsed over by
the drawer for
a valuable consideration,
to a third person, by
whom the
action is
brought.

Securities.] The word *securities*, as it stands in this act, must mean lasting liens upon the estate. The parliament might think there would be no great harm in a parol contract where the credit was not like to run very high, and therefore confined the act to written securities. *Per Lee C. J. in Barjeau v. Walmesley*, *supra*.

See also *Alcinbrook v. Hall*, 2 Wils. 309. *Robinson v. Bland*, 2 Burr. 1077. *Wettenhall v. Wood*, 1 Esp. 18. *Vaughan v. Whitcomb*, 2 N. R. 413.

Wager contrary to public policy.

Wagers on the life of Buonaparte, held illegal.

An action cannot be maintained upon such wagers as, in the event, may have an influence on the public policy of the kingdom. 2 Selw. N. P. 1302.

In *Gilbert v. Sykes, Bart.*, 16 East, 150., the defendant, in the year 1802, in consideration of one hundred guineas, agreed to pay the plaintiff a guinea a day during the life of *Buonaparte*. The defendant paid the guinea a day for some years; but then desisted. The action was brought to recover the arrears. The jury having found a verdict for defendant, on motion for a new trial it was contended, in support of the verdict, that the wager was illegal, inasmuch as it had a tendency to create an interest in the plaintiff in the life of a foreign enemy, and which, in the case of invasion, might induce him to act contrary to his allegiance. The court being of opinion, that the justice of the case had been satisfied, refused to disturb the verdict; and Lord *Ellenborough* C. J. expressed a strong opinion against the legality of the wager, as well on the ground before mentioned, as also on the ground, that the party suffering under such a contract might be induced to compass and encourage the horrid practice of assassination, in order to get rid of a life so burthensome to him.

So, on a cock-fight,

or unseemly evidence as to a third person.

On sex of a person.

Whether an unmarried female had a child.

A deposition an illegal bet on a cricket match may be recovered from a stakeholder, if he has paid it over after notice.

An action cannot be maintained upon a wager on a cock-fight, because it is a barbarous diversion, which ought not to be encouraged or sanctioned in a court of justice; and, further, because it would tend to the degradation of the court to entertain such inquiries: nor where the discussion of the subject of the wager will be attended with injury to a third person, and lead to indecent evidence. *Squires v. Whitaker*, 3 Camp. 140. 2 Selw. N. P. 1304.

On this principle, a wager between two indifferent persons of the sex of the *Chevalier D'Eon*, who had appeared to the world as a man, and acted in that character in a variety of capacities, was holden illegal. *Dacosta v. Jones*, 2 Cowp. 729.

In a late case, *Gibbs* C. J. refused to try an action upon a wager whether an unmarried woman had had a child. *Ditchburn v. Goldsmith*, 4 Campb. 152. See also *Brown v. Leeson*, 2 H. Blac. 43. *Henkin v. Gerse*, 2 Campb. 408.

A match at cricket was played for 20*l.* a side, and the money was deposited in the hands of defendant, as stakeholder. On the second day of playing, a dispute arose about the terms of the match, and the game was never finished. Defendant, however, paid over the money to the side which claimed to have won, though he had notice from the other side not to do so. On action for money had and received, brought for the money so paid over, and nonsuit thereon, the court afterwards, on motion, entered a verdict for 20*l.*, on the ground that where a stakeholder has got money in his hands for an illegal bet, which is demanded back before he pays it over, it is recoverable in this form of action: the court also held that § 2. of 9 Ann. c. 14. was not confined to games of chance only, but applied to games of the same description as § 1.; and further, that though the cricket, in this case, was prolonged to two days, yet that it must be taken to fall within the words (a) of the act, "who shall lose, &c. at any time or sitting." *Hodson v. Terrill*, 1 Cr. & M. 797.

(a) See *Bones v. Booth*, ante, p. 318.

By stat. 16 C. 2. c. 7. § 2., if any person shall by any fraud, unlawful device, or other ill practice in playing at cards, dice, tables, tennis, bowls, skittles, shovelboard, or by cock-fightings, horse-races, dog-matches, foot-races, or other pastimes or games; or by bearing a share in the stakes; or by betting on the sides of such as shall play, act, ride, or run, as aforesaid, win any sum or other valuable thing, he shall forfeit treble the value, half to the king, and half to the party grieved (if he shall sue in six months), otherwise to any person who shall sue in one year next after the said six months, in any of the courts of record at Westminster, with treble costs.

16 C. 2. c. 7.
Cheating.

And by stat. 9 Ann. c. 14., § 5. if any person shall by any fraud or shift, cosenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at cards, dice, tables, tennis, bowls, or any the games aforesaid, or bearing a share in the stakes, or betting on the sides of such as do play, win any sum of money or other valuable thing, or shall at any one sitting win of one or more persons above the value of 10*l*. and shall be convicted thereof upon indictment or information; he shall forfeit five times the value of such money or other thing so won, and shall be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury; and such penalty shall be recovered by such person as shall sue for the same, by such action as aforesaid.

9 Ann. c. 14.
Fraudulently
winning above
10*l*.

The loser is a good witness to prove the loss. *R. v. Luckup*, *M. 9 G. 2. B. R. cited Will. 425. (n. c.)*

Loser may be
a witness.

R. v. Luckup, 2 Str. 1048. The defendant was convicted on an information upon this act. And it was moved that a fine should be set upon the defendant, if he refused to speak with the prosecutor. — But by the court: All the judgment that we can give is, *that he is convicted*; and a new action must be brought upon that judgment for the forfeiture. And the defendant was discharged, without any fine or costs.

Judgment.

It was held by Lord Ellenborough C. J., that upon an indictment on this statute for winning more than 10*l*. at one sitting, the defendant may be convicted of winning a less sum than that stated in the indictment. *R. v. Hill, Darley, and others*, 1 Stark. N. P. 359.

Exact sum need
not be proved.

It is generally provided by the several statutes that nothing therein shall hinder any person from playing at any the games aforesaid within any of the king's royal palaces, where he shall then reside.

Royal palaces
excepted.

III. Of Lotteries.

By stat. 10 & 11 W. 3. c. 17. § 1., all lotteries are declared to be public nuisances; and all grants, patents, and licences, for such lotteries, to be against law.

10 & 11 W. 3.
c. 17.
Lottery, a
nuisance.

§ 2. No person shall expose to be played, drawn, or thrown at, or shall publicly or privately exercise, keep open, shew, or expose to be played at, drawn, or thrown at, or shall draw, play, or throw at any lottery, either by dice, lots, cards, balls, or any other numbers or figures, or any other way whatsoever; and every person who shall so exercise, expose, open, or shew to be played, drawn, or thrown at any such lottery, play, or device, shall forfeit 500*l*., one third to the king, one third to the poor, and one

Keeping or
playing at a
lottery.

third with double costs to him that shall inform and sue in the courts at *Westminster*; and the offenders shall likewise be prosecuted as common rogues, according to the statutes in that case made and provided.

§ 3. And every person who shall play, throw, or draw at any such lottery, play, or device, shall forfeit 20*l.*, to be recovered in like manner.

9 Ann. c. 6.
Power of the
justices.

By stat. 9 Ann. c. 6. § 56., all justices of the peace, mayors, bailiffs, head officers, constables, and other civil officers, shall use their utmost endeavours to prevent the drawing of any such unlawful lottery, by all lawful ways and means; and every person who shall set up, or shall by writing or printing publish the setting up any such unlawful lottery, with intent to have such lottery drawn, shall forfeit 100*l.*; one third to the king, one third to the poor, and one third with full costs to him who shall sue in the courts at *Westminster*.

10 Ann. c. 26.
Insurances.

By stat. 10 Ann. c. 26. § 109., every person, who shall keep any office or place for making insurances on marriages, births, christenings, or service, or any other office or place under the denominations of sales of gloves, of fans, of cards, of numbers of the queen's picture, for the improvement of small sums of money, or the like offices or place, shall forfeit 500*l.*; one third to the king, one third to the poor, and one third with full costs to him who shall inform or sue. And every printer or other person, who shall by writing or printing publish the setting up or keeping any such office or place for such purpose, shall forfeit 100*l.*, to be recovered and distributed in like manner.

Penalty.

8 G. 1. c. 2.
Sales of lands
or goods; and
chances in public
lotteries.

By stat. 8 G. 1. c. 2. § 36, 37., every person who shall keep any office or place, under the denomination of sales of houses, lands, advowsons, presentations to livings, plate, jewels, ships, goods, or other things for the improvement of small sums of money; or shall sell or expose to sale the same or any of them, by way of lottery, or by lots, tickets, numbers, or figures; or shall make, print, advertise, or publish proposals or schemes for advancing small sums of money by several persons, amounting in the whole to large sums, to be divided among them by the chances of the prizes in some public lottery; or shall deliver out tickets to the persons advancing such sums, to entitle them to a share of the money so advanced, according to any proposal or schemes; or shall make, print, or publish any proposal or scheme of the like nature, under any denomination whatsoever, — and shall be thereof convicted on oath of one witness by two justices where the offence shall be committed, or the offender shall be found, he shall, over and above any penalties by any former act made against private lotteries, forfeit 500*l.*, one third to the king, one third to the informer, and one third to the poor, to be levied by distress and sale by warrant of such justices; and shall also by such justices be committed to the county gaol without bail for one whole year, and from thence till the said sum of 500*l.* shall be paid: Provided that persons aggrieved may appeal to the next quarter sessions. And every person who shall be adventurer in, or any way contribute unto, or on the account of any such sales, lotteries, proposals, or schemes, shall forfeit double the sum contributed, with costs, half to the king, and half to him who shall sue in the courts at *Westminster*.

Penalty.

By stat. 12 G. 2. c. 28. § 1., if any person shall erect, set up, continue, or keep any office or place, under the denomination of a sale of houses, lands, advowsons, presentations to livings, plate, jewels, ships, goods, or other things by way of lottery, or by lots, tickets, numbers, or figures, cards or dice; or shall make, print, advertise, or publish, or cause to be made, &c. proposals or schemes for advancing small sums by several persons, amounting in the whole to large sums, to be divided among them by chances of the prizes in some public lottery established by act of parliament, or shall deliver out tickets, or cause or procure to be delivered out to persons advancing such sums, to entitle them to a share of the money so advanced, according to such proposals or schemes; or shall expose to sale any houses, lands, advowsons, presentations to livings, plate, jewels, ships, or other goods, by any game, method, or device whatsoever, depending upon, or to be determined by, any lot or drawing, whether it be out of a box or wheel, or by cards or dice, or by any machine, engine, or device of chance of any kind whatsoever, shall, on conviction by one justice, on oath of one witness or on view of such justice, forfeit 200*l.*, to be levied by distress and sale; which forfeiture, after deducting reasonable charges of the prosecution, shall be one third to the informer, and two thirds to the poor of the parish: but where the person convicted shall be in the city of *Bath*, then the two thirds shall go to the use of the poor residing within the hospital or infirmary erected for the benefit of poor persons resorting to the said city for the benefit of the mineral waters, after deducting the charges of conviction as aforesaid. See also 43 G. 3. c. 119. § 5. *post*.

And by § 2., the games of the ace of hearts, pharaoh, basset, and hazard, are declared to be games and lotteries by cards or dice within the meaning of stats. 10 & 11 W. 3. c. 17. 9 Ann. c. 6. § 56. 10 Ann. c. 26. § 109. 9 G. 1. c. 19. And every person who shall set up, maintain, or keep the said games, shall be liable to the forfeitures under this act, and prosecuted in like manner, and the penalties and forfeitures sued for in like manner.

By § 3., "All and every person or persons who shall be adventurers in any of the said games, lottery or lotteries, sale or sales; or shall play, set at, stake, or punt at either of the said games of the ace of hearts, pharaoh, basset, and hazard, and shall be thereof convicted in such manner and form as in and by this act is prescribed; every such person or persons shall forfeit and lose the sum of 50*l.*, to be sued for and recovered as aforesaid."

And by stat. 13 G. 2. c. 19. § 9., also the game of passage, and every other game with one or more die or dice, or with any other instrument, engine, or device, in the nature of dice, having one or more figures or numbers thereon (backgammon and the other games now played with the backgammon tables only excepted), shall be deemed games or lotteries by dice within the said act of 12 G. 2. c. 28.

And every person who shall set up, maintain, or keep any office, table, or place for the game of passage, or any other such game as aforesaid (except as excepted), shall severally forfeit as in stat. 12 G. 2. c. 28.

Moreover, by stat. 12 G. 2. c. 28. § 4., every such sale of houses, lands, advowsons, presentations, plate, jewels, ships, goods, or other things, by any game, lottery, machine, engine, or other

12 G. 2. c. 28.
Office in the nature of a lottery.

Exposing to sale lands, jewels, &c. by any game.

Penalty how to be levied.

Lotteries by cards.

Penalty on the adventurers.

13 G. 2. c. 19.
Games with figures or numbers.

12 G. 2. c. 28.
By game or lottery, sale

12 G. 2. c. 28.

void and property forfeited.

Power of the justices to commit.

Appeal.

Where a statute gives an appeal, the appellant giving reasonable notice to the other parties, such notice need not be in writing, but a verbal notice, if reasonable as to time, is sufficient.

Where a statute requires reasonable notice, it does not necessarily mean that the notice should be in writing.

Certiorari.

46 G. 3. c. 148.
Application of penalties enacted against lotteries.

device, depending upon any chance or lot, shall be void; and the same being exposed to sale in manner aforesaid, shall be forfeited to such persons as shall sue for the same in any court of record, or at the assizes.

§ 8. In case such offender have not sufficient goods and chattels whereon to levy the said penalties, or do not immediately pay or secure the same, he may be committed to the common gaol for any time not exceeding six months.

By § 5., persons aggrieved may appeal to the next sessions, giving reasonable notice to the prosecutor, and entering into recognizance before some (a) justices with two sureties to try such appeal at such sessions, and the matter shall be then finally heard and determined, and not afterwards; and in case such conviction or judgment be affirmed, the appellant shall pay treble costs; to be recovered as costs of suit may by any defendant in any other cases by law.

R. v. The Justices of Surrey, H. 2 & 3 G. 4. 5 B. & A. 539. R. N. for a mandamus to the justices of Surrey to enter continuances and hear the appeal of *Andrew Barnett* against a conviction for gaming under stat. 12 G. 2. c. 28. The defendant was convicted on the 6th of November, 1821, and entered into recognizances to appeal against it to the next quarter sessions. It was sworn on the one side, and denied by the other, that at the time of entering into recognizances his attorney gave a verbal notice to the informer of his intention to appeal. The defendant attended, in order to prosecute his appeal, at the January sessions, 1822, when, there having been no notice of appeal in writing, the court refused to hear the appeal. The fifth section of the act giving the appeal states, that "persons aggrieved may appeal, giving reasonable notice to the prosecutor, and entering into recognizances," &c. It was contended that the sessions were to judge what was a reasonable notice of appeal, and they were of opinion that it must be a notice in writing. *Sed per Abbott C. J.* "We are of opinion, that where a statute requires reasonable notice to be given, it does not necessarily mean that the notice should be in writing, but only that as to time or number of days it should be reasonable. Here, however, as the fact is disputed, we shall only grant a mandamus to the justices, commanding them to examine whether reasonable verbal notice has been given, and in that case to enter continuances and hear the appeal." Rule accordingly. See tit. Appeal.

By stat. 12 G. 2. c. 28. § 6., no such conviction or judgment shall be set aside for want of form in case the facts be proved, nor be removable by *certiorari*, until judgment and determination be given and made at such sessions.

Stat. 46 G. 3. c. 148. § 59. enacts, that all pecuniary penalties for any offence against any law touching or concerning lotteries, shall be applied to the use of H. M., and it shall not be lawful for any person to commence, &c. any action or information, for the recovery of any pecuniary penalty inflicted by any of the laws touching or concerning lotteries, unless the same be commenced and prosecuted, in the name of H. M.'s attorney-general in the court of exchequer at Westminster, if such offence be com-

(a) The act says justices, but probably it meant justice.

mitted in *England*, or in the name of H. M.'s attorney-general in the court of exchequer at *Dublin*, if such offence shall be committed in *Ireland*, or in the name of H. M.'s advocate-general in the court of exchequer in *Scotland*, if such offence shall be committed in *Scotland*; and all proceedings otherwise are declared to be void.

And by § 64. stat. 27 G. 3. c. 1. is repealed.

"*Touching and concerning Lotteries*."—Quære, Whether the above statute extends to any other than *State Lotteries*? In *R. v. Liston*, 5 T. R. 388., it was decided, that stat. 27 G. 3. c. 1., which contained a provision somewhat similar to stat. 46 G. 3. c. 148. § 59., did not repeal the power over games of chance or lotteries prohibited by stat. 12 G. 2. c. 28.

Insuring in the lottery is not gaming within stat. 5 G. 2. c. 30. § 12., which will prevent a bankrupt's certificate being allowed. *Insurance in lottery.*
1 *H. Blac.* 29.

By stat. 42 G. 3. c. 119. § 1., all games or lotteries called *Little Goes*, are declared common and public nuisances, and against the law. *42 G. 3. c. 119. Little goes.*

§ 2. No person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, shew, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a *Little Goe*, or any other lottery whatsoever not authorised by parliament, or shall knowingly suffer to be exercised, kept open, shewn, or exposed to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any such game or lottery, in his or her house, room or place, upon pain of forfeiting, for every such offence, the sum of 500*l.*, to be recovered in the court of exchequer, at the suit of the attorney-general, and to be to the use of H. M.; and every person so offending shall be deemed a rogue and vagabond within the meaning of 17 G. 2. c. 5. (a), and shall be punishable accordingly.

Persons keeping any office or place for any game or lottery not authorised by law, &c. shall forfeit 500*l.* and be deemed rogues and vagabonds within the meaning of stat. 17 G. 2. c. 5.

§ 3. Every person offending against this act in manner hereinbefore mentioned, against whom no information shall have been made as aforesaid, shall be deemed a rogue and vagabond, within the true intent and meaning of stat. 17 G. 2. c. 5.; and also of stat. 27 G. 3. c. 1. (a); and shall be punishable according to the said acts and this act.

Persons so offending, against whom no such information shall have been made, shall be punished as rogues and vagabonds.

§ 4. Upon complaint or information made upon oath before any justices of the peace, of any offence committed against this act in any house or place within the jurisdiction of any such justice, whereby any of the offenders may be liable to punishment as rogues and vagabonds, it shall be lawful for the said justice, if he shall judge it reasonable, by special warrant under his hand and seal, to authorise and empower any person or persons, by day or by night, (but if in the night-time, then in the presence of a constable or other lawful officer of the peace, who are hereby required to be aiding or assisting therein,) to break open the doors or any part of such house or place where such offence shall have been committed, and to enter into such house or place, and to seize and apprehend all such offenders and all other persons who shall be

Justices on information may authorise persons to break open the doors of places where such offences shall have been committed, and apprehend offenders and others assisting them, and carry them before a justice.

(a) *N. B.* Stat. 17 G. 2. c. 5. is repealed by stat. 5 G. 4. c. 83., and stat. 27 G. 3. c. 1. by stat. 46 G. 3. c. 148. § 64. See tit. *Uagrant*.

42 G. 3. c. 119. discovered in such house or place, and who shall have knowingly aided or assisted, or been anyways concerned with any such offender or offenders in committing such offence, and to convey them before any justice or justices of the peace of the county, riding, division, city, liberty, or place wherein such persons shall be so apprehended, to be dealt with according to law as aforesaid; and all persons who shall be discovered in such house or place, knowingly aiding, assisting, or anyways concerned with such offender or offenders in the carrying on any transactions respecting the said little goes or lotteries, or either of them, shall be deemed rogues and vagabonds, and punishable in like manner as is directed by the said recited act of the 17 G. 2. c. 5. (a); and it shall be lawful for the officer or officers having the execution of such warrant, and all other persons acting in his or their aid or assistance, to stop, arrest, and detain all and every the person and persons so discovered in such house or place, and to convey the said person and persons before such justice of the peace as aforesaid; and if any person shall forcibly obstruct, oppose, molest, or hinder any such officer, or others acting in his or their aid or assistance in the due execution of their duty, or in the due entering into such house or place, or in the seizing, detaining, or conveying before such justice any such offenders, or other persons as aforesaid, every such person so obstructing, opposing, molesting or hindering as aforesaid, shall be deemed an offender against law and the public peace, and the court before whom any such offender shall be tried and convicted shall and may order such offender to be fined, imprisoned, and publicly whipped, as in their discretion shall be thought fit; and all persons, although not discovered in such house or place as aforesaid, who shall employ or cause to be employed any person or persons in carrying on any of the transactions aforesaid, or in aiding or assisting any such person or persons, shall be deemed rogues and vagabonds, and shall be punishable in like manner as is directed by stat. 27 G. 3. c. 1. (b)

Penalty for obstructing persons in the execution of their duty.

Persons employing others, though not discovered in the premises, to be deemed rogues and vagabonds.

Persons agreeing to pay any sum, or to deliver any goods, &c. on any event relative to such game or lottery, or publishing any proposal, shall forfeit 100*l*.

Offenders may be apprehended on the spot by any person, and carried before a justice, who shall, on the penalty not being paid, commit the offender.

§ 5. "No person or persons whatever shall, on or under any pretence, device, form, denomination, or description whatsoever, promise or agree to pay any sum or sums, or to deliver any goods, or to do or forbear doing any thing for the benefit of any person or persons, whether with or without consideration, on any event or contingency relative or applicable to the drawing of any ticket or tickets, lot or lots, numbers or figures, in any such game or lottery, or to publish any proposal for any of the purposes aforesaid; and if any person or persons shall offend in any of the matters aforesaid, he, she, or they shall, for every offence, forfeit and pay the sum of 100*l*."

§ 6. It shall be lawful for any person whatever to apprehend, on the spot, any person or persons so offending, and to convey or cause to be conveyed before any justice of the peace residing near the place where such offence shall be committed, the person or persons so apprehended, to be proceeded against under this act; and when any person or persons shall be apprehended or brought before any justice for any such offence, it shall be lawful for such justice to proceed to examine into the circumstances of the case,

(a) Repealed by stat. 5 G. 4. c. 83. See tit. *U*agrant.

(b) *N. B.* This act is repealed by the 46 G. 3. c. 148. § 64.

and upon due proof upon oath, or solemn affirmation of any such offence committed against this act, to give judgment or sentence accordingly; and where the party accused shall be convicted of such offence, and such penalty shall not be immediately paid, to commit such offender to prison for any space of time not exceeding six calendar months, nor less than one calendar month, without bail or mainprize, and without appeal, or until such penalty shall be satisfied; and every such penalty, when paid upon conviction, shall go and be applied, one third thereof to H. M., one third thereof to the use of the informer or informers, and the other third to the person or persons apprehending or securing such offender or offenders.

42 G. 3. c. 119.

Application of the penalty.

§ 7. All provisions, powers, authorities, &c. &c. contained in stat. 27 G. 3. c. 1. shall extend to all the provisions of this act.

§ 8. Any sheriff's officer or other person sued or prosecuted for any thing done by virtue of this act, may plead the general issue, and give this act and the special matter in evidence; and if a verdict shall pass for the defendant, or the plaintiff shall discontinue his action or prosecution, or be nonsuited, such defendant shall have treble costs.

General issue.

Treble costs.

By stat. 9 G. 1. c. 19. § 4, 5., if any person shall, by virtue or colour of any grant or authority from any foreign prince or state, set up, continue, or keep, or cause or procure to be set up, continued, or kept any lottery, or undertaking in the nature of a lottery, under any denomination whatsoever, or shall make, print, or publish, or cause, &c. any proposal for any such lottery or undertaking; or shall sell or dispose of any ticket in any foreign lottery; and shall be convicted thereof, on oath of one witness, before two justices where the offence shall be committed, or the offender shall be found, he shall (over and above any penalties by former acts against unlawful lotteries) forfeit 200*l.*, one third to the king, one third to the informer, and one third to the poor, to be levied by distress and sale, by warrant of such justices; and shall also by them be committed to the county gaol for one year, and from thence till the said sum of 200*l.* be fully paid: Provided that persons aggrieved may appeal to the next quarter sessions, whose judgment shall be final.

9 G. 1. c. 19.
Foreign lotteries.

Appeal.

And by stat. 6 G. 2. c. 35. § 29, 30., if any person shall sell, procure, or deliver any ticket, receipt, chance, or number, or division in any foreign or pretended foreign lottery, or in any class, part, or division thereof, or in any undertaking in the nature of a lottery, or shall sell, procure, or deliver any ticket, receipt, chance, or number in any duplicate or pretended duplicate of any foreign or pretended foreign lottery; or shall receive or cause to be received any money for any such ticket, receipt, chance, or number, or in consideration of any money to be paid in case any ticket or number in any foreign or pretended foreign lottery, or any class, part, or division thereof, shall prove fortunate; and shall be convicted thereof in the courts at *Westminster*, or on the oath or affirmation of one witness before two justices where the offence shall be committed, or the offender shall be found; he shall forfeit 200*l.*, one third to the king, one third to the informer, and one third to the poor where the offence shall be committed; the same (in case of conviction before two justices) to be levied by distress and sale by warrant of such jus-

6 G. 2. c. 35.
Selling or procuring chances in foreign lotteries.

Appeal.

tices ; and shall also be committed to the county gaol for one year, and from thence till the 200^l. be paid : Provided, that persons aggrieved may appeal to the next quarter sessions ; and the judgment there to be final.

- A. A. Form of Notice by two Inhabitants to the Constable, and to the Overseers of the Poor, to ground a Prosecution on stats. 25 G. 2. c. 36. and 58 G. 3. c. 70. § 7.

To A. C., constable of the parish of ———, in the county of ———, and also to A. O. and B. O., overseers of the poor of the said parish.

WE A. B. and C. D. two of the inhabitants of the said parish of ———, paying scot and bearing lot therein, do hereby give you and each of you notice, that A. I. of the said parish of ———, innkeeper, doth keep a bawdy-house, [or, gaming-house, or other disorderly house, as the case may be,] to wit, at his dwelling-house in the said parish, called and known by the name of the ——— inn ; and we do hereby also require you, the said constable and overseers of the poor, forthwith to go with us before some one of his majesty's justices of the peace in and for the said county of ———, to the intent that such proceedings may be had for the prosecution of the said A. I. for the said offence, as in and by the statute made and passed in the twenty-fifth year of the reign of the late king George the second, intituled "An act for the better preventing of thefts and robberies, and for regulating places of public entertainments, and punishing persons keeping disorderly houses," are directed and required.

Witness our hands, this ——— day of ———, &c.

A. B.
C. D.

- B. B. Affidavit of the Truth of such Notice before a Justice of the Peace.

————— } A. B. and C. D. severally make oath and say, that
to wit. } they severally believe the contents of the notice here-
unto annexed [a copy of which they have caused to be served on
A. C. constable of the parish of ———, and also upon A. O. and
B. O., overseers of the poor of the said parish of ———, in the said
county,] to be true in substance and matter of fact.

A. B.
C. D.

Sworn by A. B. and C. D. this ——— day of }
—————, in the year of our Lord ———, before }
me, J. P. esquire, one of his majesty's justices of }
the peace in and for the county of ———. J. P. }

- c. C. Form of Recognizance to give material Evidence.

————— } *BE* it remembered, that A. B. of the parish of ———
to wit. } in the said county, mercer, and C. D. of the same,
grocer, on the ——— day of ———, in the year of our Lord ———,
at ——— aforesaid, in the county aforesaid, came before me, J. P.
esquire, one of his majesty's justices of the peace in and for the said
county, and severally acknowledged themselves to be indebted to
our sovereign lord the king in the sum of twenty pounds each.

Whereas the above bounden A. B. and C. D. have given notice in writing to A. C., constable of the said parish of —, and also to A. O. and B. O., overseers of the poor of the said parish of —, that one A. I. of — aforesaid, innkeeper, doth keep a bawdy-house: [gaming-house, or other disorderly house:] Now the condition of the above obligation is such, that if the above bounden A. B. and C. D. shall give or produce material evidence against the said A. I. for the said offence, at the next general quarter sessions of the peace to be held in and for the said county, then this recognizance to be void, otherwise of force.

Acknowledged before me,

J. P.

D. Constable's or Overseer's Recognizance to prosecute.

D.

— } *BE it remembered, that on the — day of*
to wit. } —, *in the year of our Lord —, at*
—, *in the said county, A. C. one of the constables of the parish*
of — aforesaid, [or, A. O. and B. O., overseers of the poor of
the said parish of —, as the case may be], personally came before
me, J. P. esquire, one of his majesty's justices of the peace in and for
the said county, and acknowledged himself [or, themselves] to be
indebted to our sovereign lord the king in the penal sum of —
pounds.

Whereas A. B. and C. D., two of the inhabitants of the said parish
of —, have given notice in writing to the above bounden A. C.,
constable of the said parish of —, [or, A. O. and B. O., overseers
of the poor of the parish of —, as the case may be,] that A. I.
of — aforesaid, in the county aforesaid, innkeeper, doth keep a
bawdy-house, [gaming-house, or other disorderly house,] to wit, in
the said parish of — and county of —, and having severally
made affidavit of their belief in the truth of the contents of the said
notice, have also severally entered into a recognizance in the penal
sum of — pounds each before me, the undersigned justice, on
condition that they shall give or produce material evidence against
the said A. I. for the said offence. Now the condition of this present
recognizance is such, that if the above bounden A. C. or A. O. and
B. O. do and shall prosecute with effect the said A. I. for the said
offence, then this recognizance to be void, otherwise of force.

Acknowledged before me,

J. P.

E. Warrant to apprehend the Keeper of a disorderly House.

E.

To the constables of the parish of —, in the said county.

— } *WHEREAS A. B. and C. D., two of the inha-*
to wit. } *bitants of the parish of —, in the county of*
—, *paying scot and bearing lot within the said parish, have*
given notice in writing to A. C., constable of the said parish, and also
to A. O. and B. O., overseers of the poor of the said parish, that A. I.
of the said parish, innkeeper, doth keep a bawdy-house [gaming-
house, or other disorderly house,] in the said parish of —; and
have also this day severally made affidavit before me, one of his
majesty's justices of the peace in and for the said county, that they
believe the contents of the said notice to be true; and have also
severally entered into a recognizance in the penal sum of twenty

pounds each, on condition to give or produce material evidence against the said A. I.: These are therefore to command you forthwith to bring the said A. I. before me at this place, to be bound over to appear at the next general quarter sessions of the peace to be held in and for the said county, there to answer to such bill of indictment as shall be found against him for such offence. Given under my hand and seal, &c.

F.

F. Allowance of Constable's Expenses in the Prosecution by two Justices, and Order on Overseers to pay them.

_____ } *WHEREAS* A. C., constable of the parish of
to wit. _____, in the said county, hath this day
made oath before us, J. P. and M. N. esquires, two of his majesty's
justices of the peace in and for the said county, that he hath truly
and bona fide expended the sum of _____ in the prosecution of
one A. I. for keeping a bawdy-house [gaming-house, or other
disorderly house], at _____ aforesaid, in pursuance of the condition
of the said A. C.'s recognizance: Now we, the said justices, do
hereby ascertain and allow the said A. C. the said sum of
_____ as and for the reasonable expenses of the said prosecu-
tion, and we do hereby require the overseers of the poor of the
said parish of _____ forthwith to pay the said A. C. the said
sum of _____.

In witness whereof we have hereunto set our hands at _____
aforesaid, in the county aforesaid, this _____ day of _____, in
the year of our Lord _____.

J. P.
M. N.

Homicide.

HOMICIDE, in law, signifies the killing of a man by a man.
1 Haw. c. 26. § 2.

And it includes in it not only petit treason, concerning which title see *Treason*, but also the several offences which are treated of in the following sections.

There is also another kind of untimely death of a man, not properly homicide; when he is killed by a horse, a cart, a tree, or the like, and not by a man, which is called casual death; for which see tit. *Deadend*.

- I. *Justifiable Homicide.*
- II. *Homicide by Misadventure.*
- III. *Homicide by Self-defence.*
[9 G. 4. c. 31.]
- IV. *Manslaughter.*
[9 G. 4. c. 31.]
- V. *Murder.*
[22 G. 2. c. 33. art. 28. — 9 G. 4. c. 31.]
- VI. *Self-murder.*
[4 G. 4. c. 52.]

I. Justifiable Homicide.

On a real
necessity.

To make homicide justifiable, it must be owing to some unavoidable necessity, to which the person who kills another must

be reduced, without any manner of fault in himself. 1 *Haw. c. 28. § 1.*

And there must be no malice coloured under pretence of necessity; for wherever a person who kills another acts in truth upon malice, and takes occasion from the appearance of necessity to execute his own private revenge, he is guilty of murder. 1 *Haw. c. 28. § 2.*

The same rule applies where a person kills another in defending himself, his habitation, or his property, against an act of felony accompanied by force or surprise, but not to felonies unaccompanied by force, as pocket-picking, nor to offences that are not felonies. 1 *Russ. 549. 1 East's P. C. 277.* Nor will any assault justify killing the assailant, unless there is a plain manifestation of a felonious intent. 1 *Russ. 551. 1 East's P. C. 277.*

So, where a known felony is attempted, not only the party assaulted, but his servant, or any other person present, may interfere to prevent the mischief; and if death ensue, it may be justified. 1 *Russ. 552.*

If trespassers in a forest, chase, park, or warren, or any inclosed ground wherein deer are kept, will not render themselves to the keepers, upon a hue and cry made to stand to the king's peace, but fly from or defend themselves against them, they may be slain by force of the statute 3 & 4 *W. & M. c. 10. § 5. 1 Haw. c. 28. § 15. 1 East, P. C. 256. 1 Russ. 548.*

If rioters, or forcible enterers or detainers, stand in opposition to the justices' lawful warrant, and any of them be slain, it is no felony. *Hale's Sum. 37. 1 Russ. 548.*

So, if they stand in opposition to the sheriff's *posse comitatus*. *Vide stats. 13 H. 4. c. 7. 2 H. 5. c. 8. 1 Hale, 53.*

And if the sheriff or magistrate, or any one coming in aid of them, be killed, it is murder in all. *Crompt. 22. 1 MS. Sum. 219.*

If a man come to burn my house, and I shoot out of my house, or issue out of my house, and kill him, it is no felony. *Hale's Sum. 39.*

A. makes an assault upon B., a woman or maid, with intent to ravish her; she kills him in the attempt; it is *se defendendo*; because he intended to commit a felony. 1 *Hale, 485. Hale's Sum. 39.*

If a person having actually committed a felony will not suffer himself to be arrested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from the magistrate, he may be lawfully slain by them. 1 *Haw. c. 28. § 11.*

But in civil cases, and also in the case of a breach of the peace, or any other misdemeanor short of felony, if the officer should pursue a defendant flying in order to avoid an arrest, and should kill him in the pursuit, he will not be justified. 1 *Russ. 547.*

So, if a felony hath actually been committed, and an officer or minister of justice, having lawful warrant so to do, arrest an innocent person, and such person assault the officer or minister of justice, the officer is not bound by law to give back, but to carry him away; and if in execution of his office, he cannot otherwise avoid it, but in striving kill him, it is no felony. And in that case,

So, in self-defence against a felonious assault.

So, if others present interfere.

Trespassers in parks.

Rioters.

House-burners.

Ravishers.

Felons refusing to be arrested.

But not in cases short of felony.

Suspected felon refusing to be arrested.

the officer or minister of justice shall forfeit nothing; but the party who so assaulted or offered to fly away, and is killed, shall forfeit his goods. 3 *Inst.* 56.

Officer, with
warrant.

Where a person is indicted for felony, and will not suffer himself to be arrested by an officer with a warrant, the officer may lawfully kill him, if he cannot otherwise be taken, though such person be innocent, and though no felony be committed; but this must be understood of arrests by officers only, and not by private persons of their own authority. 1 *Russ.* 548., and authorities there cited.

But it is said, that an indictment found is a good cause of arrest by a private person, if no death ensue. *Id.* n.

Felon escaping.

Also if a person arrested for felony break away from his conductors to gaol, they may kill him, if they cannot otherwise take him. But in this case, likewise, there must have been a felony actually committed. *Hale's Sum.* 36, 37.

Felon breaking
gaol.

Also if a criminal endeavouring to break the gaol assault his gaoler, he may be lawfully killed by him in the fray. 1 *Haw.* c. 28. § 13.

Resisting a
civil process.

In civil causes, although the sheriff cannot kill a man who flies from the execution of a civil process, yet if he resist the arrest, the sheriff or his officer need not give back, but may kill the assailant. *Hale's Sum.* 37.

So if in the arrest and striving together the officer kill him, it is no felony. *Hale's Sum.* 37.

Notice of
process.

Known officer.

Special officer
must declare
his authority.

The party must have some notification of the officer's business, or the killing of him will not be murder. (1 *East's P. C.* 319., and the authorities there cited.) If he be a known sworn officer, the law in the instances above mentioned will imply notice; if he be a special bailiff named in the process, he must declare his business and authority, as by using words of arrest or the like: and if such declaration be true and the process legal, and afterwards he be killed, it is murder; for after that declaration the party killing acted at his peril. But if the officer declare his business, it is not necessary he should produce the warrant itself where it is not demanded. It is also said, that if a bailiff or constable be sworn and commonly known to be such, and act within his own precinct, he need not shew his warrant to the party, though he demand a sight of it, but the officer ought to tell him the substance of it; but that all others, or these, if acting out of their precincts, ought to shew it if demanded. If this be understood merely of the warrant constituting him bailiff or constable, it may be true under the circumstances before noticed: but with respect to the writ or process itself against the party, there is no difference between the public or private bailiff; for in either case, if the party submit to the arrest and demand it, he is bound to shew at whose suit, for what cause, out of what court the process issues, and when and where returnable. In no case, however, is he required to part with the warrant out of his own possession, for that is his justification. See 8 *T. R.* 188.

Warrant to
arrest should be
shewn, but not
parted with.

Arrest to be
duly made.
One of several
may execute
a warrant.

If the warrant be directed to several, any of them may execute it. And in no case of arrest is a constable bound to carry a prisoner before a particular magistrate desired by the prisoner himself, but he may follow his own discretion; unless the warrant be special, and direct otherwise. 1 *Hale*, 459. 5 *Rep.* 59. 1 *East's P. C.* 320.

If the officer in executing his office exceed his authority, the law gives him no protection in that excess. And it not only behoves the ministers of justice and other public officers, but likewise private persons endeavouring to arrest or imprison in the several cases already specified, to be very careful that they do not misbehave themselves in the discharge of their duty; for if they do, they may forfeit this special protection. 1 *MS. Sum.* 170. *Fost.* 319. 1 *East's P. C.* 320.

No protection for an officer exceeding his authority.

In all these cases, the party upon arraignment having pleaded not guilty, the special matter must be found; whereupon the party shall be dismissed without any forfeiture, or pardon purchased. *Hale's Sum.* 38.

Trial and discharge.

II. Homicide by Misadventure.

I have purposely avoided the word *chancemedly* in this place, because authors do not seem to be agreed whether it is to be applied to homicide *by misadventure*, or to *manslaughter*. *Ld. Coke* and *Mr. Hawkins* seem to understand it of *manslaughter*; *Ld. Hale* and others, of homicide *by misadventure*. The original meaning of the word seems to favour the former opinion, as it signifies a sudden or casual meddling or contention; whereas homicide *by misadventure* supposeth no previous meddling or falling out. But the same author sometimes in different places applies it to both of them promiscuously.

Chancemedly.

Homicide by misadventure is where a man is doing a *lawful* act, without intent to hurt another, and death casually ensues. *Hale's Sum.* 31. 1 *East, P. C.* 221.

What is homicide by misadventure.

As where a labourer being at work with a hatchet, the head flies off, and kills one who stands by. Or where a third person whips a horse, on which a man is riding, whereupon he springs out and runs over a child, and kills him; in which case the rider is guilty of homicide by misadventure, and he who gave the blow, of manslaughter. 1 *Haw. c.* 29. § 3.

Cases of homicide by misadventure.

But if a person riding in the street whip his horse to put him into speed, and run over a child and kill him, it is homicide, and not by misadventure; and if he ride so, in a press of people, with intent to do hurt, and the horse killeth another, it is murder in the rider. 1 *Hale*, 476.

Aliter if the act be imprudent.

It is not sufficient that the act upon which death ensues be lawful and innocent in itself. It must be done in a proper manner, and with due caution, to prevent mischief. *Fost.* 262. 1 *East's P. C.* 261.

Lawful acts must be done with caution.

Thus parents, masters, and other persons, having authority *in foro domestico*, may give reasonable correction to those under their care: and if death ensue from such correction, it will be no more than accidental death. But if the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter according to the circumstances. If done with a cudgel, or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter; if with a dangerous weapon likely to kill or maim, as a pestle or great staff, it will be murder: due regard being had in both instances to the age and strength of the party. 1 *East's P. C.* 261.

Correction in foro domestico.

May be murder, if excessive.

Grey, a blacksmith, struck his servant with a bar of iron, by way of correction for improper behaviour, by which he was killed; held murder. A woman kicked and stamped on the belly of her child; and ruled the same. *Grey's case, Kel. 64, 5. 1 East's P. C. 261.*

Yet though the correction exceeds the bounds of moderation, the court will pay a tender regard to the nature of the provocation, where the act is manifestly accompanied with a good intent, and the instrument not such as must in all probability occasion death; though the party were hurried to great excess. As was the case of a father (*Worcester Sp. Ass. 1775*), whose son had frequently been guilty of stealing, complaints of which had come to the father, who had often corrected him. At length the son being charged with another theft, and resolutely denying it, though proved against him, the father in a passion beat his son with a rope by way of chastisement for the offence, so much, that he died. The father expressed the utmost horror, and was in the greatest affliction for what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The learned judge who tried the father consulted his colleagues in office, and the principal counsel on the circuit, who all concurred in opinion that it was only manslaughter, and so it was ruled. *1 East's P. C. 261.*

Accidents in common occupations.

Necessary caution must be used.

Accidents frequently occur amongst persons following their lawful occupations, especially such from whence danger may probably arise. If they saw the danger, and yet persisted, without sufficient warning, it will be murder. If the act were such as was likely to breed danger, and they neglected the ordinary cautions, it will be manslaughter at least, on account of such negligence, making due allowance for the nature of the occupation, and the probability of the danger; which, if very remote, and in the particular instance not reasonably to be expected, may reduce the act to misadventure. The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.

Workmen throwing rubbish.

For instance, in the case of workmen throwing stones and rubbish from a house in the ordinary course of their business, by which a person underneath happens to be killed; if they deliberately saw the danger, or betrayed any consciousness of it, from whence a general malignity of heart might be inferred, and yet gave no warning, it will be murder, on account of the gross impropriety of the act. If they did not look out, or not till it was too late, and there was even a small probability of persons passing by, it will be manslaughter. But if it had been in a retired place, where there was no probability of persons passing by, and none had been seen about the spot before, it seems to be no more than accidental death. For though the act itself might breed danger, yet the degree of caution requisite being only in proportion to the apparent necessity of it, and there being no apparent call for it in the instance put, the rule applies, *de non existentibus et non apparentibus eadem est ratio*. So if any person had been before seen on the spot, but due warning were given, it will be only misadventure. (*Hull's case, 1664. Kel. 40. 1 Russ. 535.*) On the other hand, in London and other populous towns, at a time of day when the streets are usually thronged, it would be manslaughter,

notwithstanding the ordinary caution used on other occasions of giving warning; for in the hurry and noise of a crowded street few people hear the warning, or sufficiently attend to it, however loud. 1 *East's P. C.* 262.

Again, a person driving a carriage happens to kill another: if he saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it will be murder; for the presumption of malice arises from the doing of a dangerous act intentionally: there is the heart regardless of social duty. If he might have seen the danger, but did not look before him, it will be manslaughter, for want of due circumspection. But if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and he will be excused. 1 *East's P. C.* 263.

In driving carriages.

A. was driving a cart with four horses in the highway at *White-chapel*; and he being in the cart, and the horses upon a trot, they threw down a woman who was going the same way with a burthen upon her head, and killed her. *Holt C. J.*, *Tracy J.*, *Baron Bury*, and the recorder *Lovel*, held this to be only misadventure. But, by Lord *Holt*, if it had been in a street where people usually pass, this had been manslaughter; but it was clearly agreed that it could not be murder. *O. B. Sess. before M. T. 1704*, 1 *East's P. C.* 263.

It has already been observed, that this homicide only is when it happeneth upon a man's doing a lawful act; for if the act be done in the prosecution of a felonious intention, it will be murder. 1 *Russ.* 454.

Felonious intent.

But it seems that in cases of this kind the guilt would rather depend upon one or other of these circumstances, either that the act might probably breed danger, or that it was done with a mischievous intent. 1 *Russ.* 526.

Circumstances of danger.

When sports are unlawful in themselves, or productive of danger, riot, or disorder, so as to endanger the peace, and death ensue in the pursuit of them, the party killing is guilty of manslaughter. Such manly sports and exercise as tend to give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends, are not, however, deemed unlawful sports; but prize-fighting, public boxing matches, or any other sports of a similar kind, which are exhibited for lucre, and tend to encourage idleness by drawing together a number of disorderly people, have met with a different consideration. For in these last-mentioned cases the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward or applause be obtained; and meetings of this kind have also a strong tendency in their nature to a breach of the peace. Therefore, where the prisoner had killed his opponent in a boxing match, it was holden that he was guilty of manslaughter; though he had been challenged to fight by his adversary for a public trial of skill in boxing, and was also urged to engage by taunts; and the occasion was sudden, &c. *Ward's case*, *O. B.* 1789, 1 *East's P. C.* 270.; and see 1 *Russ.* 527., and the authorities there cited.

Death happening at unlawful sports.

The rule before laid down supposeth that the act, from which death ensued, was *malum in se*. For if it were barely *malum prohibitum*, as shooting at game by a person not qualified by statute

From shooting at game by an unqualified person.

law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man. For the statutes prohibiting the destruction of the game, under certain penalties, will not in a question of this kind enhance the accident beyond its intrinsic moment. *Fost.* 259.

If there is an intent to do mischief.

Further, if there be an evil intent, though that intent extendeth not to death, it is murder. Thus, if a man, knowing that many people are in the street, throw a stone over a wall, intending only to frighten them, or to give them a little hurt, and thereupon one is killed, this is murder; for he had an ill intent, though that intent extended not to death, and though he knew not the party slain. *3 Inst.* 57.

A gentleman came to town in a chaise, and before he got out of it fired his pistols in the street, which by accident killed a woman. This was ruled manslaughter: the act was likely to breed danger, and manifestly improper. *Burton's case*, 1 *Str.* 481. 1 *East's P. C.* 266.

Reasonable precaution sufficient.

The law does not require the utmost caution that can be used; it is sufficient that a reasonable precaution, what is usual and ordinary in the like cases, be taken: such as hath been found by long experience in the course of human affairs to answer the end: for such conduct shews that the party was regardful of social duty, and free from any manner of guilt. *Fost.* 264. 1 *East's P. C.* 266. And, therefore, upon that principle, Mr. Justice *Foster* denies *Rampton's case*, *Kel.* 41., to be law: and, indeed, there is a quære put to it in the margin of the reporter. The prisoner had found a pistol in the street, which he had reason to believe was not loaded, having tried it with the rammer, which had gone down into the muzzle of the pistol; the rammer, in fact, being too short. He carried the pistol home, and his wife standing before him, he cocked it and touched the trigger; on which the pistol went off, and killed the woman. This was ruled manslaughter. In truth, the man had used the ordinary precaution, adapted to the probability of danger in such cases: he had examined the pistol by the usual method of trial. And though it was doubtless an idle frolic, yet the heart was free from all sort of guilt, even the guilt of negligence; and therefore the act ought to have been excused. And the same learned judge determined accordingly in a case something similar.

Upon a *Sunday* morning a man and his wife going to dine at a friend's house in the neighbourhood, he carried his gun with him, to divert himself on his way; but before dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church, and in the evening returned home with his wife and neighbours, bringing his gun with him; which was put into the room where his wife was, she having brought it part of the way. He, taking it up, touched the trigger, and the gun went off, and killed his wife. It came out in evidence, that while the man was at church, a person belonging to the family privately charged the gun, and went after some game; but before the service at church was ended, returned it loaded to the place from whence he had taken it; and where the defendant, who was ignorant of all that had passed, found it to all appearance as he had left it. Mr. Justice *Foster* thought it unnecessary to inquire whether the man had examined the gun before he carried it home; but being

of opinion upon the whole evidence that he had reasonable grounds to believe that it was not loaded, he directed the jury, that if they were of the same opinion, they should acquit him: and he was acquitted. *Fost.* 265.

It is a general rule in case of all felonies, that wherever a man intending to commit one felony happens to commit another, he is as much guilty as if he had intended the felony which he actually commits. 1 *Haw. c.* 29. § 11.

But in all the cases above, if it doth only hurt a man by such an accident, it is nevertheless a trespass; and the person hurt shall recover his damages: for though the chance excuse from felony, yet it excuseth not from trespass. 1 *Hale*, 472.

This homicide is not felony, because it is not accompanied with a felonious intent, which is necessary in every felony. 1 *Haw. c.* 29. § 11.

Although this homicide is not properly a man's crime, but his misfortune, yet because the king hath lost his subject, and in respect of the great favour the law hath to the life of man, and to the end that men should use all care, diligence, and circumspection, in all they do, that no hurt should come of their actions, a person convicted hereof shall forfeit his goods, and shall not presently be discharged of his imprisonment, but bailed, that he may sue out his pardon, which he shall have out of the chancery of course. 1 *Hale*, 477. 492.

But the practice now is to direct an acquittal, without obliging the prisoner, by a special proceeding, to purchase his pardon under the stat. of *Gloucester*, and no forfeiture is incurred.

And now, by 9 G. 4. c. 31. § 10., no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony.

Committing one felony while intending another.

In all such cases it is a trespass.

This kind of homicide no felony.

Forfeiture. But see 9 G. 4. c. 31. s. 10. infra.

Now the practice to acquit.

9 G. 4. c. 31. No punishment or forfeiture where homicide is not felonious.

III. Homicide by Self-defence.

In treatises on homicide, the term *chancemedley* frequently occurs, and it is not always used in one and the same sense: the best explanation of it seems to be, that it is applicable to such killing as happens upon self-defence upon a sudden rencounter. 1 *Russ.* 543.

Chancemedley.

Homicide in a man's own defence seems to be, where one, who hath no other possible means of preserving his life from one who combats with him on a sudden quarrel, kills the person by whom he is reduced to such an inevitable necessity. 1 *Haw. c.* 29. § 13.

Se defendendo, what.

And not only he, who upon an assault retreats to a wall, or some such strait, beyond which he can go no further before he kills the other, is judged by the law to act upon unavoidable necessity, but also he, who being assaulted in such a manner and in such a place that he cannot go back without manifestly endangering his life, kills the other without retreating at all. 1 *Haw. c.* 29. § 14.

Cases of *se defendendo*.

And notwithstanding a person, who retreats from an assault to the wall, give the other wounds in his retreat, yet if he give him no mortal one till he get thither, and then kill him, he is guilty of homicide *se defendendo* only. 1 *Haw. c.* 29. § 14.

But if the mortal wound were first given, then it is manslaughter. *Hale's Sum.* 42.

Resistance to officer, felonious assault.

And an officer who kills one that resists him in the execution of his office, and even a private person that kills one who feloniously assaults him in the highway, may justify the fact without ever giving back at all. 1 *Haw. c. 29. § 16.*

Previous malicious assault.

But if a person upon malice *prepenſe* strike another, and then fly to the wall, and there in his own defence kill the other, this is murder. *Hale's Sum. 42.*

The party must try to quit the combat;

It is said that, in the case of a sudden affray, all malice apart, it matters not who gave the first blow, if either party endeavour to decline the combat and retreat before a mortal wound be given. 1 *Russ. 544.*

and must be in danger, to maintain his excuse.

But the party killing cannot in any case substantiate his excuse, if he kill his adversary even after a retreat, unless there were reasonable ground to apprehend that he would otherwise have been killed himself. 1 *Russ. ibid.*

Defence of master by servant, &c.

The excuse of self-defence extends to the case of master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other. 1 *Russ. 545.*

Defence not available to prevent a trespass.

It is to be understood, however, that the same excuse does not extend to the case of homicide in endeavouring to prevent an illegal entry into a party's house, or in opposition to a trespass on his property. 1 *Russ. 545.*

Accessaries.

Hereof there can be no accessaries either before or after the fact, because it is not done with a felonious intent, but upon inevitable necessity. 3 *Inst. 56.* See 9 *G. 4. c. 31. ante, p. 339.*

IV. Manslaughter.

Manslaughter, what.

Manslaughter is thus defined:—the unlawful killing of another without malice either express or implied: which may be either voluntarily, upon a sudden heat; or involuntarily, but in the commission of some unlawful act. 4 *Black. Com. 191.* 1 *Hale, 466.* 1 *Haw. c. 30. § 1.* 1 *East's P. C. 218.*

Without malice.

There is no difference between murder and manslaughter, but that murder is upon malice forethought, and manslaughter upon a sudden occasion. As if two meet together, and striving for the wall, the one kill the other, this is manslaughter and felony. And so it is, if they had upon that sudden occasion gone into the field and fought, and the one had killed the other, this had been but manslaughter, and no murder; because all that followed was but a continuance of the first sudden occasion, and the blood was never cooled till the blow was given. 3 *Inst. 55.*

Accessaries.

There can be no accessaries to this offence before the fact, because it must be done without premeditation. 1 *Haw. c. 30. § 2.* 1 *East's P. C. 218.*

Nature of provocation, and of circumstances.

But there may be accessaries after the fact. 3 *Inst. 55.*

It is by no means, however, every provocation, however gross, which will reduce the offence of killing to manslaughter; words of reproach, insulting words or gestures, or trespasses against land or goods, will not of themselves make the killing to be manslaughter instead of murder, if the offender make use of a deadly weapon, or shew an intention to kill or to do some great bodily harm. 1 *Russ. 486.*

A blow struck.

If *A.* provoke *B.* by words, and *B.* strike *A.* (not mortally), and

then *A.* strike again, and *B.* kill *A.*, the stroke by *A.* is a new provocation, and it will be manslaughter only. 1 *Russ. ibid.*

So, in case of other personal assaults, if it be resented immediately, and the aggressor killed in the heat of blood. 1 *Russ. 487.*

Unless indeed the revenge is disproportioned to the injury, and outrageous and barbarous in its nature. *Ibid.*

So, where a man is restrained of his personal liberty. 1 *Russ. 487.*

So, where an adulterer has been detected by the husband with his wife. 1 *Russ. 488.*

So, in many other cases, provocations which were not of any serious nature have been allowed to extenuate the offence, where the party killing has not acted with cruelty, or used dangerous instruments. 1 *Russ. 488. et seq.*

But the plea of provocation will not avail the party killing, if it appears that he sought for and induced the provocation, in order to afford him an opportunity of wreaking his malice. 1 *Russ. 490:*

In cases of combat arising upon sudden quarrel or provocation, and before the parties have time to cool, it will be manslaughter only if death ensue, provided no undue advantage be sought or taken on either side. 1 *Russ. 495.*

Though it is murder if any one kill an officer in the execution of his duty, in endeavouring to arrest such person, or kill a private individual legally assisting such officer, or legally taking such person into custody, for the purpose of bringing him to justice; yet this protection extends to such only as act upon proper authority, and use their authority in a proper manner: but if the officer or private person exceed his legal authority, it will be no longer murder, but manslaughter. 1 *Russ. 501, 502.*

So the process, whether it be writ or warrant, must not be defective in the frame of it, and it must issue in the ordinary course of justice, from a court or magistrate having jurisdiction. 1 *Russ. 511.*

But it is not material that there may have been error or irregularity in the proceedings previous to the issuing of the process. 1 *Russ. 511.*

If the process, however, is defective in the frame of it, as, if there is a mistake in the name or addition of the person on whom it is to be executed; or if the name of the officer or the party be inserted without authority, and after the issuing the process, this will make the crime no more than manslaughter. 1 *Russ. 512.*

On indictment against *G. H.* for stabbing *I. S.*, to prevent the lawful apprehension of the said *G. H.*, it appeared that *I. S.* acted under a warrant to take — *H.*, of, &c. by whatsoever name he may be called or known, the son of *Samuel H.*, to answer, &c. on the oath of *F. B.*, an officer of the sheriff of *W.*, for assaulting him in the execution of his duty, and that *G. H.* stabbed him for attempting to take him on that warrant: on case, twelve judges (all who met) held the warrant ill, because, if it omitted the Christian name, it should have assigned some reason, and have given some other distinguishing particulars of *G. H.*; and his conviction was held wrong. *M. T. 1830, R. v. Hood, MS. Bayley B. S. C. 1 M. 281.*

Peace-officers, and all other ministers of justice, are bound not to exceed the necessity of the case in the execution of their duty. If, therefore, they proceed to extremities, and death ensue, upon

Other assaults.

Outrageous revenge.

Imprisonment.

Adulterer detected.

No use of dangerous weapons.

Where provocation is sought for.

Mutual combats.

Officer or other making a lawful arrest.

Process must be substantially valid.

Previous irregularity, not material.

Warrant having a blank for the Christian name of the person to be apprehended, and giving no reason for such omission, and not furnishing any distinguishing particulars, is bad.

Officers must not use more violence than required.

a slight interruption, or without there being any reasonable necessity, it will be murder, or manslaughter, according as the circumstances of the case may vary. 1 *Russ.* 529. 532.

Correction of child or apprentice, &c.

The same principles apply, also, where the death of a child or of an apprentice, &c. is occasioned by the undue correction of the parent or master. 1 *Russ.* 532.

Death of child by unskilful midwife.

Giving a child, whilst in the act of being born, a mortal wound upon the head as soon as the head appears, and before the child has breathed, will, if the child is afterwards born alive and dies thereof, and there is malice, be murder. *E. T.* 1832.

An unskilful man, who acted as midwife, to facilitate a woman's delivery, broke the child's skull before it had the opportunity to breathe, and the child died of the wound immediately after it was born:—It was insisted, that as the child was not born when the wound was given, the prisoner could not be guilty of manslaughter. But *Bolland B.* at the trial, and the judges (thirteen) afterwards, held he might, and conviction right. *E. T.* 1832, *R. v. Senior*, *MS. Bayley B.* S. C. 1 M. 346.

9 G. 4. c. 31. Punishment of manslaughter,

By 9 G. 4. c. 31. § 9., every person convicted of manslaughter shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction for any term not exceeding four years, or to pay such fine as the court shall award.

Contra form. stat. not necessary to warrant transportation for life.

R. v. Robert Chatburn, R. v. Thomas Rushworth. These prisoners were tried before *Bolland B.*, the former at *York*, the latter at *Appleby, Sum. Ass.* 1833, on indictments for murder, and were each convicted of manslaughter; and when sentence of transportation for life was about to be passed, it was objected, that as the indictment did not conclude *contr. form. stat.*, such sentence could not be passed:—The learned judge thought it unnecessary to conclude *contr. form. stat.*, where the offence was not created by statute, but only the punishment increased (2 *Haw.* 8th edit. 477. 1 *Vent.* 13. *Thomas Burgen's case*, 2 *Hale*, 191.); and passed sentence of transportation in each case, but took the opinion of the judges, who were unanimously of opinion that he was right. *M. T.* 1833. *MS.*

V. Murder.

Murder, what.

Murder is, when a man of sound memory, and of the age of discretion, unlawfully killeth any person under the king's peace, with malice forethought, either expressed by the party, or implied by law, so that the party wounded or hurt die of the wound or hurt, within a year and a day. 3 *Inst.* 47.

Malice expressed.

By *malice expressed*, is meant a deliberate intention of doing any bodily harm to another, whereunto by law a person is not authorised. 1 *Hale*, 451.

And the evidences of such a malice must arise from external circumstances, discovering that inward intention; as lying in wait, menacings antecedent, former grudges, deliberate compassings, and the like, which are various, according to variety of circumstances. 1 *Hale's Sum.* 51.

Malice implied.

Malice implied is in several cases; as when one voluntarily kills another without any provocation; for in this case the law pre-

sumes it to be malicious, and that he is a public enemy of mankind. 1 *Hale*, 455, 456.

Poisoning also implies malice, because it is an act of deliberation. 1 *Hale*, 455.

Also when an officer is killed in the execution of his office, it is murder, and the law implies malice. 1 *Hale*, 457.

Also where a prisoner dies by duress of the gaoler, the law implies malice, by reason of the cruelty. 3 *Inst.* 52.

And in general, any formed design of doing mischief may be called malice, and therefore not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that shew the heart to be perversely wicked, is adjudged to be of malice *prepense*, and, consequently, murder. 2 *Haw.* c. 31. § 18. 2 *Str.* 766.

Malice prepense.

For when the law makes use of the term *malice aforethought*, as descriptive of the crime of murder, it is not to be understood in that narrow restrained sense to which the modern use of the word *malice* is apt to lead one, a principle of malevolence to particulars; for the law by the term *malice* (*malitia*) in this instance meaneth, that the fact hath been attended with such circumstances as are the ordinary symptoms of a wicked heart, regardless of social duty, and fatally bent upon mischief. *Fost.* 256, 257.

Malice aforethought.

And wherever it appears that a man killed another, it shall be intended *prima facie* that he did it maliciously, unless he can make out the contrary, by shewing that he did it on a sudden provocation, or the like. 1 *Haw.* c. 31. § 32.

Also, wherever a person in cool blood, by way of revenge, beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far. 1 *Haw.* c. 31. § 38.

Beating a person in cold blood.

If *A.* procures *B.*, an idiot or lunatic, to kill *C.*, *A.* is guilty of the murder as principal, and *B.* is merely an instrument. So if *A.* lay a trap or pitfall for *B.*, whereby *B.* is killed, *A.* is guilty of the murder as a principal in the first degree, the trap or pitfall being only the instrument of death. 1 *Russ.* 423.

Killing by means of an idiot, &c.

Murder may be committed upon any person within the king's peace: therefore, to kill an alien enemy within the kingdom, unless it be in the heat and actual exercise of war, or to kill a Jew, an outlaw, one attainted of felony, or one in a *premunire*, is as much murder as to kill the most regular-born Englishman. 1 *Russ.* 424.

Killing an alien enemy, outlaw, &c.

The killing may be effected by poisoning, striking, starving, drowning, and a thousand other modes by which life may be extinguished; but there must be some external violence or corporal damage: and, therefore, where the mind is so affected by strong impressions, or by harsh and unkind usage, that either sudden death ensues, or some mortal disease is contracted, the killing is not such as the law can notice. 1 *Russ.* 425.

It must be by some injury to the body.

If a man, however, does an act which is likely to lead to death, and of which death is actually the consequence, such killing may be murder, although no stroke be struck by himself, and no killing may have been primarily intended: as where a person carried his sick father, against his will, in a severe season from one town to another, by reason whereof he died; and where a harlot, being delivered of a child, left it in an orchard covered only with leaves,

Acts from which death proceeds.

in which condition it was killed by a kite; in these and similar cases it was considered that the acts so done, wilfully and deliberately, were of malice prepense. 1 *Russ.* 425.

By negligence and harsh usage towards an apprentice.

Wherever there is found to be actual malice, or a wilful disposition to injure another, or an obstinate perseverance in doing an act necessarily attended with danger, without regard to the consequences, as if a master, by premeditated negligence, or harsh usage, cause the death of his apprentice, it will be murder. 1 *Russ.* 426. See *R. v. Friend*, C. C. R. 20.

Thus, where the prisoner, upon his apprentice returning to him from *Bridewell*, whither he had been sent for misbehaviour, in a lousy and distempered condition, did not take that care of him which his situation required, and which he might have done; not having suffered him to be in a bed on account of the vermin, but having made him lie on the boards for some time without covering, and without common medical care; and the death of the apprentice, in the opinion of the medical persons who were examined, was most probably occasioned by his ill treatment in *Bridewell*, and the want of care when he went home, and the medical persons inclined to think that, if he had been properly treated when he came home, he might have recovered; the court, under these circumstances, and others in favour of the prisoner, left it to the jury to consider, whether the death of the apprentice was occasioned by the ill-treatment he received from his master after returning from *Bridewell*, and whether that ill-treatment amounted to evidence of malice; in which case they were to find him guilty of murder. The prisoner was found guilty of manslaughter. *Self's case*, 1 *East's P. C.* 226.

Death of apprentice through cruel usage, want of proper food, &c.

R. v. Squire and his wife, Stafford Lent Assizes, 1799, cor. Lawrence J. MS. The prisoner *Charles Squire*, and *Hannah*, his wife, were indicted at *Stafford Lent Assizes, 1799*, for the murder of *Joseph Green*, a parish apprentice, bound to the prisoner *Charles*. It was proved that both the prisoners had treated the apprentice in a most cruel and barbarous manner for a considerable length of time, by tying a cord round his middle when naked, and taking him to a brook, and drawing him by the rope up and down the brook over-head; by beating him naked with a twisted cord; by throwing flashes and sparks of fire from red-hot iron rods upon him when only in his shirt; by beating him with a red-hot iron rod and burning him; by repeated beatings with files, hammers, and sharp instruments, and with rods and fists, so that he was seldom without burns, cuts, wounds, and black eyes; by suspending him naked by a cord round his middle to a beam on the top of the shop, with one leg tied to the other thigh, and the great toe of the other just touching the ground, and his hands buckled behind; by suspending him by the heels by a cord tied round his ancles up to the beam, and hanging with his head towards the ground, but not touching it, and his hands tied behind him, so that he was black in the face, and blood gushed out at his mouth; and leaving him in the shop in that situation and locking the door, so that he was speechless, and must inevitably have died, if a boy who passed by had not got the key, and gone into the shop and cut him down; by tying him and placing him on his naked back upon the floor in a small room all night, and other acts of inhuman barbarity; and, lastly, by not giving him sufficient food

and nourishment. The surgeon, who had examined the boy, and had seen him before, deposed, that in his judgment the boy died from debility and for want of proper food and nourishment, and not from the wounds, &c. which he had received; and while the learned judge was proceeding to examine the surgeon whether in his judgment the series of cruel usage the boy had received might not have so far broken his constitution as to promote the debility, and co-operate, along with the want of proper food and nourishment, to bring on his death, the surgeon was seized with a fainting fit, and was obliged to be taken out of court, and could not afterwards attend. Mr. J. Lawrence called up *Williams* Serjt. and *Ryder*, who were of counsel for the prosecution, and stated his doubts, that, as it did not appear from the evidence of the surgeon that the death was occasioned by those acts of violence in which the wife was proved to have been as active as her husband, but, on the contrary, the death was not occasioned by them, and as unfortunately there was no evidence on the point the learned judge was inquiring into, by the accident that happened to the surgeon, the case was short as to the wife: *for she being the servant of her husband, and, therefore, it not being her duty to provide the apprentice with sufficient food and nourishment, she was not guilty of any breach of duty in not providing him therewith. If, indeed, the husband had allowed her sufficient food for the apprentice, and she wilfully withheld it from him, then she would be guilty.* (Mrs. Ridley's case, 2 Camp. 650.; and see tit. Apprentice.) But here the fact was otherwise, and, therefore, though *in foro conscientie* she is equally guilty with her husband, yet, in point of law, she cannot be said to be guilty of not providing the apprentice with sufficient food and nourishment. *Williams* Serjt. thereupon asked the judge, what he should have done if no surgeon had examined the body of the boy? To which he answered, that in such case he must have left it to the jury in the best manner he could: but here, a surgeon having examined the body, and given his opinion of the cause of the death, which went to negative that it proceeded from the wounds, &c. he could not leave it to the jury, and, indeed, had nothing to leave. That if any physician or surgeon were present who had heard the trial, he might be examined as to the point intended to be inquired into; but upon inquiry no such person being present, the learned judge delivered his opinion to the jury as before stated respecting the wife; and they accordingly acquitted her, and found the husband guilty. S. C. 1 Russ. 16. 426.

N. B. He was executed at *Stafford*, on Monday, the 1st of April, 1799.

And it seems to be agreed, that no breach of a man's word or promise, no trespass either to lands or goods, no affront by bare words or gestures, however false or malicious it may be, and aggravated with the most provoking circumstances, will excuse him from being guilty of murder, who is so far transported thereby as immediately to attack the person who offends him in such a manner as manifestly endangers his life, without giving him time to put himself upon his guard, if he kills him in pursuance of such an assault, whether the person slain did at all fight in his defence or not. 1 Haw. c. 31. § 33. No affront will justify murder.

If he have no particular notice that it did any such thing before, yet if it is *fera natura*, as a lion, a bear, a wolf, yea, an ape or a monkey, if it get loose and do harm to any person, the owner is liable to an action for the damage.

If he have notice of the quality of any such his beast, and use all due diligence to keep him up, and yet he breaks loose and kills a man, this is no felony in the owner, but the beast is a deodand.

But if he did not use that due diligence, but through negligence the beast goes abroad, after warning or notice of his condition, and kill a man, he thinks it is manslaughter in the owner. May be manslaughter;

But if he did purposely let him loose or wander abroad, with design to do mischief; nay, though it were with design only to fright people and make sport, and it kills a man, it is murder in the owner. or murder. 1 Hale, 431.

They that are present when any man is slain, and do not their best endeavour to apprehend the murderer or manslayer, shall be fined and imprisoned. 3 Inst. 53. Persons present when murder is committed.

If a murder be committed in the day-time in a town not inclosed, and the murderer escape, the township shall be amerced: but if inclosed, whether the murder be in the night or day, the town shall be amerced. 3 Inst. 53. Escape.

By 9 G. 4. c. 31. § 7., it is enacted, "that if any of his majesty's subjects shall be charged in *England* with any murder or manslaughter, or with being accessory before the fact to any murder, or after the fact to any murder or manslaughter, the same being respectively committed on land out of the united kingdom, whether within the king's dominions or without, it shall be lawful for any justice of the peace of the county or place where the person so charged shall be, to take cognizance of the offence so charged, and to proceed therein as if the same had been committed within the limits of his ordinary jurisdiction; and if any person so charged shall be committed for trial, or admitted to bail to answer such charge, a commission of oyer and terminer under the great seal shall be directed to such persons, and into such county or place as shall be appointed by the lord chancellor, or lord keeper, or lords commissioners of the great seal, for the speedy trial of any such offender; and such persons shall have full power to inquire of, hear, and determine all such offences within the county or place limited in their commission, by such good and lawful men of the said county or place, as shall be returned before them for that purpose, in the same manner as if the offences had been actually committed in the said county or place: Provided always, that if any peers of the realm, or persons entitled to the privilege of peerage, shall be indicted of any such offences by virtue of any commission to be granted as aforesaid, they shall be tried by their peers in the manner heretofore used: Provided also, that nothing herein contained shall prevent any person from being tried in any place out of this kingdom for any murder or manslaughter committed out of this kingdom, in the same manner as such person might have been tried before the passing of this act."

9 G. 4. c. 31.
British subjects may be tried in England for murder or manslaughter committed abroad.

Proviso.

By § 8., where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of *England*, shall die of such stroke, poisoning, or hurt in *England*; or being feloniously stricken, poisoned, or otherwise hurt at any Provision for the trial for murder and manslaughter, where the death

Woman concealing her dead child.

By § 14., if any woman shall be delivered of a child, and shall by secret burying or otherwise disposing of the dead body of the said child, endeavour to conceal the body thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and it shall not be necessary to prove whether the child died before, at, or after its birth: Provided always, that if any woman tried for the murder of her child shall be acquitted thereof, it shall be lawful for the jury, by whose verdict she shall be acquitted, to find, in case it shall so appear in evidence, that she was delivered of a child, and that she did, by secret burying or otherwise disposing of the dead body of such child, endeavour to conceal the birth thereof; and thereupon the court may pass such sentence as if she had been convicted upon an indictment for the concealment of the birth.

Concealment, though made known to an accomplice.

In cases of concealment, under 43 G. 3. c. 58., it has been ruled, that the woman might be found guilty, although she had made the birth known to an accomplice. *R. v. Cornwall*, C. C. R. 336. 1 Russ. 476.

To bring the case within the statute of concealing the birth, some act must be done after the birth.

In a case under 9 G. 3. c. 31. § 14., it appeared that the prisoner was delivered in a privy; that the child dropped from her there into the soil, and that there she left it. On an indictment for endeavouring to conceal the birth, by disposing of the body in a certain privy, the jury thought she went into the privy for the purpose of being delivered there, and for the purpose thereby of concealing the birth. On case, the judges thought, upon the wording of the act, it was necessary something should be done by the prisoner after the birth, to bring the case within the act, and pardon recommended. *M. T. 1829, R. v. Wilkinson*, MS. Bayley B.

As to want of care in the person injured.

If a man give another a stroke, not in itself so mortal but that with good care he might be cured, yet if the party die of this wound within the year and day, it is murder, or other homicide, as the case may be. But if it clearly appears that the wound was not mortal, but that the death of the party was caused by ill applications of himself or those about him of unwholesome salves or medicines, and not by the wound or hurt, it seems that this is no species of homicide. 1 Russ. 428.

Person injured living disorderly.

So it was resolved, that if one gives wounds to another, who neglects the cure of them, or is disorderly, and doth not keep that rule which a person wounded should do, yet if he die, it is murder or manslaughter, according to the circumstances. 1 Russ. 429.

Counselling a woman to kill her child.

It seems agreed, that where one counsels a woman to kill her child when it shall be born, who afterwards doth kill it in pursuance of such advice, he is an accessory to the murder. 1 Haw. c. 31. § 17.

Killing another by his own desire.

He who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head. 1 Haw. c. 27. § 6. *Sawyer's case*, O. B. 1815. S. P. 1 Russ. 424.

Keeping unruly cattle.

Ld. Hale says, if a man have a beast, as a bull, cow, horse, or dog, used to hurt people, and he hath notice thereof, and it doth any body hurt, he is chargeable with an action for it.

If he have no particular notice that it did any such thing before, yet if it is *fera natura*, as a lion, a bear, a wolf, yea, an ape or a monkey, if it get loose and do harm to any person, the owner is liable to an action for the damage.

If he have notice of the quality of any such his beast, and use all due diligence to keep him up, and yet he breaks loose and kills a man, this is no felony in the owner, but the beast is a deodand.

But if he did not use that due diligence, but through negligence the beast goes abroad, after warning or notice of his condition, and kill a man, he thinks it is manslaughter in the owner.

But if he did purposely let him loose or wander abroad, with design to do mischief; nay, though it were with design only to fright people and make sport, and it kills a man, it is murder in the owner. 1 Hale, 431.

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If a murder be committed in the day-time in a town not inclosed, and the murderer escape, the township shall be amerced: but if inclosed, whether the murder be in the night or day, the town shall be amerced. 3 Inst. 53.

By 9 G. 4. c. 31. § 7., it is enacted, "that if any of his majesty's subjects shall be charged in *England* with any murder or manslaughter, or with being accessory before the fact to any murder, or after the fact to any murder or manslaughter, the same being respectively committed on land out of the united kingdom, whether within the king's dominions or without, it shall be lawful for any justice of the peace of the county or place where the person so charged shall be, to take cognizance of the offence so charged, and to proceed therein as if the same had been committed within the limits of his ordinary jurisdiction; and if any person so charged shall be committed for trial, or admitted to bail to answer such charge, a commission of oyer and terminer under the great seal shall be directed to such persons, and into such county or place as shall be appointed by the lord chancellor, or lord keeper, or lords commissioners of the great seal, for the speedy trial of any such offender; and such persons shall have full power to inquire of, hear, and determine all such offences within the county or place limited in their commission, by such good and lawful men of the said county or place, as shall be returned before them for that purpose, in the same manner as if the offences had been actually committed in the said county or place: Provided always, that if any peers of the realm, or persons entitled to the privilege of peerage, shall be indicted of any such offences by virtue of any commission to be granted as aforesaid, they shall be tried by their peers in the manner heretofore used: Provided also, that nothing herein contained shall prevent any person from being tried in any place out of this kingdom for any murder or manslaughter committed out of this kingdom, in the same manner as such person might have been tried before the passing of this act."

By § 8., where any person, being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of *England*, shall die of such stroke, poisoning, or hurt in *England*; or being feloniously stricken, poisoned, or otherwise hurt at any

May be manslaughter;

or murder.

Persons present when murder is committed.

Escape.

9 G. 4. c. 31. British subjects may be tried in *England* for murder or manslaughter committed abroad.

Proviso.

Provision for the trial for murder and manslaughter, where the death

9G. 4. c. 31.

or the cause of
the death hap-
pens in Eng-
land, or at sea.

place in *England*, shall die of such stroke, poisoning, or hurt, upon the sea, or at any place out of *England*; every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in *England* in which such death, stroke, poisoning, or hurt shall happen, in the same manner, in all respects, as if such offence had been wholly committed in that county or place."

Petit treason.

By § 2., every offence which before the commencement of this act would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories, shall be dealt with, indicted, tried, and punished as principals and accessories in murder.

Principals and
accessaries
before the fact.
Death.

By § 3., "every person convicted of murder, or of being an accessory before the fact to murder, shall suffer death as a felon. And every accessory after the fact to murder shall be liable, at the discretion of the court, to be transported beyond the seas for life, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding four years."

Accessaries
after the fact.
Transportation
for life, or im-
prisonment.

§ 4. "Every person convicted of murder shall be executed according to law on the day next but one after that on which the sentence shall be passed, unless the same shall happen to be *Sunday*, and in that case on the *Monday* following; and the body of every murderer shall, after execution, either be dissected or hung in chains, as to the court shall seem meet. And sentence shall be pronounced immediately after the conviction of every murderer, unless the court shall see reasonable cause for postponing the same; and such sentence shall express not only the usual judgment of death, but also the time hereby appointed for the execution thereof, and that the body of the offender shall be (a) dissected or hung in chains, whichever of the two the court shall order: Provided always, that after such sentence shall have been pronounced, it shall be lawful for the court or judge to stay the execution thereof, if such court or judge shall so think fit."

When execu-
tion to take
place.

Sentence to be
pronounced
immediately.
Form of it.

Power of
respite.

Delivery for
dissection.

§ 5. "Whenever dissection shall be ordered by such sentence, the body of the murderer, if executed in the county of *Middlesex* or city of *London*, shall be immediately conveyed by the sheriff or sheriffs, or his or their officers, to the hall of the surgeons' company, or to such other place as the said company shall appoint, and shall be delivered to such person as the said company shall appoint, for the purpose of being dissected; and the body of the murderer, if executed elsewhere, shall in like manner be delivered to such surgeon as the court or judge shall direct, for the same purpose."

Prison regula-
tions as to
murderers.

§ 6. "Every person convicted of murder shall, after judgment, be confined in some safe place within the prison, apart from all other prisoners, and shall be fed with bread and water only, and with no other food or liquor, except in case of receiving the sacra-

(a) But see *infra*.

ment, or in case of any sickness or wound, in which case the surgeon of the prison may order other necessaries to be administered; and no person but the gaoler and his servants, and the chaplain and surgeon of the prison, shall have access to any such convict, without the permission in writing of the court or judge before whom such convict shall have been tried, or of the sheriff or his deputy: Provided always, that in case the court or judge shall think fit to respite the execution of such convict, such court or judge may, by a licence in writing, relax, during the period of the respite, all or any of the restraints or regulations herein-before directed to be observed."

By 2 & 3 W. 4. c. 75. (for regulating schools of anatomy) § 16., so much of 9 G. 4. c. 31. § 4. as relates to the dissection of the bodies of persons convicted of murder is repealed, and it is enacted, that in every case of conviction for murder, the court shall direct the prisoner either to be hung in chains, or to be buried within the precincts of the prison, as to the court shall seem meet, and that the sentence to be pronounced shall express that the body of such prisoner shall be hung in chains, or buried within the precincts of the prison, whichever of the two the court shall order.

2 & 3 W. 4. c. 75.
Dissection of
bodies of
murderers
abolished.

By 4 & 5 W. 4. c. 26., reciting 9 G. 4. c. 31., and 2 & 3 W. 4. c. 75., so much of said acts respectively as authorises or provides, that in cases of conviction for murder, the court may direct the body of the prisoner to be hung in chains, is repealed.

4 & 5 W. 4. c. 26.
Hanging in
chains of mur-
derers abol-
ished.

At a meeting of the judges in June 1752 to consider of this law, in the case of *Swan and Jefferys*, 1 *East's P. C.* 373., they agreed that this should be the sentence or judgment:—"That you be taken from hence to the prison from whence you came, and that you be taken from thence on the _____ day of _____ instant (or, next) to the place of execution, and that you be there hanged by the neck till your body be dead; and that your body when dead be taken down, and be dissected and anatomised:" but see 2 & 3 W. 4. c. 75. § 16. *supra*.

Form of sen-
tence.

William Wyatt was convicted before *Chambre J. at Cornwall Lent Assizes* 1812, upon an indictment for murder. The day of the week on which the trial took place was *Thursday*, but by mistake it was supposed to be *Friday*, and in passing sentence the execution was directed to be on the following *Monday* instead of *Saturday*. Immediately after sentence, the court was adjourned till the next morning, without the intervention of any other business, and the error being discovered soon after the adjournment, the prisoner was directed to be brought up at the sitting of the court in the morning, which was accordingly done, and the sentence was given, before any other business was entered upon, to be executed on the *Saturday*. An order was then made, pursuant to the authority given by the 4th and 7th sections of stat. 25 G. 2. c. 37., to stay the execution and relax the restraints imposed by the act, in order to take the opinion of the judges upon the following questions:—

Wyatt's case.
Stat. directory
only as to time
of execution.

1st. Whether the statute, so far as it requires the *time* of the execution to be expressed in pronouncing the sentence, is not to be considered as *directory* only, without invalidating the judgment when omitted, or preventing the entry of the proper judgment on record specifying the time of the execution?

2d. Whether, supposing the specification of time to be a necessary act in pronouncing sentence, the error was not legally corrected by what was done in open court the next morning, the court not having proceeded to any other business whatever in the intermediate time?

The judges, on conference, held that the stat. 25 G. 2. c. 37. (a) is *directory only* so far as it requires the time of the execution to be expressed in pronouncing the sentence, and therefore the error in this case was rightly and legally corrected by the proceedings on the following morning, no other business having intervened between the conviction and pronouncing sentence. The prisoner was accordingly executed. *C. C. R.* 230.

Rescuing the
body.

And by stat. 25 G. 2. c. 37. § 10., if after execution any person shall by force rescue or attempt to rescue the body, he shall be guilty of felony, and transported for seven years.

Murders in the
fleet.

By stat. 22 G. 2. c. 33. art. 28., all murders committed by any person in the fleet shall be punished with death, by the sentence of a court-martial.

VI. Self-murder.

Felo de se.

A *felo de se*, or felon of himself, is a person who, being of sound mind, and of the age of discretion, voluntarily killeth himself. *3 Inst.* 54. *1 Hale*, 411.

Year and day.

If a man give himself a wound, intending to be *felo de se*, and dieth not within a year and day after the wound, he is not *felo de se*. *3 Inst.* 54.

Person killed
by another at
his own desire.

A person killing another upon his desire or command is guilty of murder; but in this case the person killed is not *felo de se*, as his assent, being against all law, human and divine, was void. *1 Russ.* 429.

Killing himself
intending to
kill another.

If a man, attempting to kill another, miss his blow, and kill himself, or shooting at another, mortally wound himself by the bursting of his gun, he is *felo de se*; his death being the consequence of an unlawful malicious act towards another. *1 Russ.* 430.

Present, aiding
another in com-
mitting suicide.

In a case where a woman had been drowned, and it appeared that she and a man with whom she had cohabited had gone into the water from a boat, it was laid down by the judges, that if they had gone there with a previous agreement to destroy themselves, and she had thrown herself in by his encouragement and example, it would have been murder in the man, as a principal in the second degree. *R. v. Dyson*, *1 Russ.* 430. *C. C. R.* 523.

Woman dying
of poison taken
to procure a mis-
carriage is *felo
de se*.

Person pro-
curing it, acces-
sary before fact.
Cannot be tried
under 7 G. 4.
c. 64. s. 9.

If a woman take poison with intent to procure a miscarriage, and die of it, she is guilty of self-murder, whether she was quick with child or not; and a person who furnished her with poison for that purpose will, if absent when she took it, be an accessory before the fact only, and as he could not have been tried as such before 7 G. 4. c. 64. § 9., he is not triable as a substantive felon under that act. *R. E. T.* 1832.

Prisoner was indicted as an accessory before the fact to the murder of *Sarah Wormsley*, who was charged in the indictment with wilfully murdering herself by poison. It appeared that she

(a) This statute is now repealed, except as to rescues and attempts to rescue, viz. §§ 9. & 10.

was with child by the prisoner, and knowingly took the poison, at his instigation, to procure a miscarriage. On conviction and case, three points were raised: 1st, whether she was *felo de se*; and eight judges, against *Bolland, Littledale, Park, and Lord Tenterden*, held she was: 2d, whether the prisoner was an accessory before the fact; the judges were unanimous he was; and 3d, whether he could be tried under 7 G. 4. c. 64. § 9. as an accessory; and nine judges, against *Patteson, Alderson, Park, and Vaughan*, held he could not: he could not have been tried at all before 7 G. 4., and that stat. was to be considered as extending to those persons only as before were triable either with or after the principal; not to make those triable who before could never have been tried. *E. T. 1832, R. v. Russell, MS. Bayley B. S. C. 1 M. 356.*

It is not every melancholy or hypochondriacal distemper that denominates a man *non compos*, for there are few who commit this offence but are under such infirmities; but it must be such an alienation of mind as renders a person to be a madman, or frantic, or destitute of the use of reason, which will denominate him *non compos*. 1 *Hale*, 412. See tit. Lunatics.

Non compos,
who is.

The offender herein doth incur a forfeiture of goods and chattels, but not of lands; for no man can forfeit his land without an attainder by course of law. 3 *Inst.* 54. See tit. Forfeiture.

Forfeiture.

Nor shall his goods be forfeited, until it be lawfully found by the oath of twelve men; and this belongs to the coroner to inquire of, upon view of the body. And if the body cannot be viewed, the justices in sessions may inquire thereof; for they have power by their commission to inquire of all felonies; and a presentment thereof found before them entitles the king to the forfeiture. 3 *Inst.* 54, 55. *Dalt. c. 144.*

But nevertheless, the forfeiture shall relate to the time of the wound given, and not to the time of the death, or of the inquisition. 3 *Inst.* 55. *Dalt. c. 144.* 1 *Hale's Sum.* 29. 1 *Haw. c. 27.* § 10.

To what time
forfeiture re-
lates.

But *Ld. Hale*, in his History of the Pleas of the Crown, seemeth to doubt whether it shall not relate to the time of the death only, and not the time of the wound given. 1 *Hale*, 414.

Nor doth the offence work any corruption of blood or loss of dower. 1 *Haw. c. 27.* § 8.

Corruption of
blood.

But by stat. 4 G. 4. c. 52., after reciting, that whereas it is expedient that the laws and usages relating to the interment of the remains of persons, against whom a finding of *felo de se* shall be had, should be altered and amended; it is enacted, that from and after the passing of this act (8th July, 1823), it shall not be lawful for any coroner, or other officer having authority to hold inquest, to issue any warrant or other process directing the interment of the remains of persons, against whom a finding of *felo de se* shall be had, in any public highway; but that such coroner or other officer shall give directions for the private interment of the remains of such person *felo de se*, without any stake being driven through the body of such person, in the churchyard or other burial-ground of the parish or place in which the remains of such person might by the laws or custom of *England* be interred if the verdict of *felo de se* had not been found against such person; such interment to be made within twenty-four hours from the finding of the inquisition, and to take place between the hours of nine and twelve at night.

4 G. 4. c. 52.
Remains of
persons against
whom a finding
of *felo de se* is
had, to be
privately buried
in the parish
churchyard.

Rites of Christian burial not to be performed; and former laws and usages not to be altered.

§ 2. Provided, that nothing herein contained shall authorise the performing of any of the rites of Christian burial on the interment of the remains of any such person as aforesaid; nor shall any thing herein-before contained be taken to alter the laws or usages relating to the burial of such persons, except so far as relates to the interment of such remains in such churchyard or burial ground, at such time and in such manner as aforesaid.

Horses.

FOR horse-stealing, and for other offences relating to horses, see tit. Cattle.

House.

See tit. Burglary.

How far protected by law.

A MAN's home or habitation is so far protected by the law, that if any person attempt to break open a house in the night time, and is killed in such attempt, the slayer shall be acquitted and discharged. And so tender is the law in respect of the immunity of a man's house, that it will never suffer it to be violated with impunity. Hence, in part, arises the animadversion of the law upon eaves-droppers, nuisances, and incendiaries; and to this principle it must be assigned, that a man may assemble people together lawfully (at least if they do not exceed eleven), without danger of raising a riot, rout, or unlawful assembly, in order to protect and defend his house; which he is not permitted to do in any other case. 4 *Blac. Com.* 223.

Burglary and felony.

In the case of burglary, which is breaking and entering a dwelling-house in the night time with intent to commit felony, it is a capital offence, although no felony be actually committed; for which see tit. Burglary.

7 & 8 G. 4. c. 29. Crimes committed in dwelling houses.

Where the offence falls short of burglary, it is, by 7 & 8 G. 4. c. 29. § 12., made a capital felony if any person shall steal any chattel, money, or valuable security to any value whatever in any dwelling house, any person therein being put in fear; and although the two other offences contained in the same section, viz. first, breaking and entering a dwelling-house, and stealing therein any such property whatever; and, second, the stealing in any dwelling-house any such property to the value in the whole of 5*l.* or more, are no longer liable to the sentence of death, yet they are considered and punished as aggravated larcenies. See tit. Larceny from the house.

Breaking open doors to apprehend offenders.

Concerning the breaking open the doors of a house in order to apprehend offenders, it is to be observed, that the law never allows of such extremities but in cases of necessity; and therefore that no one can justify the breaking open another's door to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance. 2 *Harc.* c. 14. § 1.

Where the king is party.

But where a person authorised to arrest another who is sheltered in a house, is denied quietly to enter into it, in order to take him,

it seems generally to be agreed, that he may justify breaking open the doors in any case where the king is party, as upon a warrant from a justice of the peace to find sureties for the peace or good behaviour, or for the levying of a forfeiture upon a penal statute, which gives the whole or any part of such forfeit to the king. 2 *Haw. c. 14. § 2.* See tit. *Arrest.*

In a civil suit, an officer cannot justify breaking open an outward door or window in order to execute process. If he do, he is a trespasser. *Fost. 319.*

Outward doors or windows are such as are intended for the security of the house against persons from without endeavouring to break in. 1 *Hale, 458.* 1 *East, P. C. 323.* 1 *Russ. 747.* These are protected by the privilege which has been before mentioned; but if the officer find the outward door open, or it be opened to him from within, he may then break open any inward door, if he find that necessary to execute his process. *Fost. 319.* Thus it has been held, that an officer, having entered peaceably at the outer door of a house, was justified in breaking open the door of a lodger, who occupied the first and second floors, in order to arrest such lodger. *Lee v. Gansel, Corp. 1.* But it seems, that if the party against whom the process is issued be not within the house at the time, the officer can only justify breaking open inner doors in order to search for him, after having first demanded admittance. *Ratcliffe v. Burton, 3 B. & P. 223.* Though, in case the person or the goods of the defendant are contained in the house which the officer has entered, he may break open any door within the house without any further demand. *Per Gibbs J., in Hutchinson v. Birch and another, 4 Taunt. 619.* If, however, the house is the house of a stranger and not of the defendant, the officer must be careful to ascertain that the person or the goods (according to the nature of the process) of the defendant are within, before he breaks open any inner door; as, if they are not, he will not be justified. *Cooke v. Birt, 5 Taunt. 765.* *Johnson v. Leigh, 6 Taunt. 240.*

In a case where an outward door was in part open, being divided into two parts, the lower latch of which was closed, and the upper part open, and the officer put his arm over the latch to open the part which was closed, upon which a struggle ensued between him and a friend of the prisoner's, and the officer prevailing, the prisoner shot at and killed him, it was held by the judges to be murder. (a)

This personal privilege of an individual, in respect to his outward door or window, is confined also to cases where the breach of the house is made in order to arrest the occupier, or any of his family, who have their domicile, their ordinary residence there: for if a stranger, whose ordinary residence is elsewhere, upon a pursuit take refuge in the house of another, this is not the castle of such stranger, nor can he claim in it the benefit of sanctuary. *Fost. 320. 5 Rep. 93.* But it should be observed, that in all cases where the doors of strangers are broken open upon the supposition of the person sought being there, it must be at the peril of find-

Outer door,
protection of.

Inner door.

Outer door
divided and
part open.

Protection of
house does not
extend to the
case of a
stranger taking
refuge there.

Search for a
stranger.

(a) *Baker's case, 1 Leach, 112, 1 East's P. C. 323.* It should be observed, that in this case there was proof of a previous resolution in the prisoner to resist the officer, whom he afterwards killed in attempting to attach his goods in his dwelling-house, in order to compel an appearance in the county court. The point reserved related to the legality of the attachment.

ing him there, unless, as it seems, where the parties act under the sanction of a magistrate's warrant, *2 Hale*, 103. *Fost.* 321. *1 East's P. C.* 324.; and an officer cannot even enter the house of a stranger, though the door be open, for the purpose of taking the goods of a defendant, but at his peril whether the goods be found there or not; and if they be not found there, he is a trespasser. *Cooke v. Birt*, 5 *Taunt.* 765. *per Dallas J.* And it has been decided, that a sheriff cannot justify breaking the inner doors of the house of a stranger *upon suspicion* that a defendant is there, in order to search for such defendant, and arrest him on mesne process. *Johnson v. Leigh*, 6 *Taunt.* 246. See, as to demand of entrance, *post*, p. 355.

House of Correction. See *tit. Gaols*, Sect. xv.

Hue and Cry.

[3 Ed. 1. c. 9.—18 Ed. 2.—7 J. 1. c. 5.]

Meaning of words.

LORD Coke saith, that hue and cry (called in ancient records *hutesium & clamor*) do mean the same thing; for that *heur* in *French* is to hoot or shout, in *English* to cry. *2 Inst.* 173. *3 Inst.* 116.

But since it appeareth by the old books (of which also *Ld. Coke* maketh observation, *2 Inst.* 173.), that hue and cry was anciently both by horn and by voice, it may seem that these two words are not synonymous; but that this *hutesium* or *hooting* is by the horn, and *crying by the voice*; which also accordeth with the *French* word *hutchet*, which signifieth a huntsman's horn; so that hue and cry in this sense will properly signify a pursuit by horn and by voice. Which kind of pursuit of robbers by blowing a horn, and by making an outcry, is said to be practised also in *Scotland*. And this blowing of a horn, by way of notice or intelligence, in other cases as well as in the pursuit of felons, seemeth to have been in use of very ancient time; for amongst the laws of *Wihfred* king of *Kent*, in the year 696, this is one: that "if a stranger go out of the road, and neither shout nor blow a horn, he shall be taken for a thief."

Hue and cry, what.

Hue and cry is the old common law process after felons, and such as have dangerously wounded any person; and this hath received great countenance and authority by several acts of parliament. *2 Hale*, 298.

Application to the constable.

When any felony is committed, or any person is grievously and dangerously wounded, or any person assaulted and offered to be robbed, either in the day or night, the party grieved, or any other, may resort to the constable of the vill; and, 1. Give him such reasonable assurance thereof, as the nature of the case will bear. 2. If he know the name of him that did it, he must tell the constable the same. 3. If he know it not, but can describe him, he must describe his person, or his habit, or his horse, or such circumstances as he knows, which may conduce to his discovery. 4. If the thing be done in the night, so that he knows none of these circumstances, he must mention the number of the persons, or the

way they took. 5. If none of all these can be discovered, as where a robbery or burglary or felony is committed in the night, yet they are to acquaint the constable with the fact, and desire him to search in his town for suspected persons, and to make hue and cry after such as may be probably suspected, as being persons vagrant in the same night; for many circumstances may *ex post facto* be useful for discovering a malefactor, which cannot be at first found. 2 *Hale*, 100, 101. 3 *Inst.* 116.

For levying hue and cry, although it is a good course to have the warrant (A) of a justice of the peace, when time will permit, in order to prevent causeless hue and cry; yet by the frame of the statutes it is by no means necessary, nor is it always convenient, for the felon may escape before the warrant be obtained, and hue and cry was part of the law before justices of the peace were first instituted. 2 *Hale*, 99.

Justice's warrant.

(A)

Hue and cry may be raised without.

The duty of the constable is, to raise the power of the town, as well in the night as in the day, for the prosecution of the offender. 3 *Inst.* 116.

Constable to raise the town.

And upon hue and cry levied against any person, or where any hue and cry comes to a constable, whether the person be certain or uncertain, the constable may search suspected places within his vill, for the apprehending of the felons. 2 *Hale*, 103.

And to search.

But though he may search suspected places or houses, yet his entry must be by the doors being open; for he cannot break open doors barely to search, unless the person against whom the hue and cry is levied be there; and then it is true he may; therefore, in case of such search, the breaking open the door is at his peril; namely, justifiable, if he be there; not justifiable, if he be not there. But it must be always remembered, that in case of breaking open a door, there must be first a notice given to them within of his business, and a demand of entrance, and a refusal, before the doors can be broken. 2 *Hale*, 103. 2 *Haw. c.* 14. § 1. See *ante*, p. 353. and *post*, p. 356.

Breaking doors to search.

Notice to be given.

If the person against whom the hue and cry is raised be not found in the constablewick, then the constable shall give notice to the next constable, and he to the next, until the offender be found, or till they come to the sea-side. And this was the law before the conquest, 3 *Inst.* 116.

Notice to the next constable.

And the officer of the town where the felony was done, as also every officer to whom the hue and cry shall afterwards come, ought to send to every other town round about him, and not to one next town only. And in such cases it is needful to give notice in writing (to the pursuers) of the things stolen, and of the colour and marks thereof, as also to describe the person of the felon, his apparel, horse, and the like, and which way he is gone, if it may be. *Dalt. c.* 54.

And to the next.

But if the hue and cry be upon a robbery, burglary, manslaughter, or other felony committed, but the person that did the fact is neither known nor describable by person, clothes, or the like, yet such hue and cry is good, as hath been said, and must be pursued, though no person certain be named or described. 2 *Hale*, 103.

What shall be done where the person cannot be described.

And therefore in this case all that can be done is, for those that pursue the hue and cry to take such persons as they have probable cause to suspect, as for instance, such persons as are vagrants, or

such suspicious persons as come late into their inn or lodgings, and give no reasonable account where they have been, and the like. *2 Hale*, 103.

3 Ed. 1. c. 9.
All persons
shall follow the
hue and cry.

By stat. 3 *Ed. 1. c. 9.*, all shall be ready, and apparelled, at the commandment and summons of sheriffs (or constables, *2 Inst.* 171.), and at the cry of the county, to sue and arrest felons; on pain of a grievous fine. And if default be found in the lord of the franchise, the king shall take the franchise to himself; and if in the sheriff or other officer, they shall have one year's imprisonment, and shall make a grievous fine.

And the life of hue and cry is fresh suit. *3 Inst.* 117.

Breaking doors
to arrest upon
pursuit.

If the person pursued by hue and cry be in a house, and the doors are shut, and refused to be opened on demand of the constable, and notification of his business, he may break open the doors; and this he may do in any case where he may arrest, though it be only a suspicion of felony; for it is for the king and commonwealth, and therefore a virtual *non omittas* is in the case: And the same law is, upon a dangerous wound given, and a hue and cry levied upon the offender. *2 Hale*, 102., *ante*, p. 353-355.

Killing in the
pursuit.

And it seems in this case, that if he cannot be otherwise taken, he may be killed; and the necessity excuseth the constable. *2 Hale*, 102.

Arresting an
innocent per-
son.

If hue and cry be raised against a person certain for felony, though possibly he is innocent, yet the constables and those that follow the hue and cry may arrest and imprison him in the common gaol, or carry him to a justice of the peace, to be examined where he was at the time of the felony committed, and the like. *2 Hale*, 102.

Arresting a
person by de-
scription.

If the hue and cry be not against a person certain, but by description of his stature, person, clothes, horse, and the like, yet the hue and cry doth justify the constable or other persons following it, in apprehending the person so described, whether innocent or guilty: for that is his warrant; it is a kind of process that the law allows of, not usual in other cases, namely, to arrest a person by description. *2 Hale*, 103.

Arresting upon
hue and cry
levied without
cause.

In case of hue and cry once raised and levied, on supposal of a felony committed, though in truth there was no felony committed, yet those that pursue hue and cry may arrest and proceed, as if so be a felony had been really committed.

Arrest on hue
and cry, and
arrest by private
person: distinc-
tion.

And therefore the justification of and imprisonment by a person upon suspicion, and by a person (especially a constable) upon hue and cry levied, do extremely differ; for in the former case, there must be a felony averred to be done, and it is issuable; but in the latter, to wit, upon hue and cry, it need not be averred, but the hue and cry levied upon information of a felony is sufficient, though perchance the information were false.

And the reasons hereof are these: — 1. Because the constable cannot examine the truth or falsehood of the suggestion of him that first levied it, for he cannot administer to him an oath; and if he should forbear his pursuit of the hue and cry till it be examined by a justice of the peace, the felon might escape, and the pursuit would be lost and fruitless. 2. Because the constable is by the several acts of parliament compellable to pursue hue and cry, and he is punishable, and so are those of the vill, if they do it not.

3. Because he that first raiseth a hue and cry, where no felony is committed, that is, he who giveth the false information, is severely punishable by fine and imprisonment if the information be false.

Raiser of hue and cry, responsible.

And therefore, if he raise hue and cry upon a person that is innocent, yet they that pursue the hue and cry may justify the imprisonment of that innocent person; and the raiser is punishable: and by the same reason, if he give notice of a felony committed, where there was in truth none.

And here the justification of the imprisonment is mixed, partly upon the hue and cry, and partly upon their own suspicion: and therefore, 1. In respect that it is upon hue and cry, there needs no averment that the felony was done, if the arrest be by that constable that first received the information, and so raised the hue and cry, or if the arrest were made by that constable, or those vills to whom the hue and cry came at the second hand, it must be averred that such a hue and cry came to them, purporting such a felony to be done. 2. But also, inasmuch as the hue and cry neither names nor describes the person of the felon, but only the felony committed, and therefore the arrest of this or that particular person is left to the suspicion and discretion of the constable, or of the people of the second or third vill, he that arrests any person upon such general hue and cry must aver that he suspected, and shew a reasonable cause of suspicion.

By stat. 7 J. 1. c. 5., the constable, or any that come to his assistance, even in this case of hue and cry, may plead the general issue, and give the whole matter of the justification in evidence; for the pursuit of hue and cry, though performed by others as well as the constable, is principally the act of the constable of the vill, and the others are but as his deputies or assistants within the precincts of their constableness. 2 Hale, 101, 2, 3, 4.

7 J. 1. c. 5. General issue allowed to those who justify on hue and cry.

And they which levy not hue and cry, or pursue not upon hue and cry, may be indicted, fined, and imprisoned. 3 Inst. 117.

Punishment of those who follow not hue and cry.

And it is an article of the leet to inquire of hues and cries levied and not pursued. 18 Ed. 2.

A. Warrant to levy Hue and Cry on a Robbery having been committed.

A.

Westmorland { To all constables and other officers, as well in
to wit. { the said county of Westmorland as elsewhere,
to whom the execution hereof doth or shall
belong.

WHEREAS A. I., of ———, in the county of ———, yeoman, hath this day made information upon oath before me, J. P. esquire, one of his majesty's justices of the peace in and for the said county of W., that on this present ——— day of ———, in the ——— year of the reign of ———, betwixt the hours of three and four in the afternoon of the same day, at a place called ———, in the said county of W., in the king's highway there, two malefactors and felons to him the said A. I. unknown, in and upon him the said A. I. then and there being in the peace of God, and of our lord the king, feloniously did make an assault, and him the said A. I. then and there feloniously did put in great fear and danger of his life, and the sum of ———, of

lawful money of Great Britain, of the goods and chattels of him the said A. I., from the person and against the will of him the said A. I. then and there violently and feloniously did steal, take, and carry away; and that one of the said malefactors and felons, to him the said A. I. unknown, is a tall, strong man, and seemeth to be about the age of _____ years, is pitted in the face with the small pox, and hath the scar of a wound under his left eye, and had then on a dark brown riding coat, &c., and did ride upon a bay gelding with a star on his forehead, and the other, &c. And that after the said felony and robbery committed, they the said malefactors and felons, to him the said A. I. unknown, did fly and withdraw themselves to places unknown, and are not yet apprehended: These are therefore to command you forthwith to raise the power of the towns within your several precincts, and to make diligent search therein for the persons above described, and to make fresh pursuit and hue and cry after them from town to town, and from county to county, as well by horsemen as by footmen; and to give due notice thereof in writing, describing in such notice the persons and the offence aforesaid, unto every next constable on every side, until they shall come to the sea shore, or until the said malefactors and felons shall be apprehended; and all persons whom you or any of you shall, as well upon such search and pursuit as otherwise, apprehend, or cause to be apprehended, as justly suspected for having committed the said robbery and felony, that you do carry forthwith before some one of his said majesty's justices of the peace in and for the county where he or they shall be so apprehended, to be by such justice examined, and dealt withal according to law. And hereof fail you not respectively, upon the peril that shall ensue thereon. Given under my hand and seal _____, in the said county of W., the _____ day of _____ aforesaid, in the year aforesaid.

Indictment.

- I. Indictment, what.
- II. What Offences are indictable.
- III. Within what Time an Indictment shall be brought.
- IV. How far several Offenders or several Offences may be joined in one Indictment.
- V. Whether the Grand Jury may examine Witnesses against the King.
- VI. How many Witnesses are requisite to an Indictment.
- VII. Whether a Grand Jury may find an Indictment specially.
- VIII. Indictment to be in English.
- IX. Form of an Indictment. And herein of Indictments in Cases of Felonies committed on board Vessels employed on Canals, Navigable Rivers, on Stage Coaches and Waggons, and on the Boundaries of Counties. [7 G. 4. c. 64.]
- X. Charges of an Indictment.
- XI. Pleading.

XII. *Acquittal upon an Indictment.*

XIII. *Indictments in Counties of Cities and Towns Corporate.*

As to the removal of an indictment into another court, see title
Certiorari.

I. Indictment, what.

INDICTMENT cometh of the *French* word *enditor*, and signifieth, in law, an accusation found by an inquest of twelve or more upon their oath. An indictment is always the suit of the king, and, as it were, his declaration; and *the party who prosecutes it is a good witness to prove it.* And when such accusation is found by a grand jury, without any bill brought before them, and afterwards reduced to a form of indictment, it is called a *presentment*; and when it is found by jurors returned to inquire of that particular offence only which is indicted, it is properly called an *inquisition.* 1 *Inst.* 126. 2 *Haw. c.* 25. § 1.

II. What Offences are indictable.

All offences of a *public* nature, *i. e.* such acts or attempts as tend to the prejudice of the community in general, are indictable. And therefore, not only all actual breaches of the peace, as *Riots, Affrays, Assaults, &c.*, but also every criminal irregularity that tends to disturb the good order of government, or to endanger or annoy the tranquillity, welfare, or convenience of the public, is punishable by indictment. *Vide* 2 *Haw. c.* 25. § 4. 3 *MS. Sum.* 28. *Et per* Lawrence J., *R. v. Higgins*, 2 *East*, 21.

The following therefore are indictable misdemeanors, *viz.*

1. All open offences against God and religion, or against public decency, that tend to corrupt the morals of the people. Of this sort are blasphemous books, or any prophane or obscene publications, bawdy-houses, &c. *Sir C. Sedley's case*, 1 *Sid.* 168. *R. v. Crunden*, 2 *Campb.* 89. 1 *Russ.* 64.
2. All crimes that are *mala in se*, and of evil example.
3. All practices that tend to endanger the constitution, as bribery at elections, seditious pamphlets, &c.
4. All contempts of the king or his courts.
5. All attempts to corrupt, mislead, or pervert public justice, or to make it a handle of fraud or oppression.
6. All acts and designs against the common occasions, necessities, and general commerce of the public; such as unlawful combinations, monopolies, forestalling, engrossing and regrating, adulteration of victuals, and all public cheats, &c. &c.

In this class are also included the several kinds of common nuisances, both positive and negative, *i. e.* either positive acts that annoy the public, or the neglect of some duty which the public have a right to require from the defendant, and by the omission of which a general inconvenience arises.

It is an indictable offence to incite and solicit a servant to steal his master's goods, though the servant do not steal the goods, and no other act be done except the soliciting and exciting. *R. v. Higgins*, 2 *East*, 5.

And such offence is indictable at the quarter sessions, as falling in with that class of offences which, being violations of the law of

Offences of public nature;

against the general good.

Nuisances, either positive acts, or of omission.

Soliciting another to commit a felony.

Indictment (*What Offences indictable.*) [Criminal

the land, have a tendency, as it is said, to a breach of the peace, and are therefore cognisable by that jurisdiction. In the case referred to, Lord *Kenyon* C. J., in delivering his opinion, said, "Can it be a question, in a country professing to have laws subservient to justice and morality, whether this be an offence? It would be a slander upon the law to suppose that an offence of such magnitude is not indictable." *Lawrence* J. said, "All offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable. Then the question is, whether an attempt to incite another to steal is not prejudicial to the community? of which there can be no doubt. The whole argument for the defendant turns upon a fallacy, in assuming that no act is charged to have been done by him; for a solicitation is an act. It is an endeavour or attempt to commit a crime." The doctrine laid down by Lord *Mansfield* in *Res v. Scofield*, *Cald.* 397. 403., comprises all the principles of the former decisions, that so long as an act rests in bare intention it is not punishable by our laws; but immediately when an act is done, the law judges, not only of the act done but of the *intent* with which it is done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. That case is ably reported, and contains every thing convincing that can be said on the subject.

Attempt to commit a crime.

Intent accompanied by an act.

Attempt to bribe a minister.

A corporator.

A juryman.

To suborn.

Neglect to provide sustenance for an infant servant.

Exposing in a public highway a child infected with the small-pox.

S. P.

Offences against statutes

An attempt to commit a felony, or even a misdemeanor, is in itself a misdemeanor. *Per Grose* J., *2 East*, 8. *1 Russ.* 45.

In cases where the intent to commit a crime is accompanied by an overt act, the party may be indicted for an attempt to commit the offence. *1 Russ.* 44.

It is indictable to attempt to bribe a cabinet minister to give defendant an office in the colonies. *Vaughan's case*, *4 Burr.* 2494. *1 Russ.* 45.

So, to promise money to a member of a corporation to induce him to vote for the election of a mayor. *Plympton's case*, *2 Ld. R.* 1377. *1 Russ. ib.*

So, to attempt by bribery to influence a juryman in giving his verdict. *Young's case.* See *1 Russ.* 45.

So, to attempt to suborn a person to commit perjury. *1 Russ.* 46. Neglect or refusal of a master to provide sufficient food and sustenance for a child of tender years, being his servant, may amount to an indictable offence. *1 Russ.* 51.

In a late case in the court of K. B., it was held an indictable offence *unlawfully* and *injuriously* to carry a child infected with the small-pox along a public highway, in which persons are passing, and near to the habitations of the king's subjects. *R. v. Vantandillo*, *4 M. & S.* 73. See also *2 Chitt. Crim. L.* 656. *1 Russ.* 114.

In a subsequent case, in the same court, it was held also an indictable offence in an apothecary, after having inoculated children, *unlawfully* and *injuriously* to cause them to be exposed in the public street, to the danger of the public health. *Res v. Burnet*, *4 M. & S.* 272.

N. B. The defendant was sentenced to six months' imprisonment. See *R. v. Sutton*, *4 Burr.* 2116.

Also, it seems to be a good general ground, that wherever a

statute prohibits a matter of public grievance to the liberties and security of a subject; or commands a matter of public convenience, as the repairing of the common streets of a town; an offender against such statute is punishable, not only at the suit of the party grieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. Yet, if the party offending hath been fined to the king in the action brought by the party (as it is said that he may in every action for doing a thing prohibited by statute), it seems questionable whether he may afterwards be indicted, because that would make him liable to a second fine for the same offence. 2 *Haw. c. 25. § 4.*

of public import.

But if a statute extend only to *private* persons, or if it extend to all persons in general, but chiefly concerns disputes of a private nature, as those relating to distresses made by lords on their tenants; it is said that offences against such statutes will hardly bear an indictment. *Ib.*

Private. Grievances mainly of a private nature.

It was held by Lord *Ellenborough* C. J., that every unauthorised obstruction of a highway, to the annoyance of the king's subjects, is an indictable offence, in *R. v. Cross*, 3 *Camp. 227.*, where it was held to be an indictable offence for stage coaches to stand plying for passengers in the public streets.

Obstruction of highway.

An indictment will not lie for throwing down skins into the public way, by which a personal injury is accidentally occasioned. *R. v. Gill*, 1 *Str. 190.* Nor for acting, not being qualified, as a justice of the peace, *Castle's case*, *Cro. Jac. 643.* Nor for selling short measure, *R. v. Osborn*, 3 *Burr. 1697.* Nor for excluding commoners by inclosing, *Willoughby's case*, *Cro. Eliz. 90.* Nor for an attempt to defraud, if neither by false tokens nor conspiracy, *R. v. Channell*, 2 *Str. 793.* Nor for secreting a woman likely to swear a bastard against defendant. *R. v. Chandler*, 2 *Ld. Raym. 1368.* Nor for bringing a bastard child into a parish, *R. v. Warne*, 1 *Str. 644.* Nor for entertaining idle and vagrant persons in the defendant's house, *R. v. Langley*, 1 *Ld. Raym. 790.* Nor for keeping a house to receive women with child, and deliver them, *R. v. Macdonald*, 3 *Burr. 1645.*

Injuries or frauds not of public concern.

It is not an indictable offence to act in breach of a by-law of a borough. *R. v. Sharpless*, 4 *T. R. 777.* 1 *Russ. 51.*

Disobeying a by-law.

A mere act of trespass, such as entering a yard, digging the ground, and cutting a stable, if unaccompanied by circumstances constituting a breach of the peace, are not indictable. 1 *Russ. 51.*

Mere trespass to land or building.

Nor, pulling off the thatch from a man's house. *Ibid.*

To house.

Where indictment stated that defendant, with force and arms, wilfully, forcibly, and injuriously seized and took away from *J. S.* a warrant to apprehend defendant for forgery, after conviction judgment was arrested, as it charged nothing but a private trespass. 1 *Russ. 51.*

Forcibly taking from the person.

But an indictment will lie for taking goods forcibly, if such taking is proved to be a breach of the peace. 1 *Russ. 52.*

Aliter, if a breach of the peace.

Also, where a statute makes a new offence, by prohibiting and making unlawful any thing that was lawful before, and appoints a particular method of proceeding, without mentioning an indictment, it seemeth to be settled at this day that no indictment can be maintained. 2 *Str. 679.* 2 *Burr. 803.* 2 *Haw. c. 26. § 4.* 1 *Rep. 67.*

Statutes, prescribing a particular remedy.

Positive prohibitory clause.

But Lord *Hale* (2 *Hale*, 171.) distinguishes upon this, and says, that if a statute prohibit any act to be done, and by a substantive clause give a recovery by action of debt, bill, plaint, or information, but mentions not an indictment, the party may be indicted upon the *prohibitory clause*, and thereupon fined, but not to recover the penalty. But then it seems, the fine ought not to exceed the penalty; but if the act be not prohibitory, but only, that if any person shall do such a thing, he shall forfeit so much, to be recovered by action of debt, bill, or plaint, or information, then he cannot be indicted for it, but the proceeding must be by action, bill, plaint, or information. *Vide R. v. Harris*, 4 T. R. 202.

Further penalty added.

Also, where a statute adds a further penalty to an offence prohibited by the common law, and prescribes a partial remedy by a summary proceeding, there either method may be pursued. 2 *Haw. c. 25*. § 4. 2 *Burr.* 803. Therefore it is indictable to disobey an order of sessions for the maintenance of relations under the stat. 43 *Eliz. c. 2.*, though that statute gives a penalty; for before the statute of *Elizabeth* disobedience to an order of sessions was an offence indictable at common law. *R. v. Robinson*, *Clerk*, 2 *Burr.* 799.

Statutes prescribing punishment, or giving a cumulative remedy.

The true rule of *distinction* seems to be, that where the offence intended to be guarded against by a statute, was *punishable* before the making of such statute prescribing a particular method of punishing it, there such particular remedy is cumulative, and does not take away the former remedy. But where the statute only enacts, "that the doing any act not punishable before, shall *for the future* be punishable in such and such a *particular manner*," there it is necessary that such *particular* method, by such act prescribed, *must be specifically pursued*; and not the common law method of an *indictment*. *Per Lord Mansfield* C. J. S. C. 2 *Burr.* 805.

S. P.

In *R. v. Balme*, 2 *Cowp.* 648., the defendants were indicted for disobeying an order of justices, on the statute 13 G. 3. c. 78., for the widening of a highway. It was objected, that a summary method of proceeding before the justices being directed by the statute for the recovery of a penalty, the prosecution ought to have been in that form, and not by way of indictment. But, by the court, disobeying an order of justices is an offence at common law; and, therefore, the prosecutor might proceed either way; the penalty given by the statute is only accumulative.

And it is a general rule, that subsequent statutes, which add accumulative penalties, do not repeal former statutes. *R. v. Jackson*, 1 *Cowp.* 297.

Statutes enforcing or prohibiting an act.

Wherever there is a prohibitory law, if it be still in force, the proper remedy under it is by indictment; and where a statute forbids the commission of any act, the doing it wilfully is indictable, although it be done without any corrupt motive. 1 *Cowp.* 297. 4 T. R. 457. 5 T. R. 607.

Penalty under a separate clause.

It is also a clear and established principle, that when a new offence is created by an act of parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause, on the ground of its being a misdemeanor. *Per Ashhurst J.*, 4 T. R. 205.

R. v. Hollis, Sitt. at West. after M. T. 60 G. 3. cor. Abbott C. J. 2 Stark. N. P. 536.—This was an indictment against the defendant, for not having removed an encroachment, made by extending his house in *Goswell-street*, in pursuance of an order made by two justices of the peace under the building act (14 G. 3. c. 78.), confirmed by the court of quarter sessions, upon an appeal by the defendant against the order. — After the indictment had been read, *Bolland*, for the defendant, submitted to the court that no indictable offence was alleged on the face of the indictment, and urged, that this was the proper time for making such an objection, for which he referred to a case before Lord *Ellenborough*, who said that it was proper to make such an objection *in limine*; and he was prepared, he said, to shew that the conviction before the two justices was void; and that, if so, no judgment could be supported upon a vicious record. — *Abbott C. J.* said, that it appeared that the defendant was charged with having disobeyed an order of two magistrates, and that he thought the objection was premature in the present stage of the business. The counsel for the prosecution then gave in evidence the petition of the defendant to the court of quarter sessions to receive his appeal. This petition recited the information and conviction before the two magistrates. Both the information and adjudication charged the defendant with having unlawfully made an addition to a house of the third rate or class of buildings, projecting three feet six inches beyond the upright line of the said building. The adjudication of the justices alleged, that this was a common nuisance; and further, directed that the same should be abated on or before the 12th of *January* then next. *Bolland*, for the defendant, objected that no offence against the building act, 14 G. 3. c. 7. § 40. 60., was charged in the conviction, and consequently, that no indictment could be supported for disobedience of an order which was utterly void. The building act, § 49., enacted, that no bow-window or other projection should be built or added to any first, second, third, or fourth-rate building next to any public street, &c., so as to extend beyond the general line of the fronts of the houses, except such projections as may be necessary for copings, cornices, &c. *Gurney and Andrews*, for the prosecution, answered, that the order of sessions was grounded upon the act of the defendant, as set forth in his own petition; and that by the § 78. of the building act, it was enacted, that the judgment and determination of the justices at the sessions should be binding on the party. It was also urged, that, as the objection appeared upon the record, the proper way of objecting would be by motion in arrest of judgment. — *Abbott C. J.* The order would be binding and conclusive in a case where the justices had jurisdiction over the subject matter; but where they have not, they cannot make an order binding upon any one. The subject matter of the order is not within the act of parliament. The defendant was accordingly acquitted.

Where an indictment for disobeying an order of justices, appears to be founded on an order made in a case in which the justices had no jurisdiction, the court will direct an acquittal at the sittings, although the defect appear on the record.

III. Within what Time an Indictment shall be brought.

By stat. 31 *Elix. c. 5.*, all indictments upon any statute penal whereby the forfeiture is limited to the king, shall be sued within two years after the offence committed; if the forfeiture be limited

31 *Elix. c. 5.*
Limitation
where there
is forfeiture to

the king, or to king and prosecutor.

to the king and prosecutor, the suit shall be in one year: and in default thereof, the same shall be sued for the king within two years after that year ended. But where a statute limits a shorter time, the suit shall be brought within such time limited.

But for indictments of felonies and other misdemeanors where there is no forfeiture to the king, or to the king and prosecutor, no time is limited by any statute; but the several acts of general pardon have the effect of a like limitation. The last act of which kind was that of the 20 G. 2. c. 52., for certain offences committed before June 15. 1747.

IV. How far several Offenders or several Offences may be joined in one Indictment.

Several offences in one indictment.

Misdemeanors.

It is no objection in arrest of judgment that an indictment contains several charges of the same nature (as several misdemeanors) in the different counts; for the judgment is the same: it would be otherwise, indeed, if the legal judgment on each count were different, for that would be like a misjoinder in civil actions. *Young & others v. the King in error*, 3 T. R. 107.

In felonies.

Indictment may be quashed, or prosecutor put to his election.

Per Buller J. ib. "In misdemeanors, the case *R. v. Benfield & Saunders*, 2 Burr. 984., shews, that it is no objection to an indictment that it contains several charges. The case of felonies admits of a different construction; but even there it is no objection in this stage of the prosecution. On the face of an indictment every count imports to be for a different offence, and is charged as at different times: and it does not appear on the record whether the offences are or are not distinct. But if it appear before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury; for he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to elect on which charge he will proceed. But if the case has gone the length of a verdict, it is no objection in arrest of judgment. So, where evidence affects several persons differently, I have selected the evidence as applicable to each, and left their cases separately to the jury."

No ground for arrest of judgment.

Per Grose J. ib. This is no objection even in the case of felonies, still less is it so in misdemeanors. (a)

Indictment may charge divers offences. Practice in felony.

In *R. v. Jones*, 2 Campb. 132., *Ld. Ellenborough* said, "In point of law there is no objection to a man being tried on one indictment for several offences of the same sort; it is usual in felonies for the judge in his discretion to call upon the counsel for the prosecution to select one felony, and to confine themselves to that, but this practice has never been extended to misdemeanors.

Felonies which require different judgments.

If, however, the several offences charged in the several counts are such as would require different judgments to be given, as for instance, if it were murder in one count, and simple larceny in

(a) A count for embezzling bank-notes upon the statute may be joined with a count for larceny. *Rex v. Johnson*, 3 M. & S. 539.

another, it will be sufficient ground for arresting the judgment. 3 *T. R.* 106.

The first count of an indictment charged prisoner with breaking and entering and stealing from a warehouse, and the second for knowingly receiving the stolen goods ; after conviction on the latter count, a case was reserved, and the two questions were : 1st, whether the two counts could be joined, the punishment on the first count being transportation for life, while on the second it was for fourteen years only ; and 2dly, whether the prosecutor ought to have been put to his election. The judges were unanimous that the two charges might be joined, but were equally divided as to prosecutor being put to his election ; and it was agreed that the clerks of assize should be directed not to put both such charges in one indictment. *Tr. T.* 1829, *R. v. Galloway and another*, 1 *R. & M.* 234. The rule so laid down was afterwards confirmed in another case. *M. T.* 1830, *R. v. Madden*, 1 *M.* 277.

The same felony may be charged in different ways, in different counts, in order to meet the facts of the case as they may come out in evidence : thus, if there be a doubt whether the goods stolen or the house in which a burglary was committed, be the goods or house of *A.* or *B.*, they may be stated in one count as the goods or house of *A.*, and in another count as the goods or house of *B.* 2 *B. & P.* 508.

Where the indictment charged *A.* with stealing, and *B.* as the receiver of various articles, which it was probable, from the evidence, that *A.* had taken at several different times, it was nevertheless held that the prosecutor ought not to be put to his election, as it was not impossible but that they all might have been taken at one time, and there was nothing to guide the prosecutor in making the selection. But as the evidence against *B.* shewed that there had been distinct acts of receiving, the prosecutor must elect what act of receiving he relied upon. It was held allowable, however, to give evidence against *B.* of her having in her possession other articles of the stolen property, in order to shew the guilty knowledge. *R. v. Dunn and another*, 1 *R. & M.* 146.

The statute 7 & 8 *G. 4. c.* 28. s. 6., which abolishes the benefit of clergy in cases of felony, provides, that nothing therein contained shall prevent the joinder in any indictment of any counts, which might have been joined before the passing of that act.

It appears to have been formerly holden, that a person could not be prosecuted upon one indictment for assaulting two persons, each assault being a distinct offence. *R. v. Clendon*, 2 *Ld. Raym.* 1572. 2 *Str.* 870. But in *R. v. Benfield and Saunders*, 2 *Burr.* 984., the court held this case of *Clendon* not to be law, and said, cannot the king call a man to account for a breach of the peace because he broke two heads instead of one? It is a prosecution in the king's name for the offence charged ; and not in the nature of an action, where each person injured is to recover separate damages.

In that case, which was for the defendants' singing a libellous song against *John and Jane Cooke*, the court held, that this being a joint act done by both (for they had both joined in the act of singing the libellous matter), they might well be joined in one and the same indictment.

Count for larceny and count for receiving may be joined in same indictment.

But *qu.* whether prosecutor must not make his election.

The same felony charged in different modes.

Various stolen articles, possibly taken at once, though probably not so ; prosecutor not to be put to his election.

Stolen goods received at different times ; prosecutor must elect.

Other acts of receiving admissible, to shew guilty knowledge.

One indictment may be preferred for assaulting two persons.

Joint singing of a libellous song.

Several offenders joined in one indictment in different counts.

Nor is it any objection on demurrer, that several different defendants are charged in different counts of an indictment for offences of the same nature, where there may be the same plea and the same judgment, though it may be a ground for an application to the discretion of the court to quash the indictment. *R. v. Kingston and others*, 8 East, 41.

Several defendants, and several offences of the same nature.

Several were indicted for an offence against a local act of parliament, and there were several counts, in some of which some were named and not the rest, and each count charged each set of persons jointly, and this was objected to on demurrer, as being a misjoinder of counts against different sets of offenders, and not like charging the same defendants with different offences *ejusdem generis*, in different counts. Lord *Ellenborough* C. J. said, this would have been a good ground of application to the court to quash the indictment, for the inconvenience which might arise at the trial, from joining different counts against different offenders; but where to the offences so charged in different counts there may be the same plea and the same judgment, there is no authority for saying that such joinder in one indictment is bad in law; nor is there any legal incongruity on the face of it to warrant us in giving judgment for the defendants on demurrer. 8 East, 46.

Several offenders in same count.

If there be several offenders who commit the same offence, though in law they are several offences in relation to the several offenders, yet they may be joined in one indictment; as, if several commit a robbery, or burglary, or murder. 2 Hale, 173.

Joint indictment of two, separate convictions requiring different judgments.

The two prisoners *A.* and *B.* were indicted jointly for a capital felony, in stealing from a dwelling-house to the amount of 6*l.* 10*s.*: *A.* was found guilty to the amount of 6*l.*, and *B.* of 10*s.* On cases, the question was, what sentence could be passed, the two prisoners having been convicted of two different felonies, which were subject to distinct judgments. The judges were of opinion, that a pardon being granted or a nol. pros. being entered as to *B.*, judgment might be given against *A.* *R. v. Hempstead and Hudson*, C. C. R. 344.

Burglary and capital larceny, judgment for on same indictment.

Where there was a joint indictment against three prisoners for burglary and for stealing to the value of 40*s.* in the dwelling house; of whom one pleaded guilty, and the other two were acquitted of the burglary, but found guilty of the capital larceny, on case reserved, a majority of the judges held, that judgment should be entered against all three; against one for the burglary and capital larceny, and against two for the larceny. *M. T.* 1823, *R. v. Butterworth and others*, C. C. R. 520.

On indictment for a receiving of stolen goods by *A.* and *B.*, *A.* and *B.* cannot be convicted of two separate acts of receiving.

But where two persons, mother and son, were indicted for knowingly receiving stolen goods, and it appeared in evidence that the mother received the stolen property from the son, and was not present when the son received it, the judges were of opinion that the mother was improperly convicted, for that it was a separate receiving by each, and not a joint receiving as laid in the indictment. *E. T.* 1830, *R. v. Messingham and another*, 1 R. & M. 259.

Larcenies committed of several things, though at several times and from several persons, may be joined in one indictment. 2 Hale, 173. But see the judgment of *Buller J. supra*.

The indictment must be several where the offence arises

If the crime wholly arise from any such joint act, which in itself is criminal, without any regard to any particular personal default of the defendants, the indictment may charge the de-

defendants jointly or severally; and some may be acquitted and some convicted. But where the offence indicted does not wholly arise from the joint act of all the defendants, but from such act joined with some personal particular, defect, or omission of each defendant, without which it would be no offence, the indictment must charge them severally and not jointly; because the offence of each defendant arises from a defect peculiar to himself. 2 *Haw. c. 25.* § 89.

Two may be indicted jointly for a battery or extortion. *Reg. v. Atkinson*, 1 *Salk.* 382.

And so it is, though the offences are of several degrees, but dependent one upon another, as the principal in the first degree, and the principal in the second degree, to wit, present, aiding and abetting in the principal, and accessory before or after. 2 *Hale*, 173.

In *R. v. Philips and others*, 2 *Str.* 921., six were indicted in one indictment for perjury, and four of them pleading were convicted. It was moved, in arrest of judgment, that the crime of perjury is in its nature several, and two cannot be indicted together. And, by the court, there may be great inconveniences if this be allowed; one may be desirous to have a *certiorari*, and the other not; the jury on the trial of all may apply evidence to all that is but evidence against one. And they cited a case, *Q. v. Hodgson and others*, where two were indicted for being scolds, and compared to barratry, and it was held not to lie. And in the principal case judgment was arrested.

In *Tremaine's P. C.* 138., there is a precedent of an indictment against three for perjury committed by the three; they deposed to one fact, but their evidence differed each from each. *Rex v. Jole*, vide 7 *T. R.* 318.

On an indictment against several for a nuisance, in injuring a public navigation, by the heightening of banks for the protection of private lands, whereby the water was brought down in such force as to damage the navigation, it appeared by special verdict that the several defendants acted separately in raising the banks of their respective lands; but per Lord Tenterden C. J., as the grievance complained of is the result and effect of the acts of all jointly, there is no objection to an indictment including all. *R. v. Trafford and others*, 2 *B. & Ad.* 874.

R. v. Levy and others, *Sitt. at West. after H. T.* 59 G. 3. cor. *Abbott C. J.*, 2 *Stark. N. P.* 458. This was an indictment against *Levy* and others for a conspiracy. The indictment alleged, that *Elizabeth Harris* being in a state of pregnancy, during her parturition the defendants conspired together, by making loud noises, and by knocking violently against the wall of the room in which the prosecutrix lay, to injure and terrify her. There were two counts for conspiracies, and one for a riot, &c. It appeared that the prosecutrix, *Elizabeth Harris*, was a Jewess, and that she had lived with *James Tweedie*, a Christian, as his wife, under a promise of marriage from him, but that they had never been married; and it was proved, that the defendants (who were Jews), and who it appeared had been offended at the prosecutrix's supposed marriage with a Christian, had, on the day specified in the indictment, viz. the 13th of September, whilst the prosecutrix was in labour, been guilty of the annoyance complained of in the indictment.—

from the circumstances belonging to each defendant.

Several degrees of the same offence.

Not so, where the offence is the separate act of each; as perjury.

Where several persons do several acts, causing one joint nuisance, they may be indicted together.

Indictment charging misdemaneors in different counts on the same day. Different misdemaneors may be proved on different days.

Indictment (*Witnesses requisite to an.*) [Criminal

Evidence being afterwards offered of similar conduct on the part of the defendants on a different day from the 13th of September, *Andrews* objected, that since but one day was alleged on the record, without the addition "*and on divers other days and times,*" it was not competent to the prosecutor's counsel to adduce evidence of any offence on another day: and he referred to a case decided by Lord *Ellenborough*. *Abbott* C. J. said, that the present case was distinguishable from that cited, since here there were two counts for conspiracies and one for a riot; and that evidence at all events might be given under the different counts of offence on separate days. The jury found *Levy* and two others guilty of a conspiracy.

V. Whether the Grand Jury may examine Witnesses against the King.

Evidence for the crown alone.

Lord *Hale* (2 *Hale*, 157.) says, that the grand jury at the *assizes* or sessions ought only to hear the evidence for the king, and in case there be probable evidence they ought to find the bill, because it is but an accusation, and the party is to be put on his trial afterwards.

Which doctrine is also laid down by C. J. *Pemberton*, in the case of the earl of *Shaftesbury*. 8 *Howell's St. Tri.* 770.

But the learned editor of *Hale's History* observes upon this, that Sir *John Hawkins*, in his remarks on the said case, unanswerably shews, that a grand jury ought to have the same persuasion of the truth of the indictment as a petty jury or a coroner's inquest; for they are sworn to present the truth, and nothing but the truth. *Vide* 8 *Howell's St. Tri.* 837.

Indictment must be found on substantial evidence.

And Lord *Coke* says, that seeing indictments are the foundation of all, and they are commonly found in the absence of the party accused, it is necessary there should be substantial proof. 3 *Inst.* 25.

VI. How many Witnesses are requisite to an Indictment.

An indictment may be found upon the oath of one witness only, unless it be for high treason, which requires two witnesses, and unless, in any instance, it be otherwise specially directed by act of parliament. 2 *Haw. c.* 25. § 129.

Twelve at least may agree for the finding an indictment.

A bill is not to be found a true bill, unless a majority of the grand jury, consisting of twelve at the least, agree in thinking that there is sufficient evidence for putting the defendant on his trial: but if less than twelve, though a majority, agree in thinking so, the bill is thrown out, and must be endorsed "no true bill."

VII. Whether the Grand Jury may find an Indictment specially.

Grand jury cannot find part of a bill.

It seems to be generally agreed, that the grand jury may not find part of an indictment to be true, and part false; but must either find a true bill or *ignoramus* for the whole; and if they take upon them to find it specially, or conditionally, or to be true for part only, and not for the rest, the whole is void, and the party

cannot be tried upon it, but ought to be indicted anew. 2 Haw. c. 25. § 2.

But where there are two counts in the indictment, as one for a riot, another for an assault, the same may be considered as two distinct indictments; and the jury may affirm the bill as to one of the counts, and reject it as to the other. *Rex v. Fieldhouse*, 1 Cowp. 325.

And where a bill is presented for murder, the grand jury may find a true bill for manslaughter only. So ruled *per Garrow B. at Staff. Sum. Ass. 1822. Rex v. Caulkin*, MS.

Rex v. Mary Doran, 1 *Lench*, 538. At the Sept. sess. 1790, at *Hicks's Hall*, for the county of *Middlesex*, the managers of the *Westminster* insurance office preferred two indictments at the same time against one *Mary Doran*; the one for a felony at the common law, and under stat. 9 G. 1. c. 22., for setting fire to and burning the house of *Daniel Mathews*, in *Little Russell Street*, *Covent Garden*; and the other for a misdemeanor, charging, that she, being possessed of the same house as tenant for years to *Daniel Mathews*, did set fire to a certain room on the second floor in the said house, with intent to burn the houses contiguous and adjoining thereto.

The grand jury found both these indictments to be true bills; and the indictment for the felony was transmitted, as usual, from *Hicks's Hall* to the *O. B.* to be tried: but when the prisoner was put to the bar, the counsel for the crown perceiving from the depositions which were taken before the magistrate, that there was not sufficient evidence to sustain the charge of *felony*, stated to the court, that as there was another indictment found against the prisoner for the *misdemeanor*, he should, under these circumstances, decline the prosecution for the capital offence. — *Eyre C. B.* expressed a strong disapprobation of the practice of preferring different indictments at the same time, on the same case, for the *felony* and the *misdemeanor*; and desired that notice might be sent to the clerk of the indictments at *Hicks's Hall*, to prevent it in future. The grand jury cannot with propriety find two indictments for the same offence at the same time, and the continuance of the practice may produce many inconveniences.

Aliter, as to two counts.

Manslaughter may be found on bill for murder.

Two indictments for the same offence, one for the *felony* under a statute, and the other for the *misdemeanor* at common law, ought not to be preferred or found at the same time.

VIII. Indictment to be in English.

By stats. 4 G. 2. c. 26. and 6 G. 2. c. 14. all indictments, informations, inquisitions, and presentments, shall be in *English*, and be written in a common legible hand, and not court hand; on pain of 50*l.* to him that shall sue in three months.

In English.

IX. Form of an Indictment.

[7 G. 4. c. 64.]

In order to understand this matter rightly, it is judged requisite first to insert the entire form of an indictment, and then to take it in pieces, and explain the several parts of it in their order.

Which order shall be as follows:

1. *The caption.*
2. *The description of the person indicted.*
3. *Of the allegation of time, and the words vi et armis.*

4. *Of the allegation of place.*

5. *The description of the person indicting, or other person named.*

6. *The description of the offence.*

7. *The conclusion, and of technical averments.*

The instance which is chosen is on the statute of stabbing.

1 J. 1. c. 8.

N. B. This stat. is now repealed.

Nature of caption.

The caption of the indictment is no part of the indictment itself, (2 Hale, 166.) but is the style or preamble, or return that is made from an inferior court to a superior, from whence a *certiorari* issues to remove; or when the whole record is made up in form; for the record of the indictment, as it stands upon the file in the court where it is taken, is only thus, *The jurors for our lord the king upon their oath present*: when this comes to be returned upon a *certiorari*, it is more full and explicit, as follows:

Westmorland. } *AT the general quarter sessions of the peace holden at Appleby in and for the county aforesaid, the ——— day of ——— in the ——— year of the reign of our sovereign lord William the fourth of the united kingdom of Great Britain and Ireland king, defender of the faith, before J. P. and K. P. esquires, and others their associates, justices of our said lord the king, assigned to keep the peace of our said lord the king in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, by the oath of ——— good and lawful men of the county aforesaid, sworn and charged to inquire for our said lord the king, and for the body of the county aforesaid, it is presented:*

That John Armstrong late of Appleby in the county aforesaid, yeoman, not having God before his eyes, but being moved and induced by the instigation of the devil, on the ——— day of ——— in the ——— year of the reign of our said sovereign lord William the fourth, of the united kingdom of Great Britain and Ireland king, defender of the faith, at the hour of nine in the afternoon of the same day, with force, and arms, at Appleby aforesaid in the county aforesaid, in and upon one George Harrison in the peace of God and of our said lord the king then and there being (the aforesaid George Harrison not having any weapon then drawn, nor the aforesaid George Harrison having first stricken the said John Armstrong) feloniously did make an assault; and that the aforesaid John Armstrong, with a certain drawn sword of the value of five shillings, which he the said John Armstrong in his right hand then and there had and held, the said George Harrison in and upon the right side of the belly near the short ribs of him the said George Harrison, (the aforesaid George Harrison as is aforesaid then and there not having any weapon drawn, nor the aforesaid George Harrison then and there having first stricken the said John Armstrong,) then and there feloniously did stab and thrust, giving unto the said George Harrison then and there with the sword aforesaid, in form aforesaid, in and upon the right side of the belly near the short ribs of him the said George Harrison, one mortal wound of the breadth of one inch and of the depth of nine inches; of which said mortal wound he the said George Harrison then and there instantly died: And so the jurors aforesaid upon their oath aforesaid do say that

the said John Armstrong him the said George Harrison, on the aforesaid thirtieth day of March in the year aforesaid, at Appleby aforesaid in the county aforesaid in manner and form aforesaid feloniously did kill, against the peace of our said lord the now king, his crown and dignity, and against the form of the statute in such case made and provided.

Westmorland.] The name of the county must be in the margin, or repeated in the body of the caption. 2 *Hale*, 166.

The county which is laid in the margin denotes the county whence the grand jurors come.

The cases agree that it is not necessary to repeat the name of the county in the body of the caption, though it is usual to do so; but that a reference to the county in the margin by the word *aforesaid* is sufficient. 1 *Saund.* 308. n. (1).

It seems agreed, that if such caption either set forth no place at all where the indictment was found, or do not shew with sufficient certainty that the place set forth is within the jurisdiction of the court before which it was taken, as where it sets forth the indictment as taken at a session of the peace holden for such a county at *B.*, without shewing in what county *B.* is, otherwise than by putting the county into the margin, it is insufficient. 2 *Haw. P. C. c.* 25. § 125.

At the general quarter sessions of the peace.] The court where the indictment is made must be expressed: otherwise the caption is erroneous. 1 *Hale*, 166. 2 *Haw. c.* 25. § 118.

Holden at Appleby in and for the county aforesaid.] It must appear where the sessions was held; and that the place where it was held is within the extent of the commission. 2 *Hale*, 166.

Where the caption of the indictment stated the court of quarter sessions where such indictment was found to have been holden on an impossible day, it was holden to be fatal. *R. v. Fearnley*, 1 *T. R.* 316.

The ——— day of ——— in the ——— year of the reign of our sovereign lord William the fourth.] It hath been adjudged that if the caption of the indictment describe the sessions holden in the time past, and not in the time present; or, as holden on such a day in such a year of the king, without ascertaining what king, it is insufficient. But it seems to be agreed, that it is sufficient to express the year of the king, without adding that of our Lord. 2 *Haw. c.* 25. § 127.

The ——— day.] Figures to express numbers are not allowable in an indictment; but numbers, whether cardinal or ordinal, must be expressed in words. 2 *Hale*, 170. Or at least in *Roman* numerals. *R. v. Phillips*, 1 *Str.* 261.

Before J. P. and K. P. esquires, and others, their associates.] It is not necessary to name all the justices, but only so many as are enabled to hold a sessions, and the rest may be supplied by the words *and others their associates*. 2 *Hale*, 167.

And although no sessions can be holden without one of the justices being of the *quorum*, yet in the caption there need not be any mention which of them, or whether any of them, are of the *quorum*; for it is sufficient if *de facto* the sessions be holden before him or them that are of the *quorum*, although not so mentioned, and so is the usual course. 2 *Hale*, 167.

Name of the county must appear in the caption.

Not necessary to repeat name of county.

Caption must shew a place within the jurisdiction of the court.

Court.

Place.

Time.

Numbers.

Before whom holden.

Oyer and
terminer.

And also to hear and determine, &c.] These words are necessary, because without this clause (by the commission) they cannot proceed by indictment. 2 Hale, 166. 1 Str. 442.

Oath of grand
jury to be
stated.

By the oath.] If the caption conclude that *it is presented*, without saying *on their oath*, it shall be quashed: for their presentment must be upon oath, and so returned. 2 Hale, 168.

So their names.

By the oath of ———.] It must name the jurors that presented the offence; and therefore "by the oath of A. B., C. D., and others," is not good; for it may be, the presentment was by a less number than twelve, or that some one of them was incapacitated, who might influence all the rest, as, for instance, a person outlawed; in which case the indictment may be quashed by plea. 2 Hale, 167.

It seems, however, to be doubtful, whether an indictment would be quashed for want of the jurors' names appearing in the caption. 2 Haw. c. 25. § 126.

Not necessary
in K. B. record.

It has been decided in *Dom. Proc.*, that the names of the jurors need not appear in the caption, in the *King's Bench* record. *Aylett's case*, July 6. 1826. 1 Saund. 248. n. (1).

Good and law-
ful men.

Good and lawful men of the county aforesaid.] These words also, *Ld. Hale* saith, are necessary. But *Mr. Hawkins* says, that it is no exception to an indictment found in the superior courts, and that it hath been overruled; because all men shall be intended to be honest and lawful till the contrary appear. 2 Hale, 167. 2 Haw. c. 25. § 17.

Sworn und
charged.

Sworn and charged to inquire for our said lord the king and for the body of the county aforesaid.] Though *Lord Hale* says it seems requisite to add this clause, 2 Hale, 167.; it is holden in *R. v. Morgan*, 1 *Ld. Raym.* 710., that it is not necessary.

IX. (2.) Of the Indicttee.

Name of
defendant.

It is presented; that John Armstrong, late of Appleby.] The name of the party indicted regularly ought to be inserted, and inserted truly in every indictment. 2 Hale, 175.

Inhabitants of
a parish.

But the inhabitants of a parish may be indicted for not repairing the highway, although no person is particularly named. *Wood's Inst. b. 4. c. 5.*

1 H. 5. c. 5.
Statute of addi-
tions.

To prevent the inconvenience of troubling one person for another, it is by stat. 1 H. 5. c. 5. "ordained and established, that in every original writ of actions personal, and appeals, and indictments in which the exigent shall be awarded, to the names of the defendants in such writs original, appeals and indictments, additions shall be made of their estate or degree, or trade, and of the towns or hamlets, or places, and the counties, of the which they were, or are, or in which they are or were or may be conversant: and if by process upon the said original writs, appeals, or indictments, in the which the said additions be omitted, any outlawries be pronounced, that they be void, frustrate, and holden for none; and that before the outlawries pronounced, the said writs and indictments shall be abated by exception of the party."

Where process
of outlawry
lies.

The exigent is a writ whereby the sheriff is commanded to proclaim the party in the county court, in order to his being outlawed. And by these words the act extendeth only to cases where process of outlawry may be awarded; and therefore it

extendeth not to an indictment for encroaching on the highway, because in that case process of outlawry lieth not, but a distress. *Cro. Eliz.* 148.

But it extends to any indictment upon which process of outlawry lies, as well as to an appeal. *2 Haw. c. 25. § 70.*

Regularly by the common law, every natural man, having no name of dignity, ought to be named in all originals and other suits by his Christian name and surname; and that, before this act, sufficed; but if he had a name of inferior dignity (as knight or banneret), he ought to be named by his Christian name and surname, and by the addition of his name of dignity. *2 Inst.* 655.

It is not necessary that there should be any addition to the name of a prosecutor or prosecutrix in an indictment. *Sull's case, 2 Leach, 861.*

If there be a corporation of one sole person that hath a fee simple, and may have a writ of right, he may be named by the common law by his Christian name without any surname, as *John bishop of P.* *2 Inst.* 666.

If it be a corporation aggregate of many able persons, as mayor and commonalty, dean and chapter; the mayor or dean need not to be named by his Christian name, because that such a corporation standeth in lieu both of the Christian name and surname. *2 Inst.* 666.

A duke, marquis, earl, viscount, or baron, might by the common law be named by his Christian name, and by the name of his dignity; as *John duke of M.* *2 Inst.* 666.

According to some authorities, the defendant was bound to answer to an indictment for felony, though his name of baptism was mistaken. *2 Hale, 238. 1 Stark. C. P. 42.*

According to others, no advantage could be taken of a mistake in the surname, *Staunf. l. 3. c. 18. f. 182.*, though there might be of a mistake in the Christian name. *2 Haw. c. 25. § 68, 69. 1 Stark. C. P. 43.*

One indicted for a misdemeanor may plead that his surname is *Shakespeare*, and not *Shakepeare*, for the latter is not *idem sonans*. *R. v. Shakespeare, 10 East, 83.*

A man may be known by two surnames, as *J. S.* and *J. D.*, but not by two Christian names, as *J. S.* and *W. S.* *Bro. Abr. tit. Misnom. pl. 47.*

But the mistake in the Christian name is pleadable, and the party shall be dismissed from that indictment. *2 Hale, 176.*

But the safest way is to allow his plea of *misnomer*, both as to his surname and as to his Christian name; for he that pleads *misnomer* of either must in the same plea (*viz.* in *abatement*) set forth what his true name is, and then he concludes himself; and if the grand jury be not discharged, the indictment may presently be amended by the grand jury, and returned according to the name he gives himself. *2 Hale, 176.* But see *7 G. 4. c. 64. § 19., post, p. 379.*

Where a prisoner's name is unknown, and he refuses to disclose it, he may be indicted as a person whose name is unknown, but who was personally brought before the jurors by the keeper of the prison; but semb., that indicting him merely as a person unknown, without shewing who it is that the jurors mean to designate, is insufficient. *R. v. —, C. C. R. 489.*

Name and addition.

No addition necessary to name of prosecutor.

Of a corporation sole.

Of a corporation aggregate.

Of a peer.

Christian and surname.

Idem sonans.

Plea of misnomer.

Name unknown.

In trespass against several, one cannot plead the misnomer of his companion. *Bro. Abr. tit. Misnom. pl. 10. 59.*

Addition ;
alias dictus.

The addition, as well of the estate, degree, or mystery, as the town, hamlet, or place, ought by force of this act to be alleged in the first name; for an addition after the *alias dictus* is ill; as, for instance, where the indictment was against "W. R. *otherwise called* W. R. *of H.*" for without the *alias dictus* there is no addition of the vill; and if the party be not sufficiently named in the first part, the *alias* cannot aid or help it. *2 Inst. 669. 3 Salk. 20. Vide post, p. 377.*

Several defend-
ants; how their
additions shall
be set forth.

Where there are several defendants of different names and the same addition, it is safest to repeat the addition after each of their names, applying it particularly to every one of them. *2 Haw. c. 23. § 106.*

Father and son.

Where a father hath the same name and the same addition with a defendant, being his son, the action is abateable, unless it add the addition of *the younger* to the other additions; but where the father is the defendant, it is said that there is no need of the addition of *the elder*. *2 Haw. c. 23. § 106.* But see, in the case of an indictor, *R. v. Peace, 3 B. & A. 579. post, p. 383.*

So, if the son be in *custodia mareschalli*, and so declared against, the count may be good without the addition of *younger*, unless the father of the same name and additions be also in the custody of the marshal; for in these cases, a distinction must be made by some farther description. *2 Haw. c. 23. § 106. Lepiot v. Browne, 1 Salk. 7.*

Dignities.

Estate or degree.] In legal understanding these two words are of one signification, and do extend to persons of nobility, of dignity, and under the degree of nobility and dignity, as yeomen, &c. and do extend as well to the clergy as to the temporality, and to graduates and degrees in universities in any kind of profession. *2 Inst. 666.*

Baronet.

In the name of dignities, my Lord Coke includes *Baronets*: and in *Cro. Car. 371.* is a case where Sir *H. F. baronet* was indicted by the name of Sir *H. F. knight*: being arraigned, he said he was never knighted; and the indictment was held not sufficient: he was then indicted *de novo*, by the name of Sir *H. F. baronet*, and pleaded *not guilty*: and no objection made to the addition of baronet. Hence it seems to be a good name of addition.

Esquire.

Esquire is a good addition. And the eldest sons of peers, in the lifetime of their fathers, though frequently titular lords, yet are only esquires. So also the younger sons of peers, and their eldest sons in perpetual succession. Also the eldest sons of knights, and their eldest sons. There are also esquires by virtue of their office as justices of the peace, and others who bear any office of trust under the crown. (a) *1 Blac. Com. 405.*

Foreign digni-
ties.

And it seems clear, that no one can be well described by the addition of a temporary dignity of any other nation besides our

(a) Mr. Christian, in his notes to *Blackstone*, says, "I cannot but think that this is too extensive a description of an esquire, for it would bestow that honour upon every exciseman and custom-house officer; it probably ought to be limited to those only who bear an office of trust under the crown, and who are styled esquires by the king in their commissions and appointments; and all I conceive who are once honoured by the king with the title of esquire, have a right to that distinction for life." *1 Blac. Com. 406. n. (19.).*

own; because no such dignity can give a man a higher title here than that of an esquire. 2 *Haw. c. 23. § 109.*

All dukes, marquises, earls, viscounts, and barons of other nations, or which are not lords of the parliament of *England*, are named *armigeri*, if they be no knights; and if *knights*, then they are named *milites*. 2 *Inst. 67.* Peers, not of parliament.

Clerk is a good addition to a clergyman; and he that hath taken any degree in either of the universities may be named by that degree. 2 *Inst. 668. 1 Blac. Com. 405.* Clerk.

Gentleman and *gentlewoman* are good additions. And as for gentlemen, says sir *Thomas Smith*, they be made good cheap in this kingdom: for whosoever studieth the laws of the realm, who studieth in the universities, who professes liberal sciences, and (to be short) who can live idly, and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called Mr. Such-a-one, and shall be taken for a gentleman. 1 *Blac. Com. 406.* Gentry.

Yeoman is a good addition; under which denomination are comprehended those who have freehold lands of 40s. a year, and thereby heretofore could serve upon juries, and can yet vote for knights of the shire, and do any other act where the law requires one that is a good and lawful man. 1 *Blac. Com. 406.* Yeoman.

This degree is applied only to the man, and not to the woman. 2 *Inst. 668.*

Labourer is a good addition, and in common use; for a trader may be sued either by his degree or mystery. 8 *Mod. 51, 52. 1 Str. 556. 2 Str. 816. 2 Ld. Raym. 1541.* But *labourer* is not a good addition for a woman, and an indictment will be quashed upon exception to such addition. *Reg. v. Franklyn, 2 Ld. Raym. 1179.* Labourer.

Widow or *singlewoman*, or (as some say) *wife* of such-a-one, are all of them good additions of the estate or degree of a woman; but no such-like addition is good for the estate and degree of a man. Also *spinster* is a good addition of a woman. 2 *Haw. c. 23. § 111.* Widow, &c.

Citizens and burgesses are too general for additions within this act. 2 *Inst. 668.* Citizens.

Or mystery.] This includeth all lawful arts, trades, and occupations, as tailor, merchant, mercer, parish-clerk, school-master, husbandman, labourer, and the like. 2 *Inst. 668.* Mystery.

But servant, groom, or farmer, are not additions within this act, because they are not of any mystery. And chamberer, butler, pantler, or the like, are additions of offices, and not of any mystery or occupation. 2 *Inst. 668.* Servants.

Nor are the following additions sufficient: extortioner, maintainer, thief, vagabond, heretic, and such like. 2 *Haw. c. 23. § 115.*

If a man hath divers arts, trades, or occupations, he may be named by any of them; but if a gentleman by birth be a tradesman, he shall not be named by his trade, but by the degree of gentleman, because it is worthier than the addition of any mystery. And in general a man shall be named by his worthiest title of addition. 2 *Inst. 668, 669.* Which shall be set forth of two additions.

In case of an *alias dictus*, such addition must be applied to the first name; for if it be applied to that which comes under the *alias* *Alias dictus.*

dictus only, and not to the first name, the fault will be fatal; and it is so great a fault to put no addition to the first name, that where several are indicted, such an omission, in respect of one of them, makes the indictment vicious as to all. 2 *Haw. c. 25. § 70. Semple's case, 1 Leach, 420. Ante, p. 376.*

Addition of place.

If there be two towns in a county of the same principal name, with different additions to distinguish them from one another, as *Great Dale* and *Little Dale*, or *Upper Dale* and *Lower Dale*, and the defendant named only of the principal town without any addition, as of *Dale* only, the defendant may plead that there are two *Dales* in the same county, and none without an addition. But if there be two towns of the same name in a county, without any addition to distinguish them, it may be sufficient in such case to name the defendant generally of either of such towns, without adding anything to distinguish it from the other. 2 *Haw. c. 23. § 121. 1 Chitt. Crim. L. 209.*

Hamlet.

If the defendant live in a hamlet of a town, it is said to be in the election of the party to name him either of the hamlet or of the town. 2 *Haw. c. 23. § 122.*

Parish.

But the addition of a parish, if there be two or more towns in it, is not good; but if there be but one town, the addition of parish is good; and a parish shall be intended to contain no more than one town, unless the contrary be shewn. 2 *Inst. 669. 2 Haw. c. 23. § 120.*

Of a wife.

The addition of the place of habitation of a wife is sufficiently shewn by shewing that of the husband; because it shall be intended that the wife lives where the husband does. 2 *Haw. c. 23. § 124.*

Place.

If the defendant live in a place known by a special name, and lying out of any town or hamlet, he may be well named of such place: but if he live in any place known within a town or hamlet, it is said to be safest to name him of the town or hamlet. 2 *Haw. c. 23. § 123.*

Addition of present estate, &c. necessary.

The addition of the estate, degree, or mystery, ought to be as the defendant was of at the day of the indictment brought, and not *late* of such a degree or mystery; but it is a good addition to name the defendant *late* of such a town or place, because men do often remove their habitation. 2 *Inst. 670.*

Late place of residence sufficient.

So, in the case of Lord *Balmerino*, after the rebellion in the year 1745, the indictment charged that *Arthur Lord Balmerino, late of the city of Carlisle, in the county of Cumberland*, did so and so; Lord *Balmerino* objected, that this was no title belonging to him upon which the Lord High Steward informed him, that these words were not made part of his title, but only the addition of place which the law for good reasons requires to be inserted by way of description of defendants in all indictments, and is most commonly taken from that place where the crime is by such indictment charged to have been committed. *Lord Balmerino's Trial, 18 Howell's St. Tri. 461.*

Voidable on writ of error or plea.

Shall be void.] This being a judgment in law, is interpreted to be made void by a writ of error, or by the plea of the party coming in upon a *capias utlagatum*: for though the statute saith they shall be void, yet they are but voidable by a writ of error or plea. 2 *Inst. 670.*

By the exception of the party.] But if a trader be sued by his degree, the writ shall not abate, unless he shew that he has a higher degree. *Horsepoole v. Harrison*, 1 Str. 556. *Smith v. Mason*, 2 Str. 816. 2 Ld. Raym. 1541.

How writ shall abate for want of addition.

So, if the defendant appear upon process, and plead, taking no advantage thereof by exception, he hath lost the benefit hereof: but it seemeth that the bare appearance of the party, without plea, doth not solve the want of a good addition. 2 Haw. c. 23. § 125.

Defendant must take the exception in time.

To a plea of misnomer (which may be pleaded *ore tenus*) to an indictment, the clerk of arraigns may in behalf of the crown reply, that the prisoner is known as well by the one name as the other; and if the jury find for the crown, the prisoner may plead over to the indictment. *Dean's case*, 2 Leach, 476.

Replication to plea of misnomer.

But the prosecutor may now amend under 7 G. 4. c. 64. § 19.; see *infra*.

But if an indictment of a capital crime be abated for a misnomer of the defendant's Christian name, the court will not dismiss him, but cause him to be indicted *de novo* by his true name, and arraign him again on such new indictment: for regularly a defendant shall not be dismissed for an insufficiency in an indictment, or an appeal for a capital crime; but that as he that pleads a misnomer of either his surname or Christian name must in the plea set forth what his true name is, he thereby utterly concludes himself, and if the grand jury be not discharged, the indictment may presently be amended by the grand jury, and returned according to the name he gives himself. 2 Hale, 176.

Defendant not to be discharged on account of the insufficiency of the indictment, but may be indicted afresh.

Anciently, if a plaintiff gained a new name of dignity hanging a writ, he made it abateable; but this inconvenience was remedied by 1 Ed. 6. c. 7. § 3., by which it is enacted, That if any plaintiff in any manner of action shall be made a duke, archbishop, marquis, earl, viscount, baron, bishop, knight, justice of either bench, or serjeant-at-law, depending the same action, such action for such cause shall not be abateable or abated.

Plaintiff obtaining a dignity.

In indictments of treason, felony, &c. against the greater nobility, (dukes, marquises, earls, viscounts, and barons,) the estate and degree is named first, and after the town and county; as *Edwardus Dux de Buckingham nuper de N. in com' Glouc'*. And so it is when one is named of a city, which is a county of itself, the like order is observed: — *J. S. pannarius de London in com' civitatus London*. But in case of the lesser nobility, and all under them, the town and county are named before the addition. 2 Inst. 669.

How the addition shall be set forth.

Also an indictment naming the defendant by two Christian names is not good, as where one was indicted by the name of *Elizabeth N. alias Judith H.* 1 Ld. Raym. 562.

The proceedings in regard to the misnomer of a defendant, or the omission or mistake of his addition, are now much simplified; for by 7 G. 4. c. 64. § 19., for preventing abuses from dilatory pleas, it is enacted, that no indictment or information shall be abated by reason of any dilatory plea of misnomer or of want of addition, or of wrong addition of the party offering such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall

7 G. 4. c. 64. s. 19.

No misnomer nor want of addition or wrong addition to abate indictment; but to be forthwith amended.

Misnomer of one, where several are joined.

call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded.

If several persons be indicted for one offence, *misnomer* or want of addition of one quashes the indictment only against him, and the rest shall be put to answer; for they are in law as several indictments. 2 *Hale*, 177.

And it is the common practice, where an indictment is insufficient, while the grand jury is before the court, to amend it by their consent in a matter of form, as the name or addition of the party, or the like. 2 *Haw. c. 25. § 98.* See 7 *G. 4. c. 64. § 19. supra.*

IX. (3.) Of the Allegation of Time, &c.

Time.

On the ——— day of ——— in the ——— year of the reign, &c.]
The averment of time is altogether formal, since it is unnecessary to prove the offence to have been committed at the time alleged in the indictment, unless some time be limited for the prosecution, or time itself be material to the constitution of the offence; these averments, therefore, convey, in general, little of information either to the defendant or his judges. It is nevertheless a general rule, that the time and place of every material fact must be plainly and consistently alleged; and such a degree of precision does the law exact in this respect, that an uncertainty or incongruity in the description of time and place will vitiate the indictment. 1 *Stark. C. P. 54.* and the authorities there cited. No indictment can be good without precisely shewing a certain day of the material facts alleged in it. 2 *Haw. c. 25. § 77.*

Where an omission only is charged.

But where an indictment charges a man with a bare omission, as not scouring such a ditch, it is said that it needs not shew any time because it affirmeth a present evil. 2 *Haw. c. 25. § 79.*

Night.

And if the offence be done in the night, before midnight, the indictment shall suppose it to be done in the day before; and if it happen after midnight, then it must say it was done the day after. *Lamb. b. 4. c. 5. p. 492.*

Year.

Although the day be inserted, yet, if the year is not likewise inserted, the indictment is insufficient. 2 *Hale*, 177.

Year of the king.

It is most regular to set forth the year, by shewing the year of the king; yet this may be dispensed with for special reasons, if the very year be otherwise sufficiently expressed. 2 *Hale*, 177. 1 *Chitt. Crim. L. 217.*

Year set out by inference.

And if it say, on such a day last past, without shewing in what year, that is good enough; for the certainty may be found out by the style of the sessions. *Lamb. 491.*

Time alleged need not be proved.

But though the day or year be mistaken in the indictment, yet if the offence were committed in the same county, though at another time, the offender ought to be found guilty. 2 *Hale*, 179.

It is best in indictments to set down the times as truly as can be, though it be not of absolute necessity to the defendant's conviction. 2 *Hale*, 179.

It is not necessary that the time should be laid according to the truth; for if it be stated previous to the finding of the indictment, and the place be within the county, or the extent of the court's jurisdiction, a variance between the indictment and evi-

dence in the time when the offence was committed will not be material. *Keb.* 16. 2 *Inst.* 318. *Archbold's Crim. Pl. & Ev.* 14.

If the day laid be uncertain or impossible, or if it make the indictment repugnant to itself, it is void. — But if the day laid be such as may be made certain, or be a day known, it will be good, though not laid expressly. 2 *Haw. c.* 25. § 77.

Where the indictment charged the offence (horse-stealing) to have been committed "in the 4th year of the reign of king George the fourth," and the indictment was found at the *Sum. Ass.* 1 *G. 4.*; after conviction, the judges, on *ca. res.*, held that the words "4th year of the" might be rejected as surplusage. *H. T.* 1821, *R. v. Gill*, *C. C. R.* 431. But see 7 *G. 4. c.* 64. § 20., *infra*, and *p.* 392. *R. v. Treherne*, *p.* 382.

If divers offences be laid to have been committed on divers days between such a day and such a day, it is utterly bad. 2 *Haw. c.* 25. § 82.

In indictments for assaults there need not be either a repetition of the time, or a reference to it by the word *ad tunc*, as the time first laid will be connected to all the subsequent facts. 2 *Hale*, 178.

But in indictments for felony it is otherwise, and especially where the crime consists of a combination of facts: as in murder, which consists of the assault and stroke; and in robbery from the person, and in other cases. 1 *Hale*, 178.

Indictment in the time of one king shall serve in the time of another, and the offender shall be arraigned upon it. 14 *Vin. Abr. tit. Indictment.* (*H.* 10.) *pl.* 5.

And this the rather, because the jury are to find the indictment upon their oaths. *Dalt. c.* 184.

Upon which ground, namely, because the jury are sworn to present the truth, it is best to lay all the facts in the indictment as near to the truth as may be, and not to say, in an indictment for a small assault (for instance), wherein the person assaulted received little or no bodily hurt, that such an one, *with swords, staves, and pistols, beat, bruised, and wounded him, so that his life is greatly despaired of*: nor to say in an indictment of an highway being obstructed, that the king's subjects cannot go thereon, *without manifest danger of their lives*; and the like: which kind of words, as they are not at all necessary, so they may stagger an honest man upon his oath to find the fact as so laid.

At the hour of nine in the afternoon of the same day.] But it is not necessary to mention the hour in an indictment. 2 *Haw. c.* 25. § 76., and if it be stated, no exception is allowed to it. *Combe v. Pitt*, 3 *Burr.* 1434. *Clarke's case*, 1 *Bulstr.* 203.

Excepting in cases of burglary, where it must be laid, for the purpose of shewing that the offence was in the night-time.

In short, every material fact which is issuable and triable must be laid with time and place. It must be laid with a *venue* for the sake of trial; and wherever a *venue* is necessary, time must also be mentioned. 5 *T. R.* 620.

By 7 *G. 4. c.* 64. § 20., no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor (*int. al.*) for omitting to state the time at which

The day impossible or repugnant.

Year of the king may be rejected as surplusage.

Ad tunc et ibidem in misdemeanor.

In felony.

Indictment found in time of a former king.

The facts had better be laid according to the truth.

The hour.

Burglary.

Every material fact must have time and place.

7 *G. 4. c.* 64. s. 20.

7 G. 4. c. 64.

s. 20.

Omission, or defective averment, of time;

or of venue.

the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or exhibiting the information, or on an impossible day, or on a day that never happened, nor for want of a proper and perfect *venue*, where the court shall appear by the indictment or information to have had jurisdiction over the offence. See the section at large, *post*, p. 392.

If a statute make an offence committed after a given day triable in the county where the party is apprehended, and authorises the laying it as if committed in that county, and does not vary the nature or character of the offence, it is no objection that the day on which the offence is stated to have been committed in the indictment is before the day the statute mentions, if the offence were, in fact, committed after that day. *E. T. 1831.*

Time of offence may be proved to be within a statute, though the time averred be not so.

By 11 G. 4. & 1 W. 4. c. 66. § 24., forgeries may be dealt with, &c. and laid and charged in any county or place in which the offender shall be apprehended or in custody, as if the offence had been actually committed there. That stat. took effect 21st July, 1830. On an indictment in *Caermarthenshire* for a forgery in the county of *Glamorgan*, the forgery was alleged to have been committed on the 2d July, 1830, but it was in proof, that it was not committed until after the 21st; and the judges (twelve), on a case, held, that as the forgery was the same offence before the 21st July, 1830, as afterwards, and this statute only entitled the prosecutor to charge in one county what before he must have charged in another, but made no provision for varying the charge, or introducing any additional statement, whatever charge would before the statute have been sufficient in the county in which the offence must then have been laid, will be sufficient in the other county. *E. T. 1831, R. v. Treherne, MS. Bayley B. S.C. 1 M. 298.*

Vi et armis, not necessary.

With force and arms.] By stat. 37 H. 8. c. 8., it is enacted, that whereas it hath been commonly used in indictments to put in the same words *vi et armis*, and in divers of the same indictments to declare the manner of the force and arms, *viz. baculis, cultellis, arcubus et sagittis*, or such like, where in truth the parties had no manner of such weapons at the time of the offence committed, therefore, for the future, these words or such like shall not of necessity be put in any inquisition or indictment.

But yet where such words are proper and pertinent, it is safe and advisable to insert them, if it be to no other purpose than to aggravate the offence. 2 *Haw. c. 25. § 91.*

7 G. 4. c. 64.

s. 20.

Omission of "with force and arms."

By 7 G. 4. c. 64. § 20., the omission of the words "with force and arms" is not to be a ground for staying or reversing judgment either after verdict or outlawry, or by confession, default, or otherwise. See *post*.

IX. (4.) Of the Allegation of Place.

Averment of place necessary.

At Appleby aforesaid in the county aforesaid.] No indictment can be good, without expressly shewing some place where the offence was committed, which must appear to have been within the jurisdiction of the courts, and laid in a manner free from all repugnancy. 2 *Haw. c. 25. § 83.*

If a man be stricken in one county and carried into another, the indictment shall be found where the death happens. 2 *East's P. C.* 343. Offences partly in two counties.

If goods be stolen in one county and carried into another, it may be found in either.

By 7 G. 4. c. 64. § 12., where any felony or misdemeanor shall be committed on the boundary of two or more counties, or within the distance of five hundred yards of any such boundary, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any of the said counties, the same as if it had been actually and wholly committed therein.

7 G. 4. c. 64. Crime committed within boundary of county; begun in one county, completed in another.

In bigamy, the indictment was found in *Middlesex*, and stated the first marriage to have taken place in the county of ———, and the second marriage in the county of ———; and at the conclusion it stated, "and the jurors aforesaid, &c. further say, that she said J. J. F. was apprehended on the ——— day of ——— at ———," leaving a blank for the place. Judgment being respited after conviction, the judges held unanimously that the indictment was bad, for the *Middlesex* grand jury upon the face of it had no jurisdiction. *H. T.* 1834, *R. v. J. J. Fraser, cor. Arabin Serjt. O. B. Sept. Sess. 1833.* MS.

Indictment, blank left for county, bad.

But a mistake of the place will not be material upon the evidence, on not guilty pleaded, if the fact be proved at some other place in the same county. 2 *Haw. c.* 25. § 84.

Within the county sufficient, and variance not important.

And it is not sufficient that the county be expressed in the margin, but the vill where the offence was committed must be alleged to be in the county named in the margin, or *in the county aforesaid*, which seems to be sufficient where but one county is named before; but to be uncertain where a county is named in the body of the indictment different from that in the margin. 2 *Hale*, 180. 2 *Haw. c.* 25. § 34.

In a case for riot, where two parishes had been named in the preceding part of the indictment, it proceeded to charge defendants with beginning to demolish, &c. a certain house, "situate in the parish aforesaid." An objection having been taken for this cause, it was held by *Park J.*, after consulting with *Gaselee J.*, that the parish aforesaid must relate to the last-mentioned parish, and sentence of death was recorded against the prisoner. *West. Spr. Cir.* 1832, *R. v. Richards*, 1 *Mood. & Rob.* 177.

Parish aforesaid, held to relate to parish last mentioned.

Anciently the fact must have been laid in some place whence a visne may come; and a visne may come from a ward, parish, hamlet, burgh, manor, castle, or even a forest, or other place known out of a town: but it cannot come from a thing incorporeal, and therefore not from a liberty. But see 7 G. 4. c. 64. § 20., *suprà*, p. 381.

The place must be correctly stated, if the statute on which the indictment is framed gives the penalty to the poor of the parish where the crime was committed, for in such case the parish laid in the indictment must be proved. 2 *Russ.* 717.

Place, where penalty goes to poor of parish.

So, in a road indictment against a parish, the part of the road out of repair must be proved to be within the parish as laid in the indictment. *Ib.*

Road indictment.

So, where offence is connected with a particular place, as in burglary, arson, &c., the place must be truly stated, so that the proof may correspond with it.

Offence, local.

(Partly so).

So, where an injury is partly local, and partly transitory, and a precise local description is given, a variance in proof of the place is fatal. 2 *Russ.* 717.

Place laid
which does not
exist.

In a case at *Monmouth Sum. Ass.* 1808, the prisoner's counsel proved that there was no such parish in the county of *Monmouth* as the parish of *Saint Mary's* laid in the indictment. It was contended, on the other side, that it is no longer necessary in such an indictment (a) to lay any parish, as the jury are to come from the body of the county. *Lawrence J.* said he would save the point for the opinion of the judges. The prisoner was acquitted on the merits. *R. v. Phillips*, 3 *Campb.* 77.

R. v. Leadbeater, *Staffordshire Sum. Ass.* 1818. *MS.* The indictment charged the burglary and larceny to have been committed in the parish of *Aldrewas*, *Com. Staff.* Upon cross-examination of one of the witnesses for the prosecution, it appeared that that there was no such parish as *Aldrewas* within the county of *Stafford*, the parish in which the offence was committed being *Alrewas*. — *Garrow B.* held the indictment insufficient, and directed an acquittal, upon the authority of a case reserved from the western circuit, and cited by *Campbell* (*Amicus Curiae*), in which the judges held (notwithstanding the doubt expressed by *Lawrence J.* in *R. v. Phillips*, *supra*), that it is necessary in every indictment to state a parish or vill within the county, and that upon proof that there is no such parish within the county as is laid in the indictment, the prisoner must be acquitted.

But see next
case.

It is no objection on not guilty that there is no such place in the county as that in which the offence is stated to have been committed. *H. T.* 1832.

In an indictment for setting fire to a stack of pulse, a mistake as to the place where the offence was committed is immaterial: the charge is transitory, not local. *H. T.* 1832.

Non-existence
of a place laid,
can be taken
advantage of
only by plea in
abatement.

Burning a
stack not a
local offence.

One count in an indictment stated, that the prisoner, at the parish of *Normanton-in-the-Woulds*, in the county of *N.*, maliciously, &c. did set fire to a certain stack of beans of *J. S.*: on not guilty pleaded, it appeared there was no such parish, and two points saved: one, whether the offence was local; the other, whether, there being no such parish, was an objection on not guilty; and the judges (*Ld. Lyndhurst* and *Bolland B.* absent) were unanimous that the offence had nothing of locality in it, and that there being no such place in the county can only be taken advantage of on a plea in abatement, and conviction right. *H. T.* 1832, *R. v. Woodward*, *MS. Bayley B.* S. C. 1 *M.* 323.

See also *S. P.*, *R. v. Dowling and another*, being a case of highway robbery, cited 2 *Russ.* 717.

London too
general.

If the offence be laid in *London* generally, it will be too general, because of its largeness: there must be some parish stated, with some addition, (as *St. Mary, Wood Street*,) but the ward need not be stated, because a ward is in *London* as a hundred is in a county, and the hundred need not be stated. 2 *Haw. c.* 23. § 92. *Sid.* 325. *Mackalley's case*, 9 *Rep.* 66. b.

Mere name of
place not suf-
ficient.

The mere name of the place alone without the description will be bad: as "late of *W.* in the county of *B.* with force and arms at the parish aforesaid" is bad: *W.* not having been described as

(a) 43 *G. 3. c.* 58. (*Ld. Ellenborough's Act*), now repealed.

a parish; and no other parish having been before laid. *R. v. Matthew*, 5 T. R. 162.

It is stated above, that the offence must be proved to have been committed at some place within the county alleged in the indictment; but in the particular case of an offence being committed during a journey or passage, a certain degree of latitude is allowed by the following enactment:—

By 7 G. 4. c. 64. § 13., where any felony or misdemeanor shall be committed on *any* person, or on or in respect of *any* property in or upon *any* coach, waggon, cart, or other carriage whatever, employed in any journey, or shall be committed on any person, or on or in respect of *any* property on board *any* vessel whatever employed on any voyage or journey upon any navigable river, canal, or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any county, through any part whereof such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river, canal, or navigation, shall constitute the boundary of any two counties, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in either of the said counties through, or adjoining to, or by the boundary of any part whereof such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county.

So, where an offence is committed near the boundary of a county, or begun in one county and completed in another, the stat. 7 G. 4. c. 64. § 12. enacts, that where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished, in any of the said counties, in the same manner as if it had been actually and wholly committed therein.

It has been held, that the provisions of § 12., as to boundaries of counties, apply only to *county trials at the assizes or sessions*, and not to trials before courts of limited jurisdiction. The prisoner was brought to trial before the sessions for the *Town and Borough of Southwark*, but it appeared the crime was committed in *London*, though *within five hundred yards of Surrey and the Southwark jurisdiction*: it was adjudged, that this case did not fall within the statute, and that the prisoner was properly acquitted. *R. v. Welsh*, 1 R. & M. 175.

IX. (5.) The Description of the Indictor, or other Person named in the Indictment.

In and upon one George Harrison.] Wherever the person injured is known to the jurors, his name ought to be put in the indictment. 2 Haw. c. 25. § 71.

Offences to persons or property in or upon coaches, &c. employed on journeys, or vessels in inland navigation, may be tried in any county through which the coach, &c. or vessel has passed;

or, if the sides, &c. of a canal, road, &c. are in different counties, may be tried in either.

A felony or misdemeanor committed on the borders of counties,

or begun in one county and completed in another, to be tried in either.

Name of person injured.

Person unknown.

But if they know not his name, an indictment for the murder of a person unknown, or for stealing the goods of a person unknown, is good. 2 *Hale*, 181. See *R. v. Robinson*, *post*, p. 388.

Designation of infant.

Prisoner was convicted on an indictment for the murder of "a certain female child whose name is to the jurors unknown." It appeared that prisoner was delivered of an illegitimate child at her lodgings without any secrecy, and when the child was twelve days old she carried it away, and drowned it by throwing it into a canal. The child had not been baptised. It appeared, that during her confinement she had more than once called the child "Mary Anne," and also "little Mary," and had said that she should like it to be named Mary Anne. The prisoner's master (who was the father) was stated to be a Baptist. An objection was taken, that the child had acquired a name by reputation, and therefore that the indictment was not proved; and *R. v. Walker*, 3 *Camp.* 264. *R. v. Clarke*, C. C. R. 358., and *R. v. Sheen*, 2 C. & P., were cited. Judgment being respited, and a case reserved, the judges held unanimously that the indictment was proved, and the conviction right. *M. T.* 1833, *R. v. Mary Smith*, *cor. Gurney B., Stafford Sum. Ass.* 1833. *MS.*

No addition necessary.

Also, there is no need of an addition of the person upon whom the offence is committed, unless there be a plurality of persons of the same name; neither then is it essential to the indictment, though sometimes it may be convenient for distinction sake to add it. 2 *Hale*, 182.

On an indictment for assaulting *A.*, if there are two persons, father and son, named *A.*, and the assault is upon the son, it need not be stated in the indictment that the assault was upon *A.* the younger.

Indictment for assaulting *Elizabeth Edwards*. It appeared that there were mother and daughter of that name, and that the assault was upon the daughter: it was urged that the description *Elizabeth Edwards*, without addition, applied only to the mother; but *Holroyd J.* at the trial, and the court of K. B. afterwards, thought otherwise, and defendant was convicted and sentenced. *R. v. Peace*, 3 B. & A. 579.

False description of person named in indictment.

Adding a false description to the name of a person who must be named is fatal, though it were not necessary to give him any description. *E. T.* 1831.

In bigamy, the second wife was called *Elizabeth Chant*, widow; she was in fact and by reputation a spinster, and the judges held this misdescription fatal, though it was not necessary to have stated more than her name. *E. T.* 1831, *R. v. Deeley*, *MS.* *Bayley B. S. C.* 1 *M.* 303.

7 G. 4. c. 64. Designation of person named in indictment.

By 7 G. 4. c. 64. § 20., the designation of any person mentioned in the indictment or information by a name of office or other descriptive appellation, instead of their proper name, is not to be a ground for staying or reversing judgment after verdict or outlawry, or by confession, default, or otherwise. See *post*, p. 392.

In the peace, &c.

In the peace of God and of our said lord the king then and there being.] It is usual to allege this, but not necessary, and possibly not true, for he might be breaking the peace at the time. 2 *Hale*, 186. See *tit. Larceny*.

IX. (6.) *The Description of the Offence.*

The aforesaid George Harrison not having any weapon then drawn, nor the aforesaid George Harrison having first stricken the said John Armstrong.] An indictment grounded upon an offence made by act of parliament must by express words bring the offence within the substantial description made in the act of parliament, and those circumstances mentioned in the statute to make up the offence shall not be supplied by the general conclusion *against the form of the statute.* 2 *Hale*, 170.

By 7 G. 4. c. 64. § 21., where a statute has created an offence, or increased the punishment, the indictment or information shall, after verdict, be held sufficient if it describe the offence in the words of the statute.

But there is no necessity in an indictment on a public statute to recite such statute; for the judges are bound *ex officio* to take notice of all public statutes. 2 *Haw. c. 25. § 100.*

Although the indictment need not recite a general penal statute, yet it must bring the fact within the express prohibition of the statute, otherwise the conclusion *contra formam statuti*, and the implication thereof, will not aid the indictment, but it will be insufficient. 2 *Hale*, 192.

Yet, if the prosecutor take upon him to recite it, and materially vary from a substantial part of the purview of the statute, and conclude *against the form of the statute aforesaid*, he vitiates the indictment. 2 *Haw. c. 25. § 100.* *Aliter*, where the mistaken words may be rejected as surplusage. *R. v. Haworth*, 3 *Stark. 27. ante*, tit. *Creat.*

Also, it seems to be generally agreed, that a misrecital of the place or day at which the parliament was holden vitiates an indictment. 2 *Haw. c. 25. § 104.*

And it hath been adjudged, that a misrecital of the title of a statute is fatal. 2 *Haw. c. 25. § 101.*

There is no need to allege in an indictment that the defendant is not within the benefit of the provisos of the statute; although the same may be necessary in a conviction; for since no plea can be admitted to a conviction, and the defendant can have no remedy against it, but from an exception to some defect appearing in the face of it, and all the proceedings are in a summary manner, it is but reasonable that such a conviction should have the highest certainty. 2 *Haw. c. 25. § 113.* 2 *Hale*, 170, 171.

And even in a conviction, where the benefit is given by a proviso in the statute subsequent to the enacting clause, it is not necessary to negative the benefit. 2 *Str.* 1101.

There are several words of art which the law hath appropriated for the description of the offence, which no circumlocution will supply, as *feloniously*, in the indictment of any felony; *burglariously*, in an indictment of burglary; and the like. 2 *Hale*, 184.

And if a man be indicted that he *stole*, and it is not said *feloniously*, this indictment imports but a trespass. 2 *Hale*, 172.

With a certain sword drawn.] Yet if the party were killed with another weapon, it maintains the indictment; but if it were with another kind of death, as poisoning or strangling, it doth not maintain the indictment upon evidence. 2 *Hale*, 185.

Indictment on offence created by statute must be brought substantially within it.

Offence must be brought within the statute.

Following words of statute sufficient after verdict.

Statute need not be recited.

Varying from the words of the statute, if recited, is fatal.

In indictment not necessary to negative an exception, &c. in a proviso;

nor in conviction, where the exception is on a subsequent clause.

Feloniously.

Weapon.

Death from being knocked down on a brick, averment of a blow with a brick, bad.

The indictment charged the prisoner, that with a certain piece of brick, &c. he struck and beat deceased, thereby giving him a mortal wound, of which he died. It appeared that prisoner struck deceased with his fist, who thereupon fell upon a piece of brick, which was the cause of his death. On case reserved, the judges were unanimous, that the means of death were not truly stated, and a pardon was recommended. *M. T. 1825, R. v. Kelly, 1 R. & M. 113.*

Death from a fall by being knocked down, averment of death from blows, bad.

Indictment that prisoner assaulted deceased, and gave him divers mortal blows, &c. of which he died. The evidence was, that prisoner knocked deceased down, and that in falling on the ground deceased received a mortal wound: a case was reserved, and the judges held, that the cause of death was not truly stated, there being no charge of knocking the deceased to the ground, from which the mortal wound proceeded. *E. T. 1826, R. v. Thompson, 1 R. & M. 139.*

Its value.

Of the value of five shillings.] Regularly it ought to set forth the price of the sword or weapon, or else say, of no value; for the weapon is a deodand forfeited to the king, and the township shall be charged for the value, if delivered to them; but this seems not to be essential to the indictment. *2 Hale, 185.*

The hand in which it was.

Which he the said John Armstrong in his right hand then and there had and held.] It must shew in what hand he held his sword. *2 Hale, 185.*

The manner of the offence.

In and upon the right side of the belly near the short ribs of him the said George Harrison.] There must be a certainty of the offence committed, and nothing material shall be taken by intentment or implication; but the special manner of the whole fact ought to be set forth with certainty. *2 Haw. c. 25. § 57.*

The part wounded;

In the case of murder it ought to shew in what part of the body the person was wounded: and therefore, if it be on his arm, or hand, or side, without saying whether right or left, it is not good. *2 Hale, 185.*

and no repugnance.

In stating the substance of the fact, there must be no repugnancy in the material part; but if there be enough well laid to maintain the indictment, judgment may be given on so much as is good. *2 Haw. c. 25. § 55. et seq. Reg. v. Ingram & ux. 1 Salt. 384. Benfield v. Saunders, 2 Burr. 985.*

Disjunctive allegations bad.

The offence must not be laid disjunctively, as, he murdered or caused to be murdered. *2 Haw. c. 25. § 58.*

Value of goods stolen.

If theft be alleged in any thing, the indictment must set forth the value of the thing stolen, that it may appear whether it be grand or petit larceny. *2 Hale, 183.*

What goods.

In like manner, an indictment that the defendant took and carried away such a person's goods and chattels, without shewing what in certain, as one horse, one cow, is not good. *2 Hale, 182.*

Number.

So *20 sheep and ewes* is bad; it ought to be how many of each sort. *2 Hale, 183.*

The owner. Goods and chattels.

The owner should be named: and if the thing stolen be a living thing, it should be named by its name only; if it be a dead thing, it should also be laid *bona et catalla*. *Lamb. b. 4. c. 5. 476.*

Owner must be named, if known.

R. v. Robinson, Durham Sum. Ass. 1817, 1 Holt's Rep. 595. On an indictment, laying the property in persons by name, and in another count in persons *unknown*, the evidence failed in shewing

such ownership; but it appeared that it might have been easily ascertained: *Richards* C. B. would not allow the prosecutor to have recourse to the second count, and directed an acquittal. His lordship cited a case at *Chester* before Lord *Kenyon*, where the property was laid as belonging to a person unknown; but upon the trial, it was clear that the owner was known, and might easily have been ascertained by the prosecutor. Lord *Kenyon* directed an acquittal.

As to the value, see tit. *Larceny*, § 1. *post.*

An indictment that the defendant is a common highwayman, a common defamer, a common disturber of the peace, and the like, is not good; because it is too general, and contains not the particular matter wherein the offence was committed. 2 *Hale*, 182.

Charge must not be too general.

In like manner, an indictment for divers scandalous, threatening, and contemptuous words, spoken of a justice of the peace, is not good: it ought to set forth the words in special. 2 *Str.* 699.

It must be special.

But in certain excepted cases, it is sufficient to state generally that the defendant is so and so, without specifying any particular instances; as in a charge of being a common scold, a common barrator, or of keeping a common bawdy-house. 2 *Hawk.* c. 25. § 57. 59.

Aliter, as to common scold, &c.

An indictment for disobeying an order of justice must find positively that such an order was made, and not by way of recital, *that whereas*——. 2 *Ld. Raym.* 1363.

And positive, not by recital.

But in an indictment on a conviction, it is not necessary to set forth the conviction at large, but only shortly that such a one was before such and such justices convicted, according to the form of the statute, and thereupon a warrant was issued, &c. 2 *Ld. Raym.* 1196.

Indictment on conviction.

Then and there did feloniously stab and thrust.] In an indictment it is best, and often necessary, to repeat the time and place to the several parts of the fact. 2 *Hale*, 178.

Adunc & ibidem.
Repetition of.
Death.

Thus, in an indictment of murder or manslaughter, as well the day and place of the stroke or other act done as of the death must be expressed; the former, because the escheat or forfeiture of lands relate thereto; the latter, because it must appear that the death was within the year and day after the stroke. 2 *Hale*, 179.

One mortal wound of the breadth of one inch, and of the depth of nine inches.] Regularly, the length and depth of the wound is to be shewn, but this is not necessary in all cases; as where a limb is cut off; so it may be also a dry blow. 2 *Hale*, 186.

Description of wound.

But though the manner and place of the hurt and its nature be requisite, as to the formality of the indictment, and it is fit to be done as near the truth as may be, yet if upon evidence it appear to be another kind of wound in another place, if the party died of it, it is sufficient to maintain the indictment. 2 *Hale*, 186.

IX. (7.) The Conclusion of an Indictment, and of Technical Avertments.

Against the peace of our said lord the king.] An indictment, without concluding against the peace, is insufficient, though it be

Contra pacem.

but for using a trade not having been an apprentice ; for every offence against the statute is against the peace, and ought so to be laid. 2 *Hale*, 188.

Our lord the king, in whose reign the offence was committed.

Also, an indictment that concludes against the peace, and with not of our lord the king, is insufficient. 2 *Hale*, 188.

It seems *domini regis*, in all indictments ; and the king's name must be of that king in whose time the offence was committed ; and if the offence be begun under one king, and continued under his successor, and it be laid against the peace of both kings, it seems good : but if it conclude only against the peace of the successor, it is bad, as the commencement is shewn to have been under the first ; and it may be laid against his peace alone. With respect to the omission of the words " in contempt of the king," there are precedents both ways. 2 *Haw. c.* 25. §§ 92, 93. 95. 2 *Hale*, 187, 188. *Yelv.* 66.

An indictment for an offence committed in the time of the late king, and concluding against the peace of the present king, is not sufficient. *R. v. Lookup*, 3 *Burr.* 1901.

Late king, late may be rejected as surplusage.

A *contra pacem* of our said late lord the king, where the offence is in the time of the present king, and no other king has been mentioned, is unexceptionable.

An indictment for a rape, stated to have been committed 9th of March, 1 G. 4., concluded against the peace of our said late lord the king. On case, the judges were unanimous that " late" might be rejected, and the prisoner was executed. *R. v. Scott*, *Leicestershire Lent Assizes*, 1820, before Best J. and before all the judges in *E. T.* following, C. C. R. 415.

Every indictment must charge the offence to have been done against the peace of the king in whose reign it was committed.

Thomas Cook was convicted before *Thompson B.* at *Lancaster Spring Assizes*, 1810, upon an indictment for stealing bank notes, " against the form of the statute in such case made and provided." — It was moved in arrest of judgment, that the indictment was insufficient, for want of charging the offence to have been committed against the peace. 2 *Haw. c.* 25. § 92. was relied upon, and also *Lookup's* case. — On behalf of the prosecution, that part of the same section in *Hawkins* was referred to, where it is stated that *Rastall's* precedents, both of indictments of felony and of inferior offences, do as often omit the words "*contra pacem*" as make use of them. And it was further contended, that the charging the offence to have been committed against the form of the statute, imported that it was against the peace. Judgment was respited, and the question submitted to the consideration of the judges, who held the indictment bad. *Rex v. Thomas Cook*, before all the judges, May, 1810. C. C. R. 176.

Force and arms.

That the omission of the words " with force and arms" or " against the peace," is not sufficient ground for staying or reversing judgment on indictment or information, see § 20. of 7 G. 4. c. 64. See the section at full, *post*, p. 392.

Contra pacem.

A bad *contra pacem* is as no *contra pacem*, and cured by § 20. of 7 G. 4. c. 64.

Bad *contra pacem*, same as none.

An indictment found *temp. W.* 4. for a forgery *temp. G.* 4. concluded against the peace of our lord the king : on case, the judges thought the *contra pacem* bad, but the major part thought that it might be rejected as surplusage, and that the stat. would cure the defect. *E. T.* 1832, *R. v. Chalmers*, MS. Bayley B. S. C. 1 M. 352.

His crown and dignity.] But an indictment need not conclude against his crown and dignity, though it be usual in many indictments. 2 Hale, 188.

If an offence were felony at common law, but a special act of parliament ousts the offender of some benefit that the common law allowed him, when certain circumstances are in the fact, though the body of such indictment must express those circumstances, according as they are prescribed in the statute, yet the indictment need not conclude against the form of the statute. But yet, if it should conclude in such case against the form of the statute, it would not vitiate the indictment, but would be only surplusage. 2 Hale, 190.

But, on the other side, if an offence be purely at common law; if it conclude *contra formam statuti*, it is insufficient, and shall be quashed, except in the instance above given of clergy. 2 Hale, 192.

Therefore an indictment of battery concluding *contra formam statuti* is insufficient, and shall be quashed. 2 Hale, 192.

But according to many decisions, it is now settled that such a conclusion is mere surplusage, and the indictment is available. 1 Russ. 612., n. (i), and authorities there cited. 1 Saund. 135. n. (3).

And against the form of the statute in such case made and provided.] Regularly, if a statute only make an offence, or alter an offence from one crime to another, as making a bare misdemeanor a felony, the indictment for such new-made offence, or new-made felony, must conclude against the form of the statute; otherwise it is insufficient. 2 Hale, 192.

If an offence be newly enacted, or made an offence of a higher nature by an act of parliament, the indictment must conclude *contra formam statuti*. 2 Hale, 189.

If an act of parliament, making an offence, be but temporary, and made perpetual by another statute, the indictment concluding against the form of the statute, is good. 2 Hale, 173.

If the former statute be discontinued, and revived by another statute, the best way, is to conclude against the form of the statutes; though there is good opinion that it is good enough to conclude against the form of the first statute. 2 Hale, 173.

And indeed it seems clear that if a statute refer to a former statute, and adopt and continue the provisions thereof, the indictment must conclude against the form of the statute. 2 Haw. c. 25. § 117. 1 Saund. 135. n. 3.

But if one statute be relative to another, as where the former makes the offence and the latter adds a penalty, the indictment ought to conclude against the form of the statutes. 2 Hale, 173.

If one statute creates an offence, and the other adds a penalty; or if the same offence be prohibited by several statutes; or where a later statute ordains that a former statute shall be executed in a new case not mentioned in the former, the conclusion shall be *contra formam statutorum*. 2 Haw. c. 25. § 117.

If one statute subjects an act to a pecuniary penalty, and a subsequent statute makes it felony, an indictment for the felony, concluding against the form of the statute, is right.

By stat. 34 G. 3. c. 20. § 9., having paper in possession with false stamps, subjects to 500*l.* penalty; stat. 49 G. 3. c. 81 makes

Crown and dignity not necessary.

Where common law offence is rendered more penal by statute, indictment need not conclude *contra formam statuti*.

Common law offence: conclusion *contra formam statuti* does not vitiate.

Where a statute creates an offence, or makes it of a higher nature, *contra formam statuti* necessary.

Where an indictment ought to conclude *contra formam statuti* or *statutorum*.

it felony. An indictment concluded *contra formam statuti*; and on case, the judges held it right. *R. v. Pim, Devonshire Sum. Ass. 1820, cor. Burrough J. and before the judges in M. T. following, C. C. R. 425.*

If an offence be at common law, and also prohibited by statute, the indictment may conclude *contra formam statuti*, or *statutum*. *2 Hale, 191.*

Trespass
made felony.

If a trespass be made a felony, the indictment must conclude *contra formam statuti*. *2 Hale, 189.*

If an offence be at common law, and also prohibited by statute, with a corporal or other penalty, yet it seems the party may be indicted at common law; and then, though it conclude not *contra formam statuti*, it stands as an indictment at common law, and can receive only the penalty that the common law inflicts in that case. *2 Hale, 191.*

Riot.

Thus, in case of a riot, the indictment need not conclude *contra formam statuti*, though prohibited by acts of parliament under severe penalties. *2 Hale, 191.*

Perjury.
Forgery.

So in case of perjury. *Ib.*

But otherwise in the cases of indictments for forcible entry, and for forgery. *2 Hale, 192.*

7 G. 4. c. 64.
What defects
shall not vitiate
an indictment
after verdict or
otherwise.

By 7 G. 4. c. 64. § 20., "That the punishment of offenders may be less frequently intercepted in consequence of technical niceties, be it enacted, that no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute,' instead of the words 'against the form of the statutes,' or *vice versa*, nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office or other descriptive appellation instead of his, her, or their proper name or names, nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence."

What shall not
be sufficient to
stay or reverse
judgment after
verdict.

§ 21. "And be it further enacted, that no judgment after verdict upon any indictment or information for any felony or misdemeanor shall be stayed or reversed for want of a similitur, nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; and that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall after verdict be held sufficient to warrant the punishment prescribed

by the statute, if it describe the offence in the words of the statute."

But § 20. of the statute does not cure the want of "against the form of the statute," for what but for the form of the statute would be no offence. *T. T.* 1831.

Contra formam statuti where still necessary.

A count in indictment for stealing a bank-note did not conclude against the form of the statute, as it ought; and on conviction motion in arrest, on the ground of this omission; case *inde*, and on consideration the judges held the omission fatal, and not cured by 7 G. 4. *T. T.* 1831, *R. v. Pearson*, MS. *Bayley B.* S. C. 1 M. 313.

By 7 & 8 G. 4. c. 28. § 14. it is enacted, That wherever this or any other statute relating to any offence, whether punishable upon indictment or summary conviction, in describing or referring to the offence or the subject matter on or with respect to which it shall be committed, or the offender or the party affected or intended to be affected by the offence, hath used or shall use words importing the singular number or the masculine gender only, yet the statute shall be understood to include several matters as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction; and wherever any forfeiture or penalty is payable to a party aggrieved, it shall be payable to a body corporate in every case where such body shall be the party aggrieved.

Rule for the interpretation of all criminal statutes.

X. Charges of an Indictment.

By stat. 10 & 11 W. 3. c. 23., no clerk of assize, clerk of the peace, or other person, shall take any fee of any person bound over to give evidence against a traitor or felon for the discharge of his recognizance; nor shall take more than 2s. for drawing any bill of indictment against any such felon; on pain of 5*l.* to the party grieved, with full costs. And if he draw a bill defective, he shall draw a new one *gratis*, on the like pain.

10 & 11 W. 3. c. 23.

Fees to clerk of assize, &c.

For the drawing of indictments for other misdemeanors not being treason or felony, no fee is limited by any statute; and therefore the same dependeth upon the custom and ancient usage.

See 7 G. 4. c. 64. §§ 22.—30., concerning the expenses of prosecutions, tit. *Costs*.

XI. Pleading.

If a defendant plead misnomer in abatement to an indictment for a misdemeanor, and it is found against him, he cannot afterwards plead the general issue: but final judgment must be given against him. *R. v. Gibson*, 8 East, 107.

When one may plead over. Not in misdemeanor.

It is otherwise in the case of felony: in such case, he may plead over to the felony. And in all pleas, whether to the writ or in bar by matter of record, or by matter of fact, or both, if the plea do not confess the felony, though his plea be found against him by issue tried, or adjudged against him, by the court, yet he shall not be convicted thereon, but plead over to the felony *not guilty*, as well upon an indictment as upon an appeal, and this *in favorem vite*. 2 Hale, 239.

Aliter in felony.

Modes of pleading to an indictment.

It is thought right to insert in this place a short account of the several modes of pleading to an indictment; a thing omitted in former editions of this work, though very fit to be known and understood.

Pleas upon the arraignment are of three kinds :

I. *Pleas in Abatement of the Indictment.*

1. *Defects arising on the Indictment itself.*
2. *Defect in Matters of Fact*—as misnomer, false addition.

II. *Pleas in bar of the Indictment.*

1. *Matter of Record.*
2. *Mist of Record and Fact.*

Matters of record, are—pardons.

Mist — 1. *auterfoits acquit*
 2. — *attaint* } *of same felony.*
 or convict

III. *Pleas to the Matter of the Indictment—not guilty.*

Dilatory plea, affidavit necessary.

In pleading a dilatory plea, defendant must annex an affidavit of the truth of the plea. *R. v. Grainger, 3 Burr. 1617.*

XI. (I. 1.) *Defects arising on the Indictment itself.*

Such exceptions to an indictment as may be taken advantage of in arrest of judgment may generally be made available by way of plea in abatement. 2 *Hale*, 236.

In *R. v. Whealey, 2 Burr. 1127.*, *Ld. Mansfield* said, "Before verdict, the court may use a discretion, whether it be right to quash an indictment on motion, or put the defendant to demur; but after verdict, they are obliged to arrest the judgment, if they see the charge to be insufficient."

And, as may be seen in the foregoing sect. (IX.), there are many causes of such pleading in abatement; and generally, all manner of uncertainty is good cause of abatement.

The court will not upon motion quash a bad plea in abatement.

R. v. Cooke, H. 1824, 2 B. & C. 618. To an indictment for a conspiracy, the defendant pleaded the following plea:—"And *Richard Stafford Cooke*, Lord *Stafford*, Baron *Stafford*, who is indicted by the name of *Richard Stafford Cooke*, late of the parish of *Castle-Church*, in the county of *Stafford*, gentleman, in his own person comes, and having heard the said indictment read, prays judgment of the said indictment, because he says, that on the day of taking the inquisition aforesaid, and long before, he was, and from thence hitherto hath been, and still is, Lord *Stafford*, Baron *Stafford*, and the state, degree, title, and honour of Lord *Stafford*, Baron *Stafford*, on the day of taking the inquisition aforesaid, and long before, had and enjoyed, and still has and enjoys. And this, &c." A rule *nisi* had been obtained for quashing this plea, on the ground that it was clearly bad (a), and pleaded for the purpose of delay. On shewing cause, it was urged against the rule, that by quashing the plea, defendant would be deprived of the opportunity of discussing its validity on a writ of error, and *Thomas v.*

(a) *Viz.* for not setting out the patent and pedigree: the following authorities were cited; 2 *Hale*, 240. *Co. Lit.* 16. b. and note 3. *Countess of Rutland's case*, 6 *Rep.* 58. *Rex v. Knollys*, 1 *Ld. Raym.* 10.

Smythies, 4 Taunt. 668., was cited. For the rule, *Com. Dig.* tit. *Indictment*, (H.) was cited to support a position, that in criminal proceedings in general, it is discretionary in the court either to quash a plea on motion, or leave the prosecutor to demur. But *Abbott C. J.* declared, that there was a great difference between indictments and pleas in this respect; *et per Cur.*, it would be much too strong a measure to quash the plea in this case.

XI. (I. 2.) Defects in Matters of Fact.

Indictment of one by the name of *T. D.* Plea by his counsel, *ore tenus*, that his name was *J.* and not *T. D.* Clerk of the arraigns replied, on behalf of the crown, that he was known as well by the name of *T.* as by the name of *J. D.*—Issue joined.—The sheriff returned a jury *instantly* to try this issue, and it was found for the crown; upon which the prisoner pleaded over to the felony, *not guilty.* *Dean's case*, 1 Leach, 476.

Misnomer may be tried by jury returned *instantly*.

A person indicted for a misdemeanor may plead that his surname is *Shakespeare*, and not *Shakepeare*, for the latter is not *idem sonans.* *R. v. Samuel Shakespeare*, 10 East, 83.

Where the name is not *idem sonans.*

Misnomer may be pleaded by attorney, as well as in person. *R. v. Westby*, 10 East, 83. (n.)

May be pleaded by attorney.

In all cases of pleading misnomer, there must be a plea over to the felony. 2 Hale, 238.

Omitting the name of dignity is matter of abatement, and of reversal of outlawry. 1 Show. 392. *Dethick's case*, Cro. Eliz. 224. 542.

Name of dignity omitted;

Duke or not duke; earl or not earl; baron or not baron, shall not be tried by the country, but by record; and the writ testifying the plea pleaded must be shewn, because it is a dilatory plea. *Countess of Rutland's case*, 6 Rep. 53. 2 Hale, 240.

to be tried by record.

XI. (II.) Pardons.

Pardon is matter of record, and must be pleaded as such, and in bar; letters under the king's sign-manual cannot be pleaded as a pardon; it must be pleaded *sub pede sigilli.*

Pardon.

One is indicted of felony by the name of *J. E. yeoman*; and the king pardons him by the name of *J. E. gentleman*, all manner of felonies. Held, that the pardon is good, and may be pleaded, with an averment that the said *J. E. yeoman*, and *J. E. gentleman*, are one and the same person. *Keilw.* 58. A.

Plea of.

By 7 & 8 G. 4. c. 28. § 13., where the king shall be pleased to extend his royal mercy to any offender convicted of any felony punishable with death, or otherwise, and by warrant under his royal sign-manual, countersigned by one of his principal secretaries of state, shall grant to such offender either a free or conditional pardon, his discharge, in case of a free pardon, or performance of the condition, in the case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender as to the felony for which such pardon shall be so granted: Provided always, that no free pardon, nor any such discharge in consequence of it, nor any conditional pardon, nor the performance of the condition in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender

7 & 8 G. 4. c. 28. Pardon under sign manual.

might otherwise be lawfully sentenced on a subsequent conviction, for any felony committed after the granting of any such pardon.

XI. (II. 1.) *Plea of Auterfoits acquit.*

Auterfoits acquit of same felony.

Another plea in bar is *auterfoits acquit de mesme felonie*. It is mixed; for it consists, first, of matter of record, viz. the former indictment and acquittal, and before what justices, and whether by verdict or otherwise; and, second, of matter of fact, viz. that the prisoner is the same person who was acquitted, and that the fact is the same of which he was acquitted, and is now indicted. 2 *Hale*, 241.

In bar.

It is a good plea on an indictment of felony to say that he was before arraigned of the same felony before such and such justices, &c. and was acquitted; and the person so pleading shall vouch the record, for he shall not be compelled to have the record at hand, because his plea is not dilatory, but in bar; and such plea shall be a good bar. *Staundf.* 105. lib. 2. c. 36.

Dilatory.

If the plea be dilatory, the record must be shewn. *Co. Lit.* 127. b.

Where acquittal is in an inferior court.

If the second indictment be in K. B. and first acquittal were before justices of the peace or gaol delivery, a writ of *certiorari* will be granted to remove the record before them, and the plea be respited till the acquittal can be removed into the court. 2 *Hale*, 242.

Evidence to be given.

The court may examine proof that it is the same felony, and allow it.

Acquittal in any court having jurisdiction is sufficient.

The record must be part of the plea.

An acquittal in any court having jurisdiction is as good a bar as an acquittal in the highest. 2 *Haw. c.* 35. § 10.

Captain *Roche* was indicted for the murder of *J. H.* at the *Capo of Good Hope*. — Plea *auterfoits acquit de m. f.* before *O. M. B.* provincial fiscal, &c. there. It was moved to charge the jury at once with both issues; but, *per Curiam*; *non allocatur*. 1 *Leach*, 194.

Person and offence must be the same.

The matter of fact of the plea is, that he is the same person; and that it is the same felony whereof he was acquitted; which may be put in issue, or may be confessed by the king's attorney. 2 *Hale*, 243. *R. v. Clarke, B. & B.* 473.

Plea must shew that the offence is the same.

A plea of *auterfoits acquit* must shew, that defendant was acquitted on an indictment under which he might have been punished, if he had been convicted, and also that the same offence was charged. Therefore, where the offence in the first indictment appeared to have been committed in the reign of a different king, it was bad, nor can defendant in such a case aver that they were the same offences, as he would thereby contradict the record. *R. v. Taylor*, 3 *B. & C.* 502.

There must be judgment also.

A bare verdict of acquittal is not enough without judgment *quod eat inde sine die*.

Insufficient indictments.

Unless the first indictment were such as the prisoner might have been convicted upon, an acquittal upon it will be no bar to the second, upon proof of the facts contained in the second indictment. *Vandercombe's case*, 2 *East's P. C.* 522. 2 *Leach*, 708.

When the law says that *auterfoits acquit* is a good plea, it shall

be intended when he is *lawfully* acquitted; and therefore, upon a discharge for an insufficient indictment he may be tried again for that offence.—As, where one is acquitted upon a trial in a mistaken county. *Vaux's case*, 4 Rep. 45. (a). *Wigges' case*, 46. (b). *Staundf. lib.* 2. c. 36. 106. (a). *Com. Dig.* Indictment (L.)

So the acquittal must be by verdict upon trial, and a judgment must follow; no discharge by a coroner's inquest, or the special finding by the grand inquest, or judgment reversed, will be good cause for pleading this plea. 2 *Hale*, 246.

But if it be upon erroneous direction of the judge (2 *Inst.* 318.), or erroneous judgment of no felony upon special verdict found, (the judgment being unreversed by writ of error,) it is a good cause for such a plea. 2 *Hale*, 247.

Though there be a variance as to time, place, or name, yet if the offence be the same, this shall be a good plea. *Cogan's case*, 1 *Leach*, 448.—*J. C.* was indicted for publishing as true a certain forged will and testament, purporting, &c. The will as in evidence was thus: "*T. G.* do hereby," &c. The will recited in the indictment was "*I, T. G.*" and it was held a fatal variance.—He was subsequently indicted as before, but in reciting the will the pronoun *I* was left out. *Auterfoits acquit* was pleaded, and the former record of acquittal being produced, it was held not to prove the plea, not being legal evidence of his having been acquitted of the same offence, and the prisoner pleaded over not guilty.

Variances of time and place may be helped by the averment that it is one and the same felony.

It must be by verdict upon trial.

And will be good if the offence be the same.

Aliter if there be a variance.

Accessory.

Auterfoits attain or convict of same felony.

Judgment necessary.

7 & 8 G. 4. c. 28. *Auterfoits* attain must be for some felony.

Rule of pleading.

For the law of *Accessory* and *Principal*, see tit. *Accessory*.

Plea of *auterfoits acquit*, and a copy prayed of the indictment, on which they alleged their acquittal, and refused by the court; but also it was said, the prisoner was entitled to hear the indictments read over very slowly and distinctly. *Vandercombe's case*, 2 *Leach*, 708.

(II. 2.) *Auterfoits attain de mesme felonie* also is a good plea in bar, notwithstanding there have been a pardon of the attainer and felony. 2 *Hale*, 253.

The sheriff may return a jury *instantly* to try whether the prisoner were *auterfoits convict*, &c. as said; and whether he be the same person that was then tried and convicted. And the record will be proof of the facts of trial and conviction; and the fact of identity must be found by the jury. *Scott's case*, 1 *Leach*, 401.

There must have been judgment.

By § 4., no attainer shall be pleaded in bar of any indictment, unless the attainer be for the same offence as that charged in the indictment.

From these several rules and cases, the following rules may be deduced.

1. The party pleading matter of record must specially set out the record. *Acc. R. v. Wildey*, 1 *M. & S.* 183.

2. He must shew the record *sub pede sigilli*, or have the record removed into the court where it is pleaded, by *certiorari*; or if it be a record of the same court, must vouch the term, year, and roll; for the record is part of the plea.

3. He must make averment, as the case shall require, that he is the same person, and that it is the same offence.

4. No issue shall be taken upon the plea of *nul tiel* record, because it is pleaded in court; but the king's attorney may haveoyer of the record.

5. The averments are issuable.

6. If issues be taken upon them, they shall be tried by the jury that is returned to try the person. 22 H. 8. c. 14.

7. He that pleads these pleas must plead over not guilty to the felony; for if the pleas be found against him, he shall be tried by the country.

Counter pleading.

To the foregoing pleas in bar the crown may counter plead.

Demurrer.

And to this counter plea the prisoner may reply.

There may also be a demurrer to the indictment; but this plea is a confession of the indictment, and should be avoided, as the prisoner may have all the advantages of exception to the indictment, either before his plea of not guilty, or after his conviction, and before judgment, as he might have by demurrer. 2 Hale, 257.

Defects cured by verdict.

But see 7 G. 4. c. 64. § 21. *ante*, p. 392., by the provisions of which certain defects there specified are cured by verdict; and see also § 20. of the same stat. *Ibid*.

But if the attorney-general demur, and the prisoner join in demurrer, and it be adjudged against the prisoner, he shall plead over to the felony. 2 Hale, 257.

Upon a demurrer to an indictment, the court must look to the whole record, to see whether they are warranted in giving judgment on it: and therefore it is open to objections, as well to the jurisdiction of the court where the indictment is found, as to the subject-matter of the indictment. *R. v. John Fearnley*, 4 T. R. 316.

In indictment there can be no justification *pleaded*. *Ib*. 258.

Not guilty.

(IV.) The last plea is, *not guilty*, and it consists of two parts: 1. The issue of not guilty, whereunto the clerk joins issue: 2. The putting himself upon his country, when the clerk demands how he will be tried.

And if he fail in either of these, it is in law a standing mute. *Ib*. 258.

XII. Acquittal on an Indictment.

14 G. 3. c. 20.
Et vide title
Gaols.

By stat. 14 G. 3. c. 20., every prisoner charged with any felony or other crime, or as an accessory thereto, who shall on his trial be acquitted, or against whom no indictment shall be found by the grand jury, or who shall be discharged by proclamation for want of prosecution, shall be immediately set at large in open court, without payment of any fee to the sheriff or gaoler: but in lieu thereof, the treasurer, or other proper officer of the several counties, or of such districts, hundreds, ridings, or divisions, as are not usually assessed to the county at large, and of such cities, towns corporate, cinque ports, liberties, franchises, and places, as do not pay to the rates of the several counties in which they are respectively situate, shall, on a certificate signed by one of the judges or justices before whom such prisoner shall have been discharged, pay out of the general rate of the county or district such sum as hath been usually paid, not exceeding 13s. 4d.

Discharge on
acquittal with-
out fee.

But an action cannot be brought by the person acquitted of felony against the prosecutor of the indictment, without obtaining a copy of the record of his indictment and acquittal; which in prosecutions for felony it is not usual to grant, if there is any the least probable cause to found such prosecution upon. For it would be a very great discouragement to the public justice of the kingdom, if prosecutors for felonies, who had a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried.—But an action on the case for a malicious prosecution may be founded on such an indictment whereon no acquittal can be, as, if it be rejected by the grand jury, or be *coram non iudice*, or be insufficiently drawn; for it is not the danger of the plaintiff, but the scandal, vexation, and expense, upon which this action is founded. However, any probable cause for preferring it is sufficient to justify the defendant, provided it doth not appear that the prosecution was malicious. 3 *Blac. Com.* 126. *Burr.* 1971.

Granting copy of indictment in felony.

If, however, a copy of the indictment be procured, even without an order of the court, it will be admissible in evidence. *Leggatt v. Tollervey*, 14 *East*, 302. cit. 1 *Phill. Evid.* 423. See also *Caddy v. Barlow*, 1 *Man. & Ryl.* 279. n. and (a), *ib.*, and *Browne v. Cumming and others*, 10 *B. & C.* 70.

Copy of indictment is evidence however obtained.

But in cases of misdemeanor, the defendant is entitled to a copy of the indictment as a matter of right. 1 *Phill.* 423.

In misdemeanor it is matter of right.

Morrison v. Kelly, 1 *Blac. Rep.* 385. At the sittings in *Mid-dlesex*, an action came on to be tried for a malicious prosecution in indicting the plaintiff for keeping a disorderly house. To prove the fact, the clerk of the peace for the *Westminster* sessions attended, with the original record of the acquittal. It was objected, that there ought to be a copy of the record granted by the court before which the acquittal is had, in order to ground an action for a malicious prosecution. But it was ruled by *Ld. Mansfield C. J.*, that though this is necessary where the party is indicted for felony, yet the practice is otherwise in case of misdemeanors.

In misdemeanor.

Rex v. the Inhab. of Burbon, *M.* 57 *G. 3.* 5 *M. & S.* 392. Indictment for non-repair of a highway. Plea, not guilty. Upon the trial before *Wood B.* at the *Westmorland Sum. Ass.* 1816, there was a verdict of not guilty. And now, *Scarlett* moved for a new trial, upon the ground that the verdict was against all the evidence; and he said, that the prosecution was for the purpose of trying a civil right only.—But, *per Lord Ellenborough C. J.* In general, the rule is not to grant a new trial in a criminal proceeding, after a verdict of not guilty. And, inasmuch as the right will not be bound on the plea of not guilty, we do not think it would be proper to break into the general rule on the suggestion that the prosecution was merely intended to determine a civil right. *R. R.*

Right not bound on verdict of acquittal on road indictment.

XIII. Indictments in Counties of Cities and Towns Corporate.

By stat. 38 *G. 3. c. 52.* § 1., reciting, whereas there at present exists in the counties of cities and of towns corporate within this kingdom an exclusive right that all causes and offences which arise within their particular limits should be tried by a jury of persons

38 *G. 3. c. 52.*

38 G. 3. c. 52.

In what case the court may direct an issue to be tried by a jury of the county next adjoining to the city or town corporate in which the venue is laid.

residing within the limits of the county of such city or town corporate; which ancient privilege, intended for other and good purposes, has in many instances been found by experience not to conduce to the ends of justice: And whereas it will tend to the more effectual administration of justice in certain cases, if actions, indictments, and other proceedings, the causes of which arise within the counties of cities and towns corporate, were tried in the next adjoining counties, enacts, that from and after the 1st of *June* 1798, in every action, whether transitory or local, which shall be prosecuted or depending in any of H. M.'s courts of record at *Westminster*; and in every indictment removed into the K. B. by *certiorari*; and in every information filed by H. M.'s attorney or solicitor general, or by the leave of the court of K. B.; and in all cases where any person or persons shall plead to or traverse any of the facts contained in the return to any writ of mandamus, if the venue in such action, indictment, or information be laid in the county of any city or town corporate within that part of *G. B.* called *England*, or if such writ of mandamus be directed to any person or persons, body politic and corporate, that it shall be lawful for the court in which such action, &c. or other proceeding shall be depending, at the instance of the prosecutor or plaintiff, or of any defendant, to direct the issue or issues joined in such action, &c. to be tried by a jury of the county next adjoining to the county of such city or town corporate; and to award proper writs of *venire* and *distringas* accordingly, if the said court shall think it fit so to do.

Indictments may be preferred to county next adjoining.

Indictment found in county of city or town corporate may be transferred to county next adjoining.

51 G. 3. c. 100. In cases of conviction under recited act, the sentence may be executed in the county of the city or town corporate, as well as in adjoining county.

§ 2. Indictments for offences committed within the county of any city or town corporate, may be preferred to the jury of the county next adjoining.

§ 3. Indictments found by the grand jury, or inquisitions taken before the coroner of the county of a city or town corporate, may be ordered by the court to be filed with the proper officer of the next adjoining county, and defendants may be removed to the gaol thereof.

By stat. 51 G. 3. c. 100., after reciting the provisions of the preceding act, it is enacted, that from and after the passing of this act, it shall and may be lawful for the court before which any conviction shall have taken place in pursuance of the provisions of the said recited act, to order every such convict to be punished according to law, either within the county where such conviction shall have taken place, or within the county of the city or town corporate wherein such offence shall have been committed; and in cases where the court shall order such convict to be punished within the county of such city or town corporate, it shall be lawful for the court, after passing sentence upon every such convict, to order him to be delivered into the custody of the sheriff, gaoler, or other proper officer of the county of such city or town corporate; and the sheriff, gaoler, or other proper officer of the county of such city or town corporate is commanded to receive into his custody every such convict, and to execute the sentence so passed upon him in such adjoining county, as if he had been tried and had received such sentence in the county of such city or town corporate.

§ 2. And whereas it is provided by the said in part recited act, (§ 8.) that in all cases of indictments and other proceedings which

may be tried before H.M.'s justices of oyer and terminer or general gaol delivery, for any county, in pursuance of the provisions contained in the said act, it should and might be lawful for such justices to order the expenses of the prosecution, and of the witnesses, and of the several rewards payable in pursuance of the statutes in such cases made and provided on the conviction of offenders, to be paid by and to the same persons and in the same manner as the same would have been payable if such indictment had been tried in the court of oyer and terminer or general gaol delivery of the county of such city or town corporate: And whereas it is just and expedient that a similar provision should be made for the payment of all other expenses which may be incurred by any such adjoining county in relation to any person who may be tried or removed for trial to such adjoining county, for any offence committed or charged to have been committed in the county of any such city or town corporate; the justices of oyer and terminer or general gaol delivery, at any sessions thereof holden for such county, shall order all expenses whatsoever incurred by such county in relation to any person who shall be tried in such county or removed thither for trial, for any offence committed or charged to have been committed within the county of any such city or town corporate, as well in maintaining and supporting such person and carrying the sentence into execution as in any other respect, to be repaid to the treasurer of such county, or other person acting as treasurer of such county, or who shall have actually paid such expenses, by the same person and in the same manner as the same would have been payable, if such offender or supposed offender had remained in the county of such city or town corporate, and had been tried in the court of oyer and terminer or general gaol delivery of the county of such city or town corporate, and as if the sentence with respect to such offender had been carried into execution within the county of such city or town corporate.

51 G. 3. c. 100.

Providing for payment of expenses not before provided for by the county of a city or town corporate.

Condition of a Recognizance to prefer a Bill of Indictment.

THE condition of this recognizance is such, That if the above bound A. I. shall personally appear at the next general quarter sessions of the peace to be holden at — in and for the said county, and then and there prefer a bill of indictment against A. O. late of — yeoman, for the felonious taking and carrying away of — the property of —, and shall then and there give evidence concerning the same to the jurors who shall inquire thereof on the part of our said lord the king; and in case the same be found a true bill, Then if the said A. I. shall personally appear before the jurors who shall pass upon the trial of the said A. O., and give evidence upon the said indictment, and not depart without leave of the court, then this recognizance to be void.

Condition of a Recognizance to answer to an Indictment.

THE condition of this recognizance is such, That if the above bound A. O. shall personally appear at the next general quarter sessions of the peace to be holden at — in and for the said county, then and there to answer to an indictment to be preferred

against him by A. I. of ——— yeoman, for assaulting and beating him the said A. I., and not depart without leave of the court, Then this recognizance to be void.

Indorsing a Warrant in another County.

See Warrant.

Infants.

How far answerable for Crimes.

Infant, who.

Age of discretion.

BY an infant or minor is meant any one who is under the age of twenty-one years. 1 *Inst.* 2.

It is said generally, that those who are under a natural disability of distinguishing between good and evil, as infants under the age of fourteen years, which is called the age of discretion, are not punishable by any criminal prosecution whatsoever. But this must be understood with some allowance; for if it appear by the circumstances that an infant under the age of discretion could distinguish between good and evil, as, if one of the age of nine or ten years kill another and hide the body, or make excuses, or hide himself, he may be convicted and condemned, and forfeit as much as if he were of full age. — But in such case the judges will in prudence respite the execution, in order to get a pardon; and it is said, that if an infant apparently wanting discretion be indicted and found guilty of felony, the justices themselves may dismiss him without a pardon. And in general it must be left to the discretion of the judge, upon the circumstances of the case, how far an infant under that age is *capax doli*, or hath knowledge to discern betwixt good and evil. *Hale's Sum.* 43. 1 *How. c.* 1. § 8. 1 *Hale*, 18. 1 *Russ.* 3.

Infant liable.

Breach of peace.

In case of any notorious breach of the peace, as a riot, battery, or the like, an infant under the age of twenty-one is equally liable to suffer as a person of the full age of twenty-one. 1 *Russ.* 2 3 *Bac. Abr.* 591.

Perjury.

Cheating.

Aliter for a mere non-feasance.

Exception.

So, if an infant judicially perjure himself, he shall be punished for the perjury: and he may be indicted for cheating. *Ibid.*

But where the offence charged is a mere non-feasance, there in some cases he shall be privileged by his non-age, if under twenty-one, though above fourteen years; because laches in such case shall not be imputed to him, unless it be of such a thing as the party be bound to by reason of tenure or the like, as to repair a bridge, &c. *Ibid.*

For not attaching one who has killed another.

If *A.* kills *B.*, and *C.* and *D.* are present, they may be fined or imprisoned if they do not attach the offender; but if *C.* is under twenty-one, he shall not be fined or imprisoned. 3 *Bac. Abr.* 591.

The following is an important case, as to the capability of an infant of ten years old to commit the crime of murder; and as to the expediency of visiting such an offender with capital punishment.

At *Bury Summer Assizes*, 1748, *William York*, a boy of ten years of age, was convicted before *Ld. Ch. J. Willes*, for the murder of a girl of about five years of age; and received sentence of death. But the chief justice, out of regard to the tender years of the prisoner, respited execution till he should have an opportunity of taking the opinion of the rest of the judges, whether it were proper to execute him or not, upon the special circumstances of the case; which he reported to the judges as follows: — The boy and girl were parish children, but under the care of a parishioner, at whose house they were lodged and maintained. On the day the murder happened, the man of the house and his wife went out to their work early in the morning and left the children in bed together. When they returned from work the girl was missing; and the boy being asked what was become of her, answered, that he had helped her up, and put on her clothes, and that she was gone he knew not whither. Upon this, strict search was made in the ditches and pools of water near the house, from an apprehension that the child might have fallen into the water. During this search, the man, under whose care the children were, observed that a heap of dung near the house had been newly turned up; and upon removing the upper part of the heap, he found the body of the child, about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner. Upon this discovery, the boy, who was the only person capable of committing the fact that was left at home with the child, was charged with the fact, which he stiffly denied. When the coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length, being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said, that the child had been used to foul herself in bed; that she did so that morning (which was not true, for the bed was searched and found to be clean); that thereupon he took her out of the bed and carried her to the dung-heap; and with a large knife which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung-heap; placing the dung and straw that was bloody under the body, and covering it up with what was clean; and having done so, he got water and washed himself as clean as he could. The boy was the next morning carried before a neighbouring justice, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice very prudently deferred proceeding to a commitment, till the boy should have an opportunity of recollecting himself. Accordingly, he warned him of the danger he was in, if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself; and then ordered him into a room where none of the crowd that attended should have access to him. When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice, and then he repeated his former confession; upon which he was committed to gaol. On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the justice, and of many declarations to the same purpose, which the boy made to other people after he came to gaol, and even down to the day of his

York's case.
Case of murder
by a boy of ten
years old.

York's case.

(a) 1 Hale, 630.

trial. For he constantly told the same story in substance, commonly adding, that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confession, he was convicted. Upon this report of the chief justice, the judges, having taken time to consider of it, unanimously agreed, 1. That the declarations stated in the report were evidence proper to be left to the jury. 2. That supposing the boy to have been guilty of the fact, there were so many circumstances stated in the report which were undoubtedly tokens of what Ld. Ch. J. *Hale* somewhere (a) called a *mischievous discretion*, that he was certainly a proper object for capital punishment, and ought to suffer. For it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity. There are many crimes of the most heinous nature, such as, in the present case, the murder of young children, poisoning parents or masters, burning houses and the like, which children are very capable of committing, and which they may in some circumstances be under strong temptations to commit: and, therefore, though the taking away the life of a boy of ten years old may savour of cruelty, yet as the example of this boy's punishment may be a means of deterring other children from the like offences, and as the sparing this boy merely on account of his age, will probably have a quite contrary tendency,—in justice to the public, the law ought to take its course, unless there remaineth any doubt touching his guilt. In this general principle all the judges concurred. But two or three of them, out of great tenderness and caution, advised the chief justice to send another reprieve for the prisoner; suggesting, that it might possibly appear on further inquiry that the boy had taken this matter upon himself, at the instigation of some person or other, who hoped by this artifice to screen the real offender from justice. Accordingly, the chief justice did grant one or two more reprieves; and desired the justice who took the boy's examination, and also some other persons in whose prudence he could confide, to make the strictest inquiry they could into the affair, and make report to him. At length he, receiving no further light, determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last: but before the expiration of that reprieve, execution was respite till further order, by warrant from one of the secretaries of state. And at the summer assizes, 1757, he had the benefit of H. M.'s pardon, upon condition of his entering immediately into the service. *York's case, Foster, 70.*

Under seven.

But within seven years of age, there can be no guilt whatsoever of any capital offence; the infant may be chastised by his parents or tutors, but cannot be capitally punished, because he cannot be guilty; and if he be indicted for such an offence as is in its nature capital, he must be acquitted. 1 *Hale*, 19, 20.

Committing a rape.

An infant under fourteen is presumed by law unable to commit a rape, and therefore, it seems, cannot be guilty of it; and though in other felonies *malitia supplet aetatem* in some cases, yet it seems as to this fact the law presumes him impotent, as well as wanting discretion. 1 *Hale*, 630.

Forcible entry.

An infant may be guilty of forcible entry, in respect of personal

actual violence. 1 *Haw. c. 64. § 35.* And the justices may fine him therefore; but yet it shall be good discretion in the justices of the peace to forbear the imprisonment of such infant. *Dalt. c. 126.*

Imprisonment.

Because it is said, that he shall not be subject to corporal punishment, by force of the general words of any statute wherein he is not expressly named. 1 *Haw. c. 64. § 35.*

Corporal punishment.

But this must be understood, where the corporal punishment is, as it were, collateral to the offence, and not the direct intention of the proceeding against the infant. 1 *Russ. 6.*

Where a fact is made treason or felony by statute, it extends as well to infants, if above fourteen years, as to others.

Treason or felony.

An infant under the age of discretion cannot be an approver, because he cannot take the oath requisite in that case. 2 *Haw. c. 24. § 5.*

Cannot be an approver.

Judgment.

[*Stats. 3 G. 4. c. 114.—4 G. 4. c. 48.—7 G. 4. c. 64.—7 & 8 G. 4. c. 28.—9 G. 4. c. 31.—1 W. 4. c. 70.*]

OF judgments, some are fixed and stated, as in cases of *treason, felony, præmunire, and misprision*; the particular forms of which may be seen under their respective titles. Judgments certain.

Others are discretionary and variable, according to the different circumstances of each case: thus, for crimes of an infamous nature, such as petit larceny, perjury, or forgery at common law, gross cheats, conspiracy, not requiring a villanous judgment, keeping a bawdy-house, bribing witnesses to stifle their evidence, and other offences of the like nature, it seems to be in a great measure left to the prudence of the court to inflict such corporal punishment, and also such fine, and binding to the good behaviour for a certain time, as shall seem most proper and adequate to the offence. 2 *Haw. c. 48. § 14.*

Judgments variable.

The court may assess a fine, but cannot award any corporal punishment against a defendant, unless he be actually present in court. 2 *Haw. c. 48. § 17.*

Judgmen in the offender's absence.

Per Holt C. J. Judgment cannot be given against any man in his absence for a corporal punishment; there is no such precedent. A ca. sa. *pro fine* is common, but there never yet was a writ to take a man and put him in the pillory. 1 *Salk. 400. S. C. 1 Ld. Raym. 267.* See also 1 *Ld. Raym. 47.*

Sentence for corporal punishment cannot be passed on a person in his absence. Acc.

In a case where defendants had confessed themselves guilty of an information charging them with a misdemeanor, and where a motion was made to dispense with their personal appearance to receive sentence, the court refused it, saying, it ought to be denied in every case, where it was probable or possible that the punishment would be corporal. *R. v. Hann and another, 3 Burr. 1786.*

An indictment for an assault, which had been found at the quarter sessions, was removed by *certiorari* into B. R., and tried on the civil side at the *Worcester assizes* 1831. After conviction, *Patteson J.* sentenced the defendants (under 1 *W. 4. c. 70.*), who

Aliter as to a *capias pro fine.*

were not present, to pay a fine each of 10*l.*, and to be imprisoned till they were paid, and directed a warrant to issue to take defendants in execution of the sentence. *R. v. Woodward and another*, 4 *C. & P.* 540. n.

Judgment of a joint fine.

Where there are several defendants, a joint award of one fine against them all is erroneous; for it ought to be several against each defendant; otherwise, one who hath paid his proportionable part might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another. 2 *Haw. c.* 48. § 18.

Judgment in mitigation of fine.

A fine is under the power of the court during the term in which it is set, and may be mitigated as shall be thought proper: but after the term, it admits of no alteration. 2 *Haw. c.* 48. § 20.

Power of altering orders or judgments during the same sessions, as in the same term.

While the quarter sessions last it is in the power of the court to alter their orders or judgments, the sessions as well as the term being considered only one day in law; and so it is of judgments at the *Old Bailey* during the same session. *Per Holt C. J.*, 2 *Salk.* 606. acc. 2 *Bac. Abr.* 160.

So during the same assizes.

In two cases where doubts arose whether the sentences passed on prisoners who had been convicted of murder were or were not erroneous, the judges, who differed in opinion on this point, all agreed that, if there was error, it might have been corrected by bringing the prisoners up again, and passing the proper judgment, as the sentence may be corrected or altered at any time during the assizes. *R. v. Jane Fletcher*, *C. C. R.* 58. *R. v. Wyatt*, *Id.* 230.

Judgment against the verdict.

A judgment contrary to the verdict is void.

Judgment by particular statutes.

By many statutes peculiar punishments are appointed for several offences, as stocks, imprisonment, whipping, and the like; and in all these cases, no room is left for the justices' discretion, for they ought to give judgment and to inflict the punishment in all the circumstances thereof, as such statutes do direct. *Dalt. c.* 188.

Statute enacting punishment in the alternative.

Where by 22 *G. 3. c.* 58. (now repealed) persons convicted of receiving stolen goods were made liable to the punishment of "fine, imprisonment, or whipping," it was held by the judges on *ca. res.* that the word *or* could not be read *and*; consequently that both imprisonment and whipping could not be inflicted. *R. v. Howell and another*, *C. C. R.* 253.

Larceny, transportation not exceeding four years.

Under 39 *G. 3. c.* 85. (now repealed) persons convicted of embezzling were made "liable to be transported for any term not exceeding fourteen years, in the discretion of the court before whom the offender shall be convicted;" and on *ca. res.* the question for the opinion of the judges was, whether a less sentence than transportation for seven years could be passed. The judges were unanimous that the act having expressly made the offence *larceny*, the court might inflict the like punishment as in the case of a common larceny. *R. v. Hudson*, *C. C. R.* 285.

In perjury, procedendo awarded, there having been no regular judgment.

Prisoner was convicted of perjury at the *Chester* assizes, and sentenced to seven years transportation; and a writ of error having been brought thereon, it appeared that the judgment was erroneous in form, it being entered "it is ordered," whereas it should have been "it is considered." The court awarded a *procedendo*, ordering the court below to give judgment, and meantime admitted the prisoner to bail. *R. v. Kenworthy*, 1 *B. & C.* 711.

But where a court of quarter sessions had sentenced a prisoner to transportation for fourteen years, in a case where they had only power to sentence him for seven, on writ of error being brought for this cause, the court of B. R. reversed the judgment as erroneous. *R. v. Ellis*, 5 B. & C. 395.

Upon a conviction in a court below, the defendants having been found guilty of a nuisance at the quarter sessions, the court of B. R. granted a mandamus, commanding them to pass sentence on the indictment. *R. v. Justices of West Riding of Yorkshire*, 7 T. R. 467.

The question arose on the return to the mandamus, which stated, that the court below had fined each of the defendants 6*d.*, and it was objected that the judgment was imperfect, because it did not proceed to order the nuisance to be abated; the court of K. B. thought this was unnecessary, as the indictment did not charge a *continuance* of the nuisance; but that at all events, if the judgment below was erroneous, the only mode of correcting it was by writ of error, and referred to 2 *Str.* 686. S. C. 7 T. R. 467.

By stat. 4 G. 4. c. 48., intituled "An act for enabling courts to abstain from pronouncing sentence of death in certain capital cases," after reciting § 1., that whereas it is expedient that in all cases of felony not within the benefit of clergy, except murder, the court before which the offender or offenders shall be convicted shall be authorized to abstain from pronouncing judgment of death, whenever such court shall be of opinion that, under the particular circumstances of any case, the offender or offenders is or are a fit and proper subject or fit and proper subjects to be recommended for the royal mercy: It is enacted, that from and after the passing of this act, whenever any person shall be convicted of any felony, except murder, and shall by law be excluded the benefit of clergy in respect thereof, and the court before which such offender shall be convicted shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the royal mercy, it shall and may be lawful for such court, if it shall think fit so to do, to direct the proper officer then being present in court to require and ask, whereupon such officer shall require and ask, if such offender hath or knoweth any thing to say, why judgment of death should not be recorded against such offender; and in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may, and is hereby authorised to abstain from pronouncing judgment of death upon such offender; and instead of pronouncing such judgment, to order the same to be entered of record, and thereupon such proper officer as aforesaid shall and may and is hereby authorised to enter judgment of death on record against such offender, in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender, by the court before which such offender shall have been convicted.

§ 2. A record of every such judgment, so entered as aforesaid, shall have the like effect to all intents and purposes, and be followed by all the same consequences, as if such judgment had actually been pronounced in open court, and the offender had been relieved by the court.

But where there is an erroneous judgment, it will be reversed.

Mandamus to pass sentence after conviction in a court below.

Wrong judgment to be corrected by writ of error only.

4 G. 4. c. 48.

Court may abstain from pronouncing sentence of death on persons convicted of any capital felonies, except murder.

Record of judgment to have the same effect as if pronounced.

Act not to extend to Scotland.

3 G. 4. c. 114. Persons convicted of the offences herein mentioned, may be sentenced to hard labour.

§ 3. Nothing herein contained shall extend to that part of the U. K. called *Scotland*.

By stat. 3 G. 4. c. 114., intituled "An act to provide for the more effectual punishment of certain offences, by imprisonment with hard labour;" § 1. after reciting stat. 53 G. 3. c. 162., and that it is expedient that the provisions of the said act should be extended to certain aggravated misdemeanors and offences below the degree of felony: it is enacted, that from and after the passing of this act, whenever any person shall be convicted of any of the offences hereafter specified and set forth; that is to say,

- (1.) *Any assault with intent to commit felony.* (Repealed, but see *infra*.)
- (2.) *Any attempt to commit felony.*
- (3.) *Any riot.*
- (4.) *Any misdemeanor for having received stolen goods, knowing them to have been stolen.*
- (5.) *Any assault upon a peace officer, or upon an officer of the customs or excise, or upon any other officer of the revenue, in the due discharge and execution of his or their respective duty or duties, or upon any person or persons acting in aid of any such officer or officers in the due discharge and execution of his or their respective duty or duties.* (Repealed, but see *infra*.)
- (6.) *Any assault committed in pursuance of any conspiracy to raise the rate of wages.* (Repealed, but see 9 G. 4. c. 31. § 25. *infra*.)
- (7.) *Being an utterer of counterfeit money, knowing the same to be counterfeit.*
- (8.) *Knowingly and designedly obtaining money, goods, wares, or merchandizes, bills, bonds, or other securities for money, by false pretences, with intent to cheat any person of the same.*
- (9.) *Keeping a common gaming-house, a common bawdy-house, or a common ill-governed and disorderly house.*
- (10.) *Wilful and corrupt perjury, or of subornation of perjury.*
- (11.) *Having entered any open or inclosed ground with intent there illegally to destroy, take, or kill game or rabbits, or with intent to aid, abet, and assist any person or persons illegally to destroy, take, or kill game or rabbits, and having been there found at night armed with any offensive weapon.*

"In each and every of the above cases, and whenever any person shall be convicted of any or either of the aforesaid offences, it shall and may be lawful for the court before which any offender shall be convicted, or which by law is authorised to pass sentence upon any such offender, to award and order (if such court shall think fit) sentence of imprisonment with hard labour, for any term not exceeding the term for which such court may now imprison for such offences, either in addition to, or in lieu of any other punishment which may be inflicted on any such offenders by any law in force before the passing of this act; and every such offender shall thereupon suffer such sentence, in such place and for such time as aforesaid, as such court shall think fit to direct."

9 G. 4. c. 31.

By 9 G. 4. c. 31. § 1., so much of 3 G. 4. c. 114. as relates to any of the assaults therein mentioned, is repealed.

But by § 25., "where any person shall be charged with and convicted of any of the following offences as misdemeanors; that is to say, of any assault with intent to commit felony; of any assault upon any peace officer or revenue officer in the due execution of his duty, or upon any person acting in aid of such officer; of any assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault committed in pursuance of any conspiracy to raise the rate of wages; in any such case the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and may also (if it shall so think fit) fine the offender, and require him to find sureties for keeping the peace."

By 7 & 8 G. 4. c. 28. § 8., "Every person convicted of any felony not punishable with death shall be punished in the manner prescribed by the statute or statutes specially relating to such felony; and every person convicted of any felony for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this act, and shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall so think fit, in addition to such imprisonment."

§ 9. "Where any person shall be convicted of any offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet."

§ 10. "Wherever sentence shall be passed for felony on a person already imprisoned under sentence for another crime, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which such person shall have been previously sentenced; and where such person shall be already under sentence either of imprisonment or of transportation, the court, if empowered to pass sentence of transportation, may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or transportation to which such person shall have been previously sentenced, although the aggregate term of imprisonment or transportation respectively may exceed the term for which either of those punishments could be otherwise awarded."

§ 11. "If any person shall be convicted of any felony not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment; and in an indict-

9 G. 4. c. 31. Assaults with intent to commit felony; assaults on peace officers; or to prevent the arrest of offenders; or in pursuance of a conspiracy to raise wages; punishable with hard labour.

7 & 8 G. 4. c. 28.

Felonies not capital punishable under the acts, if any, relating thereto; otherwise, under this act.

The court may order hard labour or solitary confinement as part of the sentence of imprisonment.

If a person under sentence for another crime is convicted of felony, the court may pass a second sentence, to commence after the expiration of the first.

Punishment for a subsequent felony.

7 & 8 G. 4.
c. 28.

Form of indictment for the subsequent felony.

What shall be sufficient proof of the first conviction.

Uttering false certificate of conviction.

1 W. 4. c. 70.
Judgments may be pronounced at the assizes on indictments out of K. B. except in prosecutions by information.

Motion for amending judgment under
1 W. 4. c. 70.

ment for any such felony committed after a previous conviction for felony, it shall be sufficient to state that the offender was at a certain time and place convicted of felony, without otherwise describing the previous felony; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, (for which certificate a fee of six shillings and eight-pence, and no more, shall be demanded or taken,) shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same; and if any such clerk, officer, or deputy, shall utter a false certificate of any indictment and conviction for a previous felony, or if any person other than such clerk, officer, or deputy, shall sign any such certificate as such clerk, officer, or deputy, or shall utter any such certificate with a false or counterfeit signature thereto, every such offender shall be guilty of felony, and being lawfully convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall so think fit, in addition to such imprisonment."

By the 1 W. 4. c. 70. § 9. it is enacted, "that upon all trials for felonies or misdemeanors upon any record of the court of King's Bench, judgment may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken, as well upon the person who shall have suffered judgment by default or confession, upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in court, excepting only where the prosecution shall be by information filed by leave of the court of King's Bench, or such cases of informations filed by his majesty's attorney-general, wherein the attorney-general shall pray that the judgment may be postponed; and the judgment so pronounced shall be indorsed upon the record of *nisi prius*, and afterwards entered upon the record in court, and shall be of the same force and effect as a judgment of the court, unless the court shall, within six days after the commencement of the ensuing term, grant a rule to shew cause why a new trial should not be had or the judgment amended; and it shall be lawful for the judge before whom the trial shall be had, either to issue an immediate order or warrant for committing the defendant in execution, or to respite the execution of the judgment, upon such terms as he shall think fit, until the sixth day of the ensuing term; and in case imprisonment shall be part of the sentence, to order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison."

Defendants having been convicted on an indictment for a conspiracy, which had been removed by *certiorari*, and sentence of imprisonment passed upon them under the above act at the same assizes at which they were tried, a motion was afterwards made in B. R., on the ordinary affidavits in mitigation, to amend the judgment by diminishing the punishment: The court refused the appli-

cation, holding, that a motion of this kind ought to point out some essential defect in the sentence, or to shew some reason why they did not suggest the same matter in mitigation of punishment at the assizes. *R. v. Lloyd and another*, 4 B. & Ad. 135.

On conviction at the assizes for an unlawful assembly, upon an indictment which had been found at the sessions, and removed into B. R., it having been proposed to put in affidavits in mitigation, *Patteson J.* is stated to have said, that after the trial of a traverse on the crown side of the assizes, affidavits are never put in, and he conceived that it was the intention of this act to put these cases in the same situation as traverses; but adding, that under very special circumstances affidavits might be received after the trial of a traverse. *R. v. Cox and others*, *Oxford Spring Ass.*, 1831. 4 C. & P. 538.

By 7 G. 4. c. 64. § 20., that the punishment of offenders may be less frequently intercepted in consequence of technical niceties, it is enacted, "that no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute,' instead of the words 'against the form of the statutes,' or *vice versâ*, nor for that any person or persons mentioned in the indictment or information is or are designated by a name of office or other descriptive appellation instead of his, her, or their proper name or names, nor for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment or exhibiting the information, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, where the court shall appear by the indictment or information to have had jurisdiction over the offence."

§ 21. "No judgment after verdict upon any indictment or information for any felony or misdemeanor shall be stayed or reversed for want of a similiter, nor by reason that the jury process has been awarded to a wrong officer upon an insufficient suggestion, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer; and where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy, by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute."

See tit. Indictment.

Affidavits in mitigation of sentence passed under 1 W. 4. c. 70.

7 G. 4. c. 64. What defects shall not vitiate an indictment or information.

What shall not be sufficient to stay or reverse judgment after verdict.

Larceny.

LARCENY comes from *latrocinium*, *latrociny*; and by contraction, or rather abuse, *larceny*. 3 Inst. 107.

- I. *Of Larceny in general.*
[7 & 8 G. 4. c. 29.]
- II. *Indictment, Trial, & Punishment.*
[7 G. 4. c. 64. — 7 & 8 G. 4. c. 28. — c. 29.]
- III. *Larceny from the Person.*
[7 & 8 G. 4. c. 29.]
- IV. *Larceny from the House, &c.*
[7 & 8 G. 4. c. 29.]
- V. *Larceny and Embezzlement from Lodgings.*
[7 & 8 G. 4. c. 29.]
- VI. *Larceny on board Vessels, &c. on a River, Canal, &c., or from Vessels wrecked, &c.*
[7 & 8 G. 4. c. 29.]
- VII. *Larceny from Manufactures.*
[7 & 8 G. 4. c. 29.]
- VIII. *Of other Embezzlements.*
[7 & 8 G. 4. c. 29. — 2 W. 4. c. 4.]
- IX. *Of taking Rewards, or advertising, for Return of stolen Goods.*
[7 & 8 G. 4. c. 29.]
- X. *Of offering for Pawn or Sale Goods suspected to have been stolen.*
[30 G. 2. c. 24.]
- XI. *Of further Enactments in 7 & 8 G. 4. c. 29., concerning Larceny.*

Appendix. — Digest of Larceny at Common Law.

I. Of Larceny in general.

No distinction
as to grand or
petty larceny.

All distinction between grand and petty larceny is now at an end, as by 7 & 8 G. 4. c. 29. § 2., it is provided, that “the distinction between grand larceny and petty larceny shall be abolished; and every larceny, whatever be the value of the property stolen, shall be deemed to be of the same nature, and shall be subject to the same incidents, in all respects, as grand larceny was before the commencement of this act; and every court, whose power as to the trial of larceny was, before the commencement of this act, limited to petty larceny, shall have power to try every case of larceny, the punishment of which cannot exceed the punishment herein-after mentioned for simple larceny, and also to try all accessaries to such larceny.”

Definition of
larceny.

Larceny is defined by *Bracton*, *L. 3. de Corona. c. 32. fol. 190. b.* “*Fraudulenta contrectatio rei alienæ cum animo furandi, invito domino cujus res illa fuerit; animo dico, quia sine animo furandi non*

committitur." By *Ld. Coke* (3 *Inst.* 107.) it is defined, "a felonious and fraudulent taking and carrying away by any man or woman of the mere personal goods of another, neither from the person, nor by night, nor in the house of the owner." "It is of the essence of robbery or larceny that the goods be taken against the will of the owner." *Fost.* 123.

Larceny is a felonious and fraudulent taking and carrying away, by any person, of the mere personal goods of another: *And has been well defined to be the wrongful taking of goods with intent to spoil the owner of them causa lucri.* 1 *Haw. c.* 33. § 1.

The true meaning of larceny is, "The felonious taking the property of another without his consent, and against his will, with intent to convert it to the use of the taker." *Per Grose J. in delivering the opinion of the judges in Hammond's case, O.B. May Sess.* 1812, 2 *Leach*, 1089.

It appears, however, from the following cases, that a larceny may be committed, not strictly falling under the above definition, and that *lucri causâ* may perhaps be construed to mean "for any object or purpose which the person taking the property may have in view, though not falling within the ordinary acceptation of the word *gain*."

The prisoner and another broke open a stable of prosecutor's, took out his horse, and led it along the road about a mile, till they came to an old coal-pit, into which they backed it, and thereby killed it; the object being, that the horse should not be forthcoming at the trial of one *Howarth*, who was under charge for stealing it. The case being reserved, six of the judges held it not to be essential that the taking should be *lucri causâ*; they thought a taking fraudulently, with an intent wholly to deprive the owner of the property, sufficient: but some of the six learned judges thought, that in this case, the object of protecting *Howarth* by the destruction of the animal, might be deemed a benefit, or *lucri causâ*: five judges thought the conviction wrong. *R. v. Cabbage, C. C. R.* 292.

In an old case, where the prisoner assaulted *B.* with a felonious intent, and searched his pockets for money, but finding none, pulled off the bridle of *B.*'s horse, and threw that and some bread, which *B.* had in pannels, about the highway, but did not take any thing from *B.*, held to be no robbery; and semb., because the particular goods were not taken with a felonious intent. 2 *East, P. C. c.* 16. § 98. p. 662.

Richard Morfit and *Morris Conway* were tried before *Abbott J.* at *Maidstone Lent Assizes* 1816, upon an indictment for feloniously stealing two bushels of beans, value five shillings, the goods of *John Wimble*. Upon the trial it was proved, that the prisoners were servants in husbandry to *Mr. Wimble*, and had the care of one of the teams; that *Mr. Wimble's* bailiff was in the habit of delivering out to the prisoners, at stated periods, from a granary belonging to him, and of which his bailiff kept the key, such quantities of beans as *Mr. Wimble* thought fit to allow for the horses of this team; the beans were to be split, and then given by the prisoners to the horses; that the granary door was opened by means of a false key procured for the purpose, which was afterwards found hid in the stable; and that about two bushels of beans were taken away on the day after an allowance had been delivered out

Lucri causâ.

Taking away a horse and killing it for the purpose of stifling evidence.

Clandestinely taking a master's corn, though to give the master's horses, is larceny; especially if by so feeding them the servant's labour is likely to be diminished.

as usual; and nearly that quantity of whole beans was found in a sack concealed under some chaff in a chaff-bin in the stable. The learned judge desired the jury to say, whether they thought both the prisoners were concerned in taking the beans from the granary, and also, whether they intended to give them to Mr. *Wimble's* horses. The jury answered both questions in the affirmative, and a verdict of guilty was taken, but judgment arrested until the next assizes, considerable doubts existing whether the above facts amounted to a larceny. A majority of the judges assembled, eight out of eleven, in *E. T.* following held the offence to be larceny, and that the purpose to which they intended to apply them did not vary the case: it was alleged, however, by some of the judges, that the additional beans would diminish the work of the men who had to look after the horses, so that the master not only lost his beans, or had them applied to the injury of his horses, but the men's labour was lessened, so that the *lucri causâ*, to give themselves ease, was an ingredient in the case. *Rex v. Morfit and Conway, Maidstone Lent Ass. 1816, C. C. R. 307.*

At the ensuing assizes *Morfit* was sentenced to be imprisoned one calendar month in the house of correction at *Maidstone*; and *Conway* was imprisoned one day in gaol, and then discharged.

Felonious intent.

Felony is always accompanied with an evil intention, and therefore shall not be imputed to a mere mistake or misanimadversion; as where persons break open a door in order to execute a warrant which will not justify such a proceeding; for in such case there is no felonious intention. 1 *Haw. c. 25. § 3.*

For it is the mind that makes the taking of another's goods to be felony, or a bare trespass only; but because the variety of circumstances is so great, and the complication thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary, the same must be left to the due and attentive consideration of the judge and jury, wherein the best rule is, in doubtful matters, rather to incline to acquittal than conviction. Only, in general, it may be observed, that the ordinary discovery of a felonious intent is, if the party do it secretly, or being charged with the goods deny it. 1 *Hale, 509.* See *R. v. Dannelly and Vaughan, C. C. R. 310. post, p. 445.*

Claim of right.

And if goods be taken on claim of right or property in them, it will be no felony; at the same time, it is matter of evidence, whether they were *bonâ fide* so taken, or whether they were not taken from the person actually possessing them with a thievish and felonious intent. And, therefore, obtaining possession of goods by a fraudulent claim of right, or by a fraudulent pretence of law, and then running away with them, would be a felony. 1 *Hale, 507.* 1 *Haw. c. 33. § 8. Farr's case, Kel. 43.*

Person taking his own goods in order to charge the bailee, or to sue the hundred.

In one instance a man may be guilty of felony in taking his own goods, viz., where having bailed them to another person, he afterwards steals them from such person in order to charge him for them in an action, or robs the other person of them in order to charge the hundred. 1 *Hale, 513.* 2 *East, P. C. c. 16. § 95. p. 659.*

Person taking goods wherein he has property.

But regularly, a man cannot commit felony of goods wherein he has a property: thus, if *A.* take away the trees of *B.* and cut them into boards, or if *A.* take the cloth of *B.* and make it into a doublet, *B.* may take the boards or the cloth, and it will not be felony. 1 *Hale, 513.*

Ld. Hale says, if one man take another man's hay or corn, and mingle it with his own heap or stock; or take another man's cloth, and embroider it with silk or gold; such other person may retake the whole heap of corn, or cock of hay, or garment and embroidery also; and this retaking is no felony, nor so much as a trespass. 1 *Hale*, 513.

There can be no legal right to take corn by gleaning except by special custom in particular places; and it is said a prisoner has been convicted of larceny for so taking it. 2 *Russ.* 99. It is, however, justly observed, that such taking will hardly amount to larceny, where they merely took openly the corn that was left after the removal of the crop, under a claim of right, illegal indeed, but not altogether without some colour, and where similar practices were allowed in the neighbourhood. 2 *Russ.* 100.

In general, where goods have been taken on a claim of right, if there be any fair pretence of property or right in the prisoner, or if it be brought into doubt at all, the court will direct an acquittal, as it is not fit that such disputes should be settled by means of a proceeding so highly penal. 2 *East*, P. C. c. 16. § 95. p. 659.

And it may be that the taking is no more than a trespass, and the circumstances in such case must guide the judgment. As where a man takes another's goods openly before him or before other persons, otherwise than by apparent robbery, or, having possessed himself of them, avows the fact before he is questioned. 1 *Hale*, 509. 2 *East*, P. C. 661.

Philipps and *Strong* were indicted for stealing a mare and gelding of *John Goulter*. It appeared in evidence that the prisoners had gone to the stables of *Goulter*, who kept an inn at a place called *Petty France*, in the night of the 26th of February 1801, opened them, and taken out the horse and mare, the subject of the indictment, and rode on them to *Lechlade*, about 32 or 33 miles off, where they carried them to different inns, and left them in care of the ostlers, directing them to clean and feed them, and saying that they should return in three hours. In the course of the same day, the prisoners were taken at a distance of fourteen miles from *Lechlade*, walking towards *Farringdon* in *Berkshire*, in a direction from *Lechlade*. The jury being directed to consider, whether the prisoners, when they took the horse and mare, intended to make any farther use of them than to ride them, for the purpose of assisting them on their journey towards the place where they were going, and then to leave them to be recovered by the owner, or not, as it might turn out; and whether they intended to return to *Lechlade* and make any further use of them, found the prisoners guilty; but added, they were of opinion that the prisoners meant merely to ride them to *Lechlade*, and to leave them there; and that they had no intention to return for them, or to make any farther use of them. Upon this finding, at a conference, first in *Easter*, and afterwards in *Trinity Term*, 1801, the judges (*dissentiente Grose J. et dubitante Lord Alvanley*) held it to be only a trespass, and no felony: for there was no intention in the prisoners to change the property, or to make it their own; but only to use it for a special purpose, *i. e.* to save their labour in travelling. The judge who dissented thought there was no intention to return the horses to the owner, but, for aught the prisoners concerned themselves, to deprive him of them. But the

Where his own property has been mixed with that of others.

Practice of gleaning.

Bona fide claim of right.

Trespass.

The prisoners enter another's stable at night, and take out his horses and ride them thirty-two miles and leave them at an inn, and are afterwards found pursuing their journey on foot. On a finding by the jury that the prisoners took the horses merely with intent to ride and afterwards leave them, and not to return or make any farther use of them; held trespass and not larceny.

rest agreed that it was a question for the jury; and that, if they had found the prisoners guilty generally upon this evidence, the verdict could not have been questioned. *Philipps and Strong's case, Gloucester Sp. Ass.* 1801, *cor. Lawrence J.* 2 *East, P. C.* c. 16. § 98. p. 662.

Taking female's clothes for the purpose of having her company.

Where the prisoner took out of a house the bonnet of a girl with whom he had intrigued, and placed it in his hay-rick, in order to induce her to go there again, that he might meet her: held, not to be a felonious taking. *R. v. Dickinson, C. C. R.* 420.

However, in all these cases, the concurrent conduct of the person accused must be considered, for the purpose of determining whether or not the act done by him be felony.

The doing an act openly doth not make it the less a felony.

But, nevertheless, doing it openly and avowedly doth not excuse from felony. As where a man came to *Smithfield* market to sell a horse, and a jockey coming thither to buy a horse, the owner delivered his horse to the jockey to ride up and down the market to try his paces, but instead of that the jockey rode away with the horse; this was adjudged felony. *Kel.* 82.

Ditto.

So where a person came into a sempstress's shop, and cheapened goods, and ran away with the goods out of the shop, openly, in her sight, this was adjudged to be felony. *T. Raym.* 276.

Colour of legal process.

So where a man comes into a house by colour of a writ of execution, and carries away the goods; or sues out a replevin to get another man's horse, and then runs away with him; this is felony under colour of law. 2 *Vent.* 94. *Kel.* 83.

Using legal process.

So where legal process of any other description is fraudulently made use of, for the purpose of stealing the property of another, it will be felony. 2 *East, P. C.* c. 16. § 96. p. 660. *cit.* 2 *Russ.* 130, 131.

Finding, no larceny.

It is laid down in the books, that if one lose his goods, and another find them, though he convert them, *animo furandi*, to his own use, yet it is no larceny; for the first taking was lawful. 3 *Inst.* 108. 1 *Haw. c.* 93. § 2. 2 *Russ.* 100.

And Lord *Hale* says, if *A.* finds the purse of *B.* in the highway, and takes it, and carries it away, and hath all the circumstances that may prove it to be done *animo furandi*, as denying it or secreting it, yet it is not felony. 1 *Hale*, 506.

Aliter, where the owner has not really lost them.

But the doctrine of a taking by finding must be admitted with great limitation, and must be understood to apply only where the finder really believes the goods to have been lost by the owner, and does not colour a felonious taking under such a pretence.

It will not avail, therefore, where a man's goods being in a place in which ordinarily and lawfully they are or may be placed, a person takes them *animo furandi*. 1 *Hale*, 506. See *post*, p. 417.

Horses going on a common, or

Thus, if a man's horse be going upon a common where he has a right to put him, and another take the horse with intent to steal him, it is no finding, but a felony. 1 *Hale*, 506.

Straying.

So also, if the horse stray into a neighbour's ground or common, it is felony in him that so takes him.

Sheep straying.

If *A.*'s sheep stray into *B.*'s flock, and *B.* drives it along with his flock, and by bare mistake shears it, this taking is not a felony; but if he knew it to be another's, and marks it with his mark, this is an evidence of felony. 1 *Hale*, 507.

But even if the place where the goods are found is not one in

which ordinarily they would be deposited, circumstances may shew the taking to have been felonious. 1 *Hale*, 506.

A man hides a purse of money in his corn-mow; his servant finding it, took part of it. If, by circumstances, it can appear he knew his master laid it there, it is felony: but then the circumstances must be pregnant; otherwise it may be reasonably interpreted to be a bare finding, because the purse was deposited in so unusual a place. 2 *East's P. C.* 664. 2 *Hale*, 507.

But where a gentleman left a trunk in a hackney coach, and the coachman took and converted it to his own use; held felony: for he must have known where he took up the gentleman and his trunk, and where he set him down; and therefore he ought to have restored it to him. *Lamb's case*, *O. B.* 1694, 2 *East's P. C.* 664.

Money hid in an unusual place.

Stealing box left in a hackney coach.

So also, in the case of *Wm. Wynne*, at the *O. B.* in *April Sess.* 1786, 1 *Leach*, 413. 2 *East's P. C.* 664. 2 *Russ.* 101. The prisoner, who was a hackney coachman, had taken up the prosecutor, with several packages, at the *Adelphi*, and set him down in *Orchard Street*, where the prisoner and a servant took all the things out of the coach except one corded box, which remained under one of the seats, and contained several articles; for the stealing of which the prisoner was indicted. The prisoner, having received his fare, drove off; soon after which the box was missed, and all possible means were used that day to discover it, but without effect. In a few days, however, the prisoner was traced and taken, and the box found at a Jew's, whither it had been carried by the prisoner unrecorded, the hasps forced off, and part of the goods only in it; several papers were missing, and among them two bonds, mentioned in the indictment. *Eyre B.* observed to the jury, that as the prisoner had not originally taken possession of the property himself, but had it thrown upon him by the negligence of the prosecutor, in leaving the box behind him in the coach, no felonious intention could be supposed to exist in the mind of the defendant at the moment the property was first acquired; and although the subsequent circumstance of keeping it until it was advertised was a breach of moral duty, it could not of itself be legally considered as a criminal conversion. But if from the evidence the jury were satisfied in their consciences, that he had opened the box, not merely from curiosity, but with an intention to embezzle any part of its contents, and that he had actually taken the goods, it would become a matter of legal consideration whether it was felony. The jury found the prisoner guilty; and, in *Easter term*, 1786, a majority of the judges held the conviction proper; and in *July* session following, he received sentence of transportation for seven years.

Ditto.

At *O. B. Jan. Sess.* 1789, *John Sears* was indicted before *Ashhurst J.* for stealing a parcel of calico, &c. the property of *Sarah Dixon*. The prosecutrix hired the prisoner, who was a hackney coachman, to drive her from her house in *Manchester Buildings* to a linen-draper's in *Oxford Street*, where she purchased the articles named in the indictment, which were tied up in a parcel, and put into the coach. The prisoner drove back to *Manchester Buildings*, and the prosecutrix, on getting out of the coach, ordered him to give the parcel to her servant, but he neglected so to do. The things were advertised, and a reward offered to any person

Parcel left in hackney coach, and stolen.

who would restore them, but without effect. A few days afterwards, the prosecutrix met the prisoner, but he denied ever having seen her or the things, or having driven the coach at the time. The goods, however, were traced to the prisoner's possession, and the parcel had been opened. Upon this evidence the prisoner was convicted of felony, and sentenced to six months' imprisonment. *R. v. Sears*, 1 *Leach*, 415. n. (b).

Cases of bank notes, &c. found by the prisoners, and converted to their own use.

The doctrine as to a felonious taking of goods which have been found by the party, was further confirmed in two more recent cases. In the first, it appeared that a pocket-book, containing bank notes, had been found by the prisoner in the highway, and afterwards converted by him to his own use. Upon which *Lawrence J.* observed, that if the party finding property in such manner knows the owner of it, or if there be any mark upon it by which the owner can be ascertained, and the party, instead of restoring the property, converts it to his own use, such conversion will constitute a felonious taking. *Anon. cor. Lawrence J., Stafford Sum. Ass.* 1804, 2 *Russ.* 102. And, in the other case, the two prisoners (father and son) were convicted of stealing a bill of exchange, upon evidence of their having found and converted it to their own use, by endeavouring to negotiate it. *Gibbs J.* stated to the jury, that it was the duty of every man who found the property of another to use all diligence to find the owner, and not to conceal the property (which was actually stealing it), and appropriate it to his own use. *R. v. J. & B. Walters, cor. Gibbs J. Warnick Sam. Ass.* 1812. 2 *Russ.* 102.

Cartwright v. Green.
Conversion of a large sum of money with a felonious intent, which was found in a bureau delivered to a carpenter to be repaired.

A singular case occurred, at no very distant period, of a conversion, with a felonious intent, of a large sum of money found in a bureau, which had been delivered to a carpenter, for the purpose of being repaired. 8 *Ves.* 405. 2 *Leach*, 952. 2 *Russ.* 102. The point arose in the Court of Chancery upon the following facts: *Ann Cartwright* died possessed of the bureau, in a secret part of which she had concealed nine hundred guineas *in specie*. After her death, *Richard Cartwright*, her personal representative, lent the bureau to his brother *Henry*; who took it to the *East Indies* and brought it back, without the contents of it being discovered. It was then sold to a person named *Dick* for three guineas, who delivered it to one *Green*, a carpenter, for the purpose of repairing it. *Green* employed a person named *Hillingworth*, who found out the money. *Hillingworth* received only a guinea for his trouble: but, in consequence of his discovery, the whole sum of nine hundred guineas was secreted by *Green*, by *Green's* wife, and by one *Elizabeth Sharp*, and converted to their own use. On these suggestions, *Cartwright*, the personal representative of the original owner of the bureau, filed a bill of discovery against *Green* and his wife, and *Mrs. Sharp*; in which bill *Dick* joined, but did not claim any of the money on his own account; and the defendants demurred to the bill, on the ground that an answer to the discovery sought might subject them to criminal punishment. After the argument upon this demurrer, the Lord Chancellor said, that the real question was, whether the bill charged a felony, and that the distinctions upon that point were so extremely nice, that he should not trust himself to say any thing upon them, until he had seen all the cases, and consulted some of the judges. Some time afterwards (*April 28. 1803*), his lordship delivered his opinion, and said,

"I have looked into the books, and having talked with some of the judges and others, I have not found in any one person a doubt that this is a felony. To constitute felony, there must of necessity be a felonious taking. Breach of trust will not do. But from all the cases in *Hawkins*, there is no doubt, that this bureau being delivered to *Green* for no other purpose than to repair, if he broke open any part which it was not necessary to touch for the purpose of repair, with an intention to take and appropriate to his own use what he should find, that is a felonious taking, within the principle of all the modern cases; as not being warranted by the purpose for which it was delivered. If a pocket-book, containing bank-notes, were left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket, and the notes out of the pocket-book, there is not the least doubt that it is a felony. So, if the pocket-book was left in a hackney coach, if ten people were in the coach in the course of the day, and the coachman did not know to which of them it belonged, he acquires it by finding it certainly; but not being intrusted with it for the purpose of opening it, that is felony according to the modern cases. There is a vast number of other cases. Those with whom I have conversed upon this point, who are of very high authority, have no doubt upon it." See *Wynne's case*, ante.

There must be an actual taking or severance of the thing from the possession of the owner; for all felony includes trespass; and every indictment must have the words *feloniously took*, as well as *carried away*: from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away. 1 *Haw. c. 83. § 2.*

The possession of the owner may be actual or constructive; that is, he may have the goods in his manual possession, or they may be in the actual possession of another, and at the same time be constructively in the owner's possession; and they may be his property by virtue of some contract, and yet not have been reduced by him into actual possession, in which case his possession is constructive: they may be placed by him under his servant's care to be by him managed for him; in this case the owner has a constructive possession.

Besides the actual and constructive possession in the owner, who at the same time has the property in him, there is a possession distinct from the actual property, but arising out of an interest in the goods acquired by contract; as in the case of one who has possession of goods in pledge, or of goods lent, or let: such a one has a property (as well as possession) concurrent with the absolute property of the real owner, and either defeasible or reducible into an absolute property, according to the terms agreed upon between him and the actual owner.

The above several kinds of possession will all be sufficient to sustain an indictment of larceny from the absolute owner.

The books notice cases in which, although the manual custody be out of the owner and delivered by him to another, yet the possession, absolute as well as constructive, is deemed to remain in him, and the possession of the other to be no more than a bare charge.

Upon this difference between a possession and a charge, Lord *Coke* speaks as follows: "There is a diversity between a posses-

Must be an actual taking from the possession of the owner.

Of actual and constructive possession.

Special property and possession.

Difference between a posses-

sion and a charge.

Butler or cook.

Shepherd.

Taverner's guest.

Purpose of stealing after possession obtained.

Goods taken by the person to whom they are delivered :
tailor ;
carrier ;
friend.

Goldsmith.

Hirer or borrower.

Carrier taking a package but not breaking it, no larceny.

Master of vessel taking casks sent by him, no larceny.

So where the object of hiring or loan is at an end.

sion and a charge ; for when I deliver goods to a man, he hath the possession of the goods, and may have an action of trespass if they be taken or stolen out of his possession. But my butler or cook, that in my house hath charge of my vessel or plate, hath no possession of them, nor shall have an action of trespass as the bailee shall : and therefore if they steal the plate, &c. it is larceny ; and so it is of a shepherd ; for these things be *in onere et non in possessione promi, coci, pastoris,*" &c.

So he says, " if a taverner set a piece of plate before a man to drink in it, and he carry it away, &c. it is larceny ; for it is no bailment, but a special use to a special purpose."

Then, as to those cases which lie *in possessione*, he draws a distinction between such as gain possession *animo furandi*, and such as do not ; he says, " the intent to steal must be when it comes to his hands or possession ; for, if he hath the possession of it once lawfully, though he hath the *animum furandi* afterwards, and carrieth it away, it is no larceny." 3 Inst. 47. 107.

This principle has been holden to extend to the case of a tailor who has cloth delivered to him to make clothes with ; of a carrier, who receives goods to carry to a certain place ; and of a friend, who is entrusted with goods to keep for the use of the owner, which they afterwards severally embezzle. 2 East, P. C. c. 16. § 113. p. 693. 2 Russ. 131.

So, if plate be delivered to a goldsmith to work, or to weigh, or as a deposit, it has been said, that his conversion of it will not be a felony. 2 East, P. C. ib. 2 Russ. 132.

So, where a horse was delivered upon hire or loan, and such delivery was obtained *bonâ fide*, no subsequent wrongful conversion pending the contract, would amount to felony ; and so of other goods. 2 East, P. C. ib. 2 Russ. ib.

Prisoner being indicted for stealing a truss of hay, it appeared on the trial, that he had been employed to carry three trusses in his cart, sent by one person to another, and that prisoner had taken one of them, which was found in his possession, but not broken up. *Per Parke J.* This is no larceny, as the prisoner did not break up the truss. *R. v. Peatley, Oxford Spr. Ass. 1833, 5 Carr. & P. 533.*

Where 280 casks of butter were put on board a vessel at a port in *Ireland*, consigned to persons on the *Sussex* coast, and the prisoner, who was master and owner of the vessel, sold and disposed of 13 casks, on his own account, at *Cowes*, during the voyage : the case being reserved for the opinion of the judges, it was held to be no larceny. *R. v. Madox, C. C. R. 92.*

And it is the same even where the purpose for which the hiring or loan was made is at an end : as, where the prisoner borrowed a horse to carry a child to a neighbouring surgeon ; and the day following, when this purpose was over, he took the horse a different way, and sold it ; the jury found, that he had no felonious intent when he took the horse ; and the point being reserved after a conviction, the judges held, that, under these circumstances, there was no new felonious taking, so as to make the prisoner guilty of felony ; and that the doctrine laid down in 2 East, P. C. 690. and 694. was not correct. *R. v. Banks, C. C. R. 441.*

It is laid down, however, that the privity of contract may be determined before its regular completion by the tortious acts of the bailee. 2 *Russ.* 133.

Upon which principle it has been holden, that, if a carrier open a pack and take out *part* of the goods, or a weaver take *part* of the silk that he has received to work, or a miller take *part* of the corn which has been delivered to him to grind, such takings, if with a felonious intent, will be felony. 3 *Inst.* 107, 108. 1 *Hale*, 105. 1 *Hawk. P. C. c.* 33. §§ 2. 4.

It has also been held, that if a carrier take a pack of goods to the place appointed, and deliver, or lay it down, his possession is determined; and if he afterwards carry it away with intent to steal it, this will be a new taking, and felonious. 3 *Inst.* 107. 1 *Hale*, 505. 2 *Russ.* 131.

John Brazier was tried before *Holroyd J.* at the *Sum. Ass.* for the town of *Nottingham*, 1817, for stealing fifteen bushels of wheat, of the goods and chattels of *Thomas Neale*.—*Thomas Neale*, a farmer, sent forty bags containing twenty quarters of wheat to the prisoner, who was a wharfinger and warehouseman in the town of *Nottingham*, and who received the same into his warehouse there for safe custody for his said employer *Thomas Neale*. The wheat was to lie there until sold; *Thomas Neale*, and not the prisoner, was the person to sell it. It was proved also that *Neale* did not give any authority to the prisoner to make any alteration in the wheat, or to open the bags, either in order to shew them or otherwise. While the wheat thus remained in the prisoner's warehouse for safe custody, and was the property of the said *Thomas Neale* as aforesaid, the prisoner's servant, by the prisoner's order, took eight of the bags, containing four quarters of the above wheat, from the rest, and shooting the same out of the bags down upon the warehouse floor, mixed the same with other wheat of much inferior quality and value, that was in like manner shot out of four bags on the warehouse floor and intermixed with the former; when so mixed, the whole was, by the prisoner's order, put into twelve other bags, and afterwards disposed of and sent away by him for his own benefit. Afterwards, by the prisoner's orders, the above four quarters of *Thomas Neale's* wheat were replaced with an equal quantity of the prisoner's wheat, of very inferior quality and value, by mixing the same with two quarters of the residue of *Thomas Neale's* above mentioned wheat, and replacing the same when so mixed in the bags from whence the four quarters of *Neale's* wheat had been removed as aforesaid; other part of *Thomas Neale's* wheat was in like manner fraudulently removed, replaced, and mixed by the prisoner's orders, and sixteen of the above bags, containing eight quarters of the wheat so mixed as aforesaid, were afterwards delivered by the prisoner to the vendee of *Thomas Neale*, as being part of the said wheat of him the said *Thomas Neale* so deposited in the prisoner's warehouse as aforesaid. It did not appear that there was any severing of part of the wheat in any one bag from the residue of the wheat in the same bag, with intent to steal or embezzle that part only that was so severed, and not the residue in the same bag from which it was so severed. The jury, upon the facts above stated, found the prisoner guilty

Contract determined by tortious act of bailee.

Part taken of the thing delivered.

Carrier stealing a packet after it has reached its destination.

Wharfinger opening bags of corn delivered to his custody, and taking the contents, larceny.

of larceny, but the learned judge reserved the case for the consideration of the judges, and respited the judgment. In *Mich.* term 1817, eleven judges assembled were unanimously of opinion, that taking the wheat out of the bag was larceny; taking part only would have been so, and taking the whole was as much an offence as taking part. *Rex v. Brazier*, *Nottingham Sum. Ass.* 1817, *C. C. R.* 337.

Delivery of possession of the whole.

The above cases seem exceptions to the rule that no felony can be committed by *his* stealing the goods *to whom they were delivered* in possession by the owner, in a way which excludes the supposition of their being originally taken with a felonious intent. But, in truth, the reason of the distinction seems this: though the carrier, &c. have originally the goods delivered to them upon a trust, yet they are delivered as one whole and inseparable thing, and the only trust committed to him is over them in that state; and therefore his possession is a limited one: but, if he separate them, it is exercising an act of ownership not given to him over each part, and is therefore the same as an originally unlawful taking of that individual part, and it is also a carrying away by the mere act of separation. And this distinction should be carefully remembered, as it includes a number of cases very likely to occur in practice, viz. where a part is separated from a thing delivered entire.

Separation of a part.

The following are cases of servants, or persons acting as servants, who, having had a bare charge committed to them, and stolen the goods so entrusted to them, were adjudged to be guilty of the crime of larceny:—

One employed as a clerk in the day-time, but not residing in the house, embzles a bill of exchange, which he received from his master in the usual course of business, with directions to transmit it by he post to a correspondent: Held larceny.

Francis Paradise was indicted for stealing a bill of exchange of 100*l.* value, the property of *William Periam*. The prosecutor, to whom the bill was indorsed, was a draper at *Devizes*, and the prisoner, who was his book-keeper on a salary, kept his accounts, and received and paid money for him, but did not live in his house; but came every day there to transact his business. The prosecutor delivered the bill in question, with several others, to the prisoner, and ordered him to send them by that day's post, as he had often done before, from the *Devizes* to the prosecutor's banker in *London*, as cash to be accounted for to the prosecutor. The prisoner next day asked the prosecutor's leave to go to a town in the neighbourhood, which was consented to, on condition that he returned the next day by 12 o'clock. The prisoner went to *Salisbury*, got cash for the bill, which was indorsed by the prosecutor, and next by the prisoner; who was afterwards apprehended at *Exeter* with part of the bills and the money. *Gould J.*, before whom he was tried and convicted, respited judgment, to take the opinion of the judges whether this were felony or a breach of trust. In *Easter* term 1766, all the judges (except Lord *Camden*, who was absent), held it larceny, upon the principle that the possession still continued in the master. *Rex v. Paradise*, *Sarum Lent Ass.* 1766, 2 *East's P. C.* 565.

Carter going away with his master's cart.

A carter going away with his master's cart was holden to have been guilty of felony. *Robinson's case*, *O. B.* 1755, 2 *East's P. C.* 565.

Goods delivered to a tradesman's servant to carry to a customer, are

Rex v. Bass, *O. B.* 1782, 2 *East's P. C.* 566. 1 *Leach*, 351. The prisoner was convicted of stealing gauze of the value of eight pounds, the property of the prosecutor, and the case was referred to the consideration of the twelve judges, upon the follow-

ing facts: The prisoner was servant and porter in the general employ of the prosecutor (who was a gauze-weaver), and was sent with a package of goods from his master's house, with directions to deliver them to a customer at a particular place. In his way he met two men, who invited him into a public house to drink with them, and then persuaded him to open the package, and sell the goods to a person whom one of the men brought in: which he accordingly did, by taking them out of the package, putting them into the man's bag, and receiving, to his own use, part of the money for which they were sold. All the judges held this to be felony, on the ground that the possession of the goods still remained in the master.

Where the prisoner, who was clerk to the prosecutors, and managed their cash concerns, and took bills to their bankers to discount whenever he wanted cash, took from his master's desk an accepted bill, placed there by another clerk who had got it accepted by his master's order, and got it discounted, and absconded with the cash, he was held to be guilty of larceny of the bill, though it was objected, that by the course of business he had a right to get money for the bill, and therefore could not be indicted legally for stealing the bill itself. *Chipchase's case, O. B. Oct. 1795, cor. Heath J., 2 East's P. C. 567. 2 Leach, 699.*

The prisoner's master gave him a sum of money to carry to one *Flawn*, who had agreed to give the master bills for it in a few days: instead of so carrying it, the prisoner went away with the money, bought a watch and other articles with a part, and the rest was found in his possession when apprehended. After conviction, the opinion of the judges being taken, they held it to be not a breach of trust, but felony. *Lavender's case, 2 Russ. 201.*

So, where the prosecutor was a manufacturer, who often wanted silver to pay his workmen, and the prisoner, being his maid-servant, went to his wife, and said she knew a person who would let her have ten guineas' worth of silver, upon which the wife gave her ten guineas to get them changed; instead of which the prisoner ran off with them and never returned, and it also appeared that she had previously taken away her clothes; the prisoner was found guilty of larceny. *R. v. Atkinson, 2 Russ. ib.*

The prisoner being a lodger, his landlady sent by a servant to ask him to give change for a note: the prisoner examined his purse, and said he had not sufficient, but that he would go immediately to his bankers and get it changed; and he left the house with the note, and never returned. The prisoner was convicted, and no question made as to the larceny. *Campbell's case, cited 2 East's P. C. 644. 2 Russ. 108.*

Where the prisoner, being a clerk of Messrs. *Birch and Chambers*, bankers, made false entries to the credit of one *Vale*, a customer; and *Vale*, supposing the balance to be in his favour, whereas it was in reality against him, gave prisoner checks to the amount of such false entries, on which checks prisoner took money out of the bank funds, viz. two bank notes, for the stealing of which he was indicted and convicted, the jury finding that he took the notes himself, and that he made the false entries in order to get the money; the case having been argued, the judges held it to be felony, as the property had been taken against the will of the owner, and with a

still in the possession of the owner, and the servant is guilty of larceny in breaking the package and converting them.

Merchant's confidential clerk discounting bills and absconding, larceny.

Servant making away with money given him to carry to another person.

Servant absconding with money given her to procure small change, larceny.

Banker's clerk taking their money through the means of false entries in their books, larceny.

felonious intent, which appeared from the prisoner's having made false entries for the purpose of concealing his means of obtaining it. *Hammon's case*, C. C. R. 221. 4 Taunt. 304. 2 Russ. 202.

Person employed to drive sheep, and selling them, though not a regular servant, larceny.

The prisoner was not a regular servant of prosecutor, but was employed by him to drive fifty sheep, at so much per day, from *Bristol fair* to *Bradford fair*; the prisoner sold a portion of them, and drove the rest in an opposite direction: the jury found him guilty, and that when he received the sheep he intended to convert them to his own use. The judges were unanimous that the conviction was right. *R. v. Stock*, 1 Ry. & M. 87. 2 Russ. 200.

If a man who is hired to drive cattle, sell them, it is larceny, for he has the custody only, not the right of possession: his possession is the owner's possession. *R. M. T.* 1832. Though he is a general drover. *Id.* At least, if he is paid by the day. *Id.*

Prisoner was hired to take a drove of sheep, first to *Grantham* and afterwards to *Smithfield*, at 3s. per day; he was a general drover: after leaving *Grantham*, and before he reached *Smithfield*, he sold what remained, and embezzled the money. The jury found he had no intention of stealing them when he received them: but on case, the judges (12) thought that immaterial: the owner parted with the custody only, as to a servant, not with the possession; prisoner's possession was that of the owner. *M. T.* 1832, *R. v. M'Namee*, MS. Bayley B. S. C. 1 M. 368.

Sheriff's officer purloining goods taken under a *fi. fa.*, larceny.

The prisoner, a sheriff's officer, having seized the prosecutor's goods under a *fi. fa.*, opened a closet, took out some engravings, and sold them for his own use. After conviction, the judges held this to be larceny, for that the officer had only the custody of the goods, like a servant, and not the legal possession. *R. v. Eastall*, 2 Russ. 197.

Where goods have not been reduced into the master's actual possession.

There is another class of cases, in which the master becomes by contract with another the owner of goods in the actual possession of that other, and which are by the master's direction delivered to his servant for him. If the servant, having thus received the goods, steal them, it is larceny at common law, as in the following case, viz.

A corn-factor, having purchased a cargo of oats on board a ship, sent his servant with his barge to receive part of the oats in loose bulk; and the servant ordered some of them to be put into sacks, which he afterwards embezzled: this was holden to be larceny.

Where the prisoner had been convicted for stealing forty bushels of oats, a question whether the facts amounted to felony was reserved for the opinion of the judges. The prosecutors, who were corn-factors, had purchased a cargo of oats on board a ship lying in the river *Thames*, and they sent the prisoner, who was employed in their service as a lighterman, with their barge, to one *Wilson*, a corn-meter, for as much oats, in loose bulk, as the barge would carry. The prisoner proceeded to the ship, and received from *Wilson* two hundred and twenty quarters of oats, in loose bulk, and five quarters in sacks. The five quarters were put into sacks by the order of the prisoner, and were afterwards embezzled by him. The question submitted to the judges was, whether this was felony, as the oats had never been in the possession of the prosecutor; or whether it was not like the case of a servant receiving charge of, or buying, a thing for his master, and never delivering it. And the judges held that it was larceny in the prisoner, and a taking from the actual possession of the owner, as much as if the oats had been in his granary. *Spear's case*, *Kingston Sp. Ass.* 1798, 2 East's P. C. 568. 2 Leach, 825.

The prosecutors had bought 240 quarters of oats from a vessel in the *Thames*; and while they were in the act of being delivered into prosecutors' barge, the prisoner, who was their servant, came in another boat with ten empty sacks, procured them to be filled with oats, took them away, and sold them. The judges held, that he was properly convicted. *Abraham's case*, 2 East, P. C. c. 16. § 16. p. 569. The property of the masters in the corn was complete before the delivery to the prisoner; and after the purchase of it in the vessel the prosecutors had a lawful and exclusive possession of it, as against all the world but the owner of the vessel. 2 East, P. C. ib. 2 Russ. 200.

The prosecutors, who were soap manufacturers, had bought some barilla lying in a vessel in the *London Docks*, and employed one B., a master carman, to bring it home. B. sent the prisoner (his servant) for it with a cart, to whom it was delivered in the presence of prosecutors' clerk, who was employed to see it weighed out. The prisoner, in concert with others, caused it to be purloined before it reached the prosecutors' premises. The judges held this to be larceny in the prisoner, whether the barilla was considered the property of the prosecutors or of B. *R. v. Harding and others*, C. C. R. 125.

These several cases were all founded upon the master having an actual or legal possession prior to the delivery to the servant. But there are others, in which the master has neither property nor possession in the goods previously to the receipt of them by his servant from a third person, for the purpose of delivering them to him. And it has been held that, at common law, a servant so receiving goods and then embezzling them is not guilty of larceny.

For it is laid down, that if the servant have done no act to determine his original, lawful, and exclusive possession, as by depositing the goods in his master's house, or the like, although to many purposes and as against third persons, this is in law a receipt of the goods by the master, yet it has been ruled otherwise with respect to the servant himself, upon a charge of larceny at common law, in converting such goods to his own use.

Waite was indicted for stealing *East India* bonds, the property of the governor and company of the bank of *England*. The prisoner was cashier of the bank, and as such had received the six bonds amongst others by an order from the Court of Chancery, and had given receipts for them for the governor and company of the bank of *England*. The custom was for the directors to lock up such securities in a chest in the cellar, but these had never been out of the prisoner's desk till he converted them to his own use. This case was very fully argued, both for the crown and for the prisoner, and it was held, that as *Waite* received the bonds and they were never put into the cellar, in the usual course, the governor and company of the bank had no possession of them, but the possession remained always in the prisoner. *Waite's case*, O. B. 1743, 1 Leach, 28. 2 East's P. C. 570.

The prisoner, a banker's clerk, took from a customer some cash, and several bank notes, which he was authorised to receive and to give a discharge for the same, and he purloined one of the notes before he put it into the drawer, where in the course of business it was his duty to have placed it. In this case, after argument at

Prisoner taking from a vessel oats which had been bought by his masters.

Barilla stolen while taking from a vessel in the London Docks to the house of the purchaser.

Where goods are delivered by another to the master by the hands of his servant, the master not having property or possession of them prior to such delivery to the servant, the servant purloining such goods is not guilty of larceny; unless the servant's possession be determined.

Clerk of bank of England embezzling East India bonds.

Banker's clerk embezzling a bank-note received from a customer.

considerable length, it was agreed by the judges, that it was not felony, inasmuch as the note was never in the possession of the bankers, distinct from the possession of the prisoner, but that it would have been otherwise if the prisoner had deposited it in the drawer, and had taken it afterwards. *Bazeley's case*, 2 East's P. C. c. 16. § 17. p. 571.

Tradesman's
servant embez-
zling money re-
ceived in the
shop.

So the prisoner, who was a confectioner's servant, had received from a customer some money that had been marked for the purpose in concert with his master: and on search it was discovered that he had placed a part only of the marked money in the till, and the rest was found upon him: the judges held, that he was not guilty of larceny, but only of a breach of trust, the money not having been put into the till, and therefore not having been in the possession of the master, as against the prisoner. *Bull's case*, 2 East, P. C. c. 16. § 17. p. 572.

7 & 8 G. 4.
c. 29. s. 47.
Embezzlement
by servant, &c.
made larceny.

But the punishment of such embezzlements is now provided for by 7 & 8 G. 4. c. 29. § 47., which declares and enacts, that if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall, by virtue of such employment, receive or take into his possession any chattel, money, or valuable security, for, or in the name, or on the account of, his master, and shall fraudulently embezzle the same or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant, or other person so employed; and every such offender, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as herein-before mentioned; viz. by § 46. he shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit) in addition to such imprisonment.

7 & 8 G. 4.
c. 29.

Indictment;
charge of
several offences;
avowment of
property em-
bezzled.

§ 48. enacts, that it shall be lawful to charge in the indictment, and proceed against the offender, for any number of distinct acts of embezzlement not exceeding three, which may have been committed by him against the same master, within the space of six calendar months, from the first to the last of such acts; and in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained, if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed, shall not be proved; or if he shall be proved to have embezzled any piece of coin, or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly.

Court may
order a parti-

Prisoner being indicted for embezzlement, applied to the court for an order for a particular of the charges against him, stating by

affidavit that he had been farming bailiff to prosecutor, that he did not know what charges were to be brought against him, and that he had applied for a particular, which had been refused; and *Littledale J.* granted the order. *R. v. Bootyman, Shrewsbury Spr. Ass. 1832, 5 Carr. & P. 300.* See *R. v. Hodgson, 3 C. & P. 422.*

As the 39 G. 3. c. 85., which is now repealed, was framed nearly in the same words as 7 & 8 G. 4. c. 29. § 47., it will be proper to insert the decisions on some of the cases under 39 G. 3. c. 85.

The effect of the stat. (39 G. 3.) is, to constitute the offence described in it a larceny. It specifies what the circumstances are which shall be sufficient to constitute such offence a larceny, and under which circumstances the offender shall be deemed to have feloniously stolen. "First, he must be a servant or clerk, &c.; then he must receive or take into his possession the money, goods, &c.; and that must be for or on account of his master; and must fraudulently embezzle the same." [*Per Ld. Ellenborough C. J. in Rex v. Johnston, 3 M. & S. 548, 549.* See the case, *post*, p. 429.

Shortly after the act was passed, it was ruled, that it was an offence within its provisions for a servant to embezzle money received from a customer of his master's, though the money had been given to the customer by the master, in order that it might be paid in the course of business to the servant, for the purpose of trying the servant's honesty. *Whittingham's case, O. B. 1801, 2 Leach, 912.* And in *Hedge's case, O. B. 1809, C. C. R. 160. 2 Leach, 1033.*, it was decided by the judges, that a servant secreting money which the master had marked and sent by a friend, to make a purchase at his shop, with a view of trying the honesty of his servant, is guilty of a felonious breach of trust, and an embezzling within 39 G. 3. c. 85., and not a larceny at common law.— See also *Thomas Bull's case, cited arguendo in Bazeley's case, 2 Leach, 841. and 2 East, P. C. 572.* See *ant2*, p. 425.

But where the property taken was delivered to the servant by the master himself, it was ruled that the case was not within this statute. The indictment charged the prisoner with having received and taken into his possession one shilling on account of his master, and embezzling the same; and upon the evidence it appeared, that having two shillings and sixpence of his master's money to pay on account of his master, he only paid one shilling and sixpence, and converted the other shilling to his own use, upon which the learned judge directed the jury to acquit the prisoner. *Peck's case, cor. Park J. Stafford Sum. Ass. 1817, MS. 2 Russ. 213.*

The prisoner was indicted at common law, for stealing certain silver coin, the property of *T. N. and G. N.* It appeared that he was their servant, and as such was employed to procure change for a 5*l.* note; he received the whole in silver, with which he made off: after conviction, it was held wrong, as the masters never had possession except by the hands of the prisoner, and that he was only amenable under 39 G. 3. *R. v. Sullens, 1 R. & M. 129.*

Rex v. John Hall, 3 Stark. C. N. P. 67. and C. C. R. 463. The prisoner was convicted before *Bayley J.* at *Lancaster Sum. Ass. 1821*, of embezzling six one-pound notes, received by him as clerk to *Messrs. Hollingshead & Co.* It appeared in evidence, that on the 10th of November, he received from a *Mrs. Webster*, for and

cular of the charges to be given to the prisoner.

39 G. 3. c. 29.
(now repealed.)

Felony in servant to embezzle money received from a third person on his master's account, though paid to him with the master's privity, in order to try his honesty.

Aliter where the property taken was delivered to the servant by his master.

Servant making away with change received for a note, not larceny at common law.

If a servant, immediately on receiving a sum for his master, enters a smaller in his master's

books, and ultimately accounts to his master for the smaller sum only, he may be considered as embezzling the difference at the time he made the entry. And it will make no difference, though he received other sums for his master on the same day, and in paying them and the smaller sum to his master together, he might give his master every piece of money or note he received at the time he made the false entry. Servant of two partners taking money which is the property of one only.

on account of Messrs. *Hollingshead & Co.* 18*l.* in one-pound notes, and he immediately entered in the books of Messrs. *Hollingshead & Co.* as the amount received, 12*l.* only, and he accounted to them only for 12*l.* In the course of the same day he received for them other sums, amounting to 104*l.* 2*s.*, and in the evening of that day, he paid to Messrs. *Hollingshead & Co.* 116*l.* 2*s.* It was urged on the part of the prisoner, that the money he so paid might have included every one of the notes he received from Mrs. *Webster*, and if so, that he could not be considered as having embezzled any of those notes. Every one of those notes certainly might have been included in what he so paid; but his lordship told the jury, that as in what the prisoner paid, he paid only 12*l.* as and for all he received of Mrs. *Webster*, and he paid the other 104*l.* 2*s.* as and for money received of other persons, he ought to be considered as embezzling six of the notes he received from Mrs. *Webster*, because he would then have misapplied those specific notes to his own benefit and to his master's prejudice. The jury found the prisoner guilty, and on case, nine judges in *M. T.* 1821 (*Best J. absente*) thought it an embezzlement from the time of making the false entry.

Rex v. Leech, Lanc. Sum. Ass. 1821, 3 *Stark. C. N. P.* 70. The prisoner was indicted under stat. 39 *G. 3. c.* 85. for having embezzled a number of bank notes, which he had received into his possession as the clerk and servant of *T. R. B.* He was also charged with a common larceny. The prosecutor *T. R. B.* and *T. R.* were partners in trade, and the prisoner was in their employment in the capacity of book-keeper. Whilst he was thus in their employment he received the notes in question into his possession, being the private property of *T. R. B.*, to be deposited in the safe where the money of the firm was usually kept. He afterwards took them from the safe, and absconded with them. It was objected, that he could not be considered as the servant of *T. R. B.* the prosecutor, being, in fact, the servant of the prosecutor and his partner jointly; but *Bayley J.* held, that he was the servant of both; and said, that it had been decided by the judges, that where a traveller is employed by several houses to receive money, he is the individual servant of each. The prisoner was convicted.

Acc. R. v. Carr, M. T. 1811, *C. C. R.* 198.

The statute is not confined to clerks and servants of persons in trade; it extends to the clerks and servants employed to receive of all persons whatsoever.

Rex v. Squire, York Sp. Ass. 1818, *C. C. R.* 349. 2 *Stark. Rep.* 349. *S. C.* The prisoner was indicted before *Bayley J.* at *York Spring Ass.* 1818, for embezzling fourteen one-guinea notes, received by him by virtue of his employment as clerk and servant to eight persons, who were overseers for the township of *Leeds*. It appeared in evidence, that he had acted for several years for the overseers of that township at a yearly salary, under the name of their accountant and treasurer; that he received and paid all the money receivable or payable on their account, and that he rendered to them every week a weekly account, purporting to be an account of whatever he had received or paid during that period; that on the 23d of *June* 1817, he received the fourteen notes in question from *John Senior*, being money due from him as overseer of another township, for money supplied by the

The overseers of a township employed the prisoner as their accountant and treasurer, and he received and paid all the money received or payable on their account; he received a sum and embezzled it; and on case reserved, the judges were clear that

township of Leeds to a pauper in *Leeds*, belonging to *Senior's* township; that he had not entered that receipt in his weekly accounts, and that he had omitted other receipts at various times, to an amount exceeding 1800*l.* The learned judge told the jury, that if they were satisfied he intentionally omitted entering this receipt, for the fraudulent purpose of applying the money to purposes of his own, and that he had so applied it, they ought to find him guilty; and they found him guilty accordingly: but it having been urged that the prisoner was not such a clerk or servant as the statute contemplated, that point was reserved for the consideration of the judges, who, in *Easter* term following, were of opinion, that the prisoner was clearly a clerk and servant within the statute.

Elizabeth Smith was convicted at the *Sum. Ass.* 1813, for the county of *Norfolk*, of embezzling a 5*l.* note, the property of *Charles Pincing*, in whose service she lived as housekeeper. *Ld. C. B. Macdonald*, before whom the prisoner was tried, doubting whether the stat. 39 G. 3. c. 85. applied to a female servant, inasmuch as that act enacts and declares, "That if any servant or clerk, or any person employed for the purpose, in the capacity of a servant or clerk to any person or persons whomsoever, &c. shall, by virtue of such employment, receive or take into his possession any money, &c.," such servant fraudulently embezzling the same shall be deemed to have stolen it feloniously: sentence was respited, and the point reserved for the consideration of the judges, who, in *M. T.* following, were unanimously of opinion that the act extended to female servants as well as male. *Elizabeth Smith's case, Norfolk Sum. Ass.* 1813, *C. C. R.* 267.

The prisoner, who was clerk of a chapelry, purloined some of the money which he was collecting for the sacrament, and was indicted under 7 & 8 G. 4., for embezzlement; and in different counts he was stated to be the servant of the minister, of the churchwardens, of the minister and churchwardens, and of the poor of the parish. After conviction, the judges held, that he was not properly the servant of any of the parties, as laid in the indictment. *R. v. Burton*, 1 *R. & M.* 237.

The prisoner was master of a charity school, which was under the management of a committee, and at the desire of the treasurer of such committee he received a contribution for the school, which he embezzled; but he had never before been employed to receive any contribution. In the indictment, under 7 & 8 G. 4., he was stated to be the servant of such treasurer. But it was afterwards held by the judges, that he did not stand in that relation either to the treasurer or to the committee, so as to bring him within the act. *R. v. Nettleton*, 1 *R. & M.* 259.

R. v. Johnson, 3 *M. & S.* 549, 550. The prisoner had been convicted at the assizes for *Lancashire*, and adjudged to be transported for fourteen years, upon an indictment, several counts of which charged him with embezzling bank-notes against the form of the statute (a), and others with stealing bank-notes in the common form of counts for larceny; it was assigned for error that this was a *misjoinder*, the counts for embezzlement on the

he was a clerk and servant within the act.

Stat. 39 G. 3. c. 85. extends to female servants.

Parish clerk purloining sacrament-money.

Master of charity school embezzling a subscription.

Counts for larceny at common law, and for embezzlement under the statute, may be joined in the same indictment.

statute, and the counts for grand larceny being counts upon which a different judgment ought by law to be given. But the court of K. B. were of opinion, that the counts for embezzlement might well be joined with the counts for larceny, considering that the statute had in fact made the offence of embezzlement described in it a larceny; and that having so done, it had attached upon it all the properties and consequences attaching upon the crime of larceny.

39 G. 3. c. 85. extends to apprentices, but only in cases where money is received by virtue of their employment.

This stat. applies only to servants employed to receive money, and to instances in which they receive what they embezzle by virtue of their employment. Therefore, where a butcher's apprentice, under eighteen, carried a bill for 17s. 10d. to a customer, got the money from him, and embezzled it, he having never been employed to receive money for his master, on case to take the opinion of the judges whether the stat. extended to apprentices, the judges seemed to think it did, there being no exception; but on the ground that the prisoner was never employed to receive money, and therefore did not receive this by virtue of his employment, they held the conviction wrong. *Rex v. Mellish*, O. B. E. T. 1805, C. C. R. 80.

Man employed occasionally, when he had nothing else to do, held to be a servant.

The prisoner was employed by a carrier to carry out parcels, &c. when he had nothing else to do, for which the carrier paid him what he thought proper; the carrier having given him an order to receive 2l., the prisoner embezzled it. The judges held he was to be considered a servant within 39 G. 3. E. T. 1815, *R. v. Spencer*, C. C. R. 299. See *R. v. Hughes*, *infra*.

Servant paid by a proportion of the price of the goods sold by him.

The owner of a colliery employed the prisoner as captain of one of his vessels, to carry and sell his coals, for which he was to be paid by a certain proportion of the profit: the prisoner having embezzled the money which he received for the sale of the coals, held, that it was a case within the stat., and that he was properly convicted. 1808, *R. v. Hartley*, C. C. R. 139.

Ditto.

The prisoner was in the employ of persons who were turners, and his business was to make articles out of their materials, to deliver them out, and to receive the money for them; and he was paid a proportion of the price at the end of each week. Having appropriated to his own use all the money that he received for certain articles, he was tried and found guilty; and it was agreed by the judges that the conviction was proper. E. T. 1809, *R. v. Hoggins*, C. C. R. 145.

Clerk receiving money in a different course from his regular employ.

The prisoner being clerk to H. and D., carcass butchers, his regular duty was to receive each evening from the porters the money which they had received from the customers; it appeared that the prisoner received from a customer a draft for a debt due to his employers, and that he made away with the produce of it: Held, that it was sufficiently a receipt of money, by virtue of his employment, to bring him within the 39 G. 3. H. T. 1817, *R. v. Beechey*, C. C. R. 319.

Turnpike-gate keeper received a sum from another turnpike-gate keeper.

The lessees of the tolls of a turnpike employed the prisoner to receive the tolls at a particular gate, and afterwards directed him to receive from another turnpike-gate keeper the amount of the tolls which he had received at another gate, which sum the prisoner embezzled: a majority of the judges held, that, as he allowed himself to be employed to receive such money, though it was out of the regular course of his business, his case fell within the provisions of the stat. T. T. 1823, *R. v. Smith*, C. C. R. 516.

If the property has ever been in the possession of the master or of any of his other servants, the case is not within the stat. *R. T. R.* 1830.

Where the property has been in possession of master or another servant.

A clerk of *A.* received from another clerk of *A.* 3*l.* to pay, among other things, for the insertion of an advertisement: he paid 10*s.* and charged 20*s.*, and embezzled the difference. On case, the judges thought the case not within the stat., because *A.* had had possession of the money by the hands of his other clerk. *Tr. T.* 1830, *R. v. Murray*, *MS. Bayley*, *B. S. C.* 1 *M.* 276.

Embezzlement by a servant not authorised to receive is not within 7 & 8 *G. 4.* *R. E. T.* 1832.

Servant not authorised to receive the property.

Prisoner was servant to a carrier, employed to lock up goods: he had no authority to receive money. He was standing in his master's counting-house, when one of his master's debtors came in, and supposing him to be a clerk authorised to receive money, paid him 8*l.*, and he gave a receipt, but embezzled the money. On indictment *inde*, and case, the judges (12) held, that as he had no authority to receive money, the case was not within 7 & 8 *G. 4. c. 29.* and that the conviction was wrong. *E. T.* 1832, *R. v. Thorley*, *MS. Bayley* *B. S. C.* 1 *M.* 343.

A servant may be found guilty of embezzlement, though he is not a general servant, and is employed to receive in a single instance only. *R. M. T.* 1832.

Person employed as a servant in a single instance only.

Prisoner was employed by the prosecutor to keep some beasts for him in *Smithfield* market, and on the sale of a cow and calf, to drive them to the purchasers, and receive the price, 16*l.*; prisoner received the money, and embezzled it: he was employed by the prosecutor as a drover in this instance. On case, the judges (12) were unanimous, that the prisoner was a person employed within the act to receive, and conviction right. *M. T.* 1832, *R. v. Hughes*, *MS. Bayley* *B. S. C.* 1 *M.* 370. See *R. v. Spencer*, *supra*.

Since the decision in the case of *R. v. Hughes* the following case has been reported:—

Prisoner had been employed by prosecutor, sometimes as a regular labourer and sometimes as a roundsman, and had been sent several times to a bank for money: on the day in question, he was not working for prosecutor, but was to be paid 6*d.* for getting a check cashed at the *Bicester* bank. This the prisoner did, but made off with the money. *Parke J.* (after consulting *Taunton J.*) held, that the prisoner was not a servant of the prosecutor within the meaning of the stat., and that this therefore was no embezzlement. *R. v. Freeman*, *Oxford Sp. Ass.* 1833, 5 *Carr. & P.* 834.

S. P.

It is, however, to be observed, that it does not appear that either the case of *R. v. Hughes*, or of *R. v. Spencer*, was cited to the court in *R. v. Freeman*; and further, that *R. v. Hughes* had been decided in the preceding *M. T.* by the unanimous opinion of twelve judges. See also the cases of *R. v. Stock*, and *R. v. M'Namee*, *supra*, p. 424.

In an indictment on this stat., against a servant for embezzling money received on his master's account, it is not sufficient to follow the words of the statute; but there must be a positive allegation, that the money was the property of the prosecutor, as in other cases of larceny. *Rex v. M'Gregor*, *O. B. Sept.* 1801,

Indictment must state in whom the property is.

Indictment need not aver that prisoner feloniously embezzled, if it conclude that he feloniously stole, &c.

Trial.
County.
Receiving in one county, denying such receipt in another county.

S. P.

7 G. 4. c. 64.
§ 12. offence begun in one county completed in another.

Owner delivering his property with intent of parting with it absolutely.

Obtaining delivery of a horse sold, on promise to return imme-

C. C. R. 23. 3 Bos. & Pull. 106. 2 East's P. C. 576. *Rez v. Floyd, Dorchester Sp. Ass.* 1802, cor. *Le Blanc J. MS.* C. C. R. S. P.

The indictment charged that the prisoner was employed as a clerk to A., and that by virtue of his employment, he received from B. on account of his master 9*l.* 18*s.* 9*d.* without shewing of what monies that sum was made up, and that he fraudulently embezzled and secreted the same, omitting the word *feloniously*; and so it concluded that the jurors say, that he did feloniously embezzle, steal, take, and carry, &c. Objection was made, that in the introductory part of the indictment it was not alleged that he did *feloniously* embezzle, &c.; and that therefore the indictment failed to shew that he had committed a felony, and that unless it was so shewn in the body of the indictment, it was not enough that it was so alleged in the conclusion of it. The judges, however, considered it to be sufficient that it was stated in the conclusion, and the indictment was holden good. *R. v. Crighton, cor. Thomson B., Lancaster Sum. Ass.* 1803, and before all the judges at Serjeants' Inn, *M. T.* 1803, C. C. R. 92. and cited per Bayley J., 3 *M. & S.* 555.

But, in order to found a judgment upon the statute, the indictment must be specially drawn, so as to bring the case within it. *Jones's case, Winton Spring Ass.* 1800, 2 East's P. C. 576.

Where the prisoner received money in the county of Salop, and denied such receipt in the county of Stafford, it was holden by the judges to be evidence to shew that the original receipt was with intent to embezzle, and that the trial was properly had in the county of Salop. Some of the judges were of opinion that the offence was triable in either county, as referable to the original taking in the one, and not accounting, but denying the receipt, when called upon in the other. *Hobson's case, Shrewsbury Lent Ass.* 1803 & *E. T.* 1803, 1 East's P. C. Add. xxiv. 2 *Russ.* 217. C. C. R. 56.

And in a case where the prisoner received the money in Surrey, and the same day being called upon to account for it in Middlesex, denied that he had ever received it, there being no evidence of the prisoner having done any act to embezzle in the county of Surrey, the judges held that he was properly indicted in the county of Middlesex. *Taylor's case, O. B.* 1803, C. C. R. 63. 3 *Boss. & Pull.* 596. 2 *Leach*, 974.

But by 7 G. 4. c. 64. § 12., where a felony or misdemeanor shall be committed on the boundaries of two or more counties, or within 500 yards of such boundary, or shall be begun in one county and completed in another, every such offence may be tried in any of the said counties as if it had been actually and wholly committed therein.

Where the owner delivers his property to another, intending to part with it altogether and absolutely, the taking and disposing of it will not amount to felony, although the party receiving it intended to defraud the owner, and induced him to part with it by false representation. 2 East's P. C. c. 16. § 102. p. 668. § 103. p. 669. 2 *Russ.* 109.

Justin Harvey was indicted for horse stealing: and it appeared in evidence that the prisoner met the prosecutor at a fair; with the horse, which he had brought there for the purpose of selling it; and being known to him, proposed to him to become the purchaser.

They walked together in the fair; and, upon a view of the horse, the prosecutor told the prisoner he should have it for 8*l.*; and calling his servant, ordered him to deliver it to the prisoner: who immediately mounted the horse, telling the prosecutor that he would return immediately and pay him; the prosecutor replied *very well*; and the prisoner rode away with the horse, and never returned.—*Gould J.* ordered an acquittal; for here was a complete contract of sale and delivery: the property as well as the possession was entirely parted with. *R. v. Harvey, Chelmsford Ass. 1787, cor. Gould J., 1 Leach, 467. 2 East's P. C. 669.*

So, also, where the prisoner, with a fraudulent intent to obtain goods, ordered a tradesman to send him a piece of silk, to be paid for on delivery; and, upon the silk being sent accordingly, gave the servant who brought it bills which were mere fabrications, and of no value: it was holden not to be larceny, on the ground that the servant *parted with the property* by accepting such payment as was offered, though his master did not intend to give the prisoner credit. *Park's case, O. B. Jan. 1794, 2 Leach, 614. 2 East's P. C. 671.*

The prisoner bespoke a box of goods, telling the tradesman he meant to pay him ready money; the box was left at a coach-office ready for departure the day following, and an appointment was made for the payment of the bill at a coffee-house; the prisoner never went to the coffee-house, but had, in the meantime, carried off the box from the office: Held to be larceny; the jury finding, that it was the prisoner's intention, *ab initio*, to get the goods without payment, and convert them to his own use. *H. T. 1828, R. v. Campbell, 1 R. & M. 179.*

The prisoner agreed for the purchase of some oxen at a fair, and was to pay for them at an adjoining inn; he never appeared there, but in the meantime took away the beasts and sold them again in the fair; and the custom was, to pay before they were delivered: Held to be larceny, the jury finding, that he never intended to pay for the beasts. *E. T. 1828, R. v. Gilbert, 1 R. & M. 185.*

Where the prisoner agreed for the purchase of goods to be paid for on delivery, and he was afterwards allowed to take them from the wharf, on his promise to pay for them before they were lodged in his house; on the way there, however, he took them in another direction, and disposed of them. The jury found, that he never meant to pay, but to defraud the owner. Held larceny. *H. T. 1830, R. v. Pratt, 1 R. & M. 250.*

The prisoner procured some chests of tea to be delivered to him at a carrier's office, by falsely pretending that he was the person to whom they were addressed. The jury found that he knew they were not his property, and intended to steal them; and held to be larceny, as the carrier's servant had no authority to part with the ownership to the prisoner. *E. T. 1826, R. v. Longstreeth, 1 R. & M. 137.*

The prosecutor having been inveigled by sharpers to bet with them, and suffered by them to win in the first instance, was afterwards stripped of a large sum, by losing a bet; and the whole transaction was found by the jury to have been a preconcerted scheme to get the prosecutor's money; but it was holden by the judges, on case reserved, not to be a felonious taking, as the pro-

diately and pay for it; and riding off and not returning; no felony.

Taking goods by purchase though giving false bills in payment.

Goods sold for ready money, and fraudulently taken without being paid for.

Purchase of oxen at a fair, clandestinely taken away without payment.

Prisoner allowed to take goods from the wharf on a promise to pay for them before he placed them in his house.

Prisoner obtaining boxes sent by a carrier by personating the person to whom they were addressed.

Property parted with as for a bet fairly lost.

No difference where delivery from the owner upon credit obtained under another's name.

Obtaining silver on pretence of sending a half guinea presently in exchange; no felony.

Obtaining by fraud from a hatter a hat intended for another person.

One writing a letter in the name of another to a third person to borrow money, which he obtains by that fraud, is only guilty of misdemeanor.

Prisoner fraudulently getting back goods which he had pawned.

secutor parted with the *property* in his money, under an idea that it had been fairly won. *Case of Nicholson, Jones, and Chappel*, O. B. 1794, 2 *Leach*, 610. 2 *East's P. C.* 669.

It makes no difference in these cases, that the credit was obtained by fraudulently using another's name, to whom, in truth, the credit was intended to be given, if the delivery of the goods were made by the owner, or any other having the disposing power for that purpose. 2 *East's P. C.* 672.

Thus, where the prisoner went to a tradesman's house, and said she came from a Mrs. Cook, a neighbour, who would be obliged if he would let her have half a guinea's worth of silver, and that she would send the half guinea presently. The prisoner obtained the silver, and never returned; and this was holden no felony. This was, in truth, a *loan* of the silver, upon the faith that the amount would be repaid at another time. It was money obtained on a false pretence; and the same determination has been made in similar cases at the O. B. *Coleman's case*, O. B. June, 1785, 2 *East's P. C.* 672.

The prisoner discovered that *Paul* had ordered a hat of *Beer*, and he sent a boy to *Beer's* for it in *Paul's* name, and obtained it. He was indicted for stealing it. And one count stated it to be *Beer's* property, another *Paul's*. It was urged that he should have been indicted for obtaining it by false pretences: and on a case reserved, the judges held the conviction could not be supported. Not on the first count, because *Beer* had parted with the ownership; and not on the second, because *Paul* had never had possession. *R. v. Adams, Taunton Sp. Ass.* 1812, *cor. Chambre J. C. C. R.* 225.

James William Atkinson was indicted (*M. T.* 1799), for stealing two bank-notes, the property of *William Dunn*, against the statute. It appeared that the prisoner sent one *Dale* (to whom he was unknown) with a letter directed to *Dunn*; bidding *Dale* to tell *Dunn* that he brought the letter from Mr. *Broad*; and to bring the answer to him (the prisoner) in the next street, where he would wait for him. *Dale* accordingly carried to *Dunn* the letter, which was written in the name of *Broad*, a friend of *Dunn's*, soliciting the loan of 3*l.* for a few days; and desiring that the money might be inclosed back in a letter immediately. *Dunn* thereupon sent the bank-notes in question, inclosed in a letter directed to *Broad*, and delivered the same to *Dale*, who delivered them to the prisoner, as he was first ordered. The letter turned out to be an imposition. It was objected at the trial that this was no felony, because the absolute dominion of the property was parted with by the owner, though induced thereto by means of a false and fraudulent pretence. And on reference to the judges after conviction, all present held that it was no felony; on the ground that the property was intended to pass by the delivery of the owner; and that this case came within the stat. 33 *H. 8. c. 1.* against false tokens, which particularly speaks of counterfeit letters. *Atkinson's case*, O. B. Sept. 1799, *cor. Le Blanc J. MS. C. C. R.* 2 *East's P. C.* 673.

The prisoner having pledged certain articles with a pawnbroker, got them back from his managing servant, by pretending to leave in their place some valuable jewels, though, in fact, they were common stones: a case being reserved, the judges held that as the

servant, who had a general authority from his master, parted with the property and ownership, and not merely with the possession, it did not amount to felony. *Hil. Term, 1826. R. v. Jackson, 1 R. & M. 119.*

R. v. Walsh, Esq. M. P., H. T. 1812, C. C. R. 215. 4 Taunt. 258. 2 Leach, 1054. *Walsh*, a stock-broker, advised *Sir Thomas Plumer* to sell stock, which he did, and the money was paid unto *Sir T. P.*'s bankers; *Sir T. P.* then gave *W.* a check on his banker for 22,500*l.*, that he might buy exchequer bills therewith. *W.* bought exchequer bills to the amount of 6000*l.*, and embezzled the rest of the money. It did not appear that *W.* had any intention to embezzle when he advised *Sir T. P.* to sell the stock, but afterwards, foreseeing that he would give a check to buy exchequer bills, he formed his plan for embezzling part. When he got the check, he got the money from the bankers. *Walsh* was indicted for stealing, first, the check, and, secondly, part of the money received upon it at the banker's. And such money was described, first, as *Sir T. P.*'s, and, secondly, as the banker's. The jury found that he had the design to embezzle when he took the check from *Sir T. P.* The case was twice argued, and the judges were unanimous that it was no felony: first, because there was no fraud or contrivance to induce *Sir T. P.* to give the check; secondly, because it could not be called his goods and chattels, and was of no value in his hands; thirdly, because he had never had possession of the money received at the banker's, so that it could not be called his money; and, fourthly, because the bankers were discharged of the money on paying it on the check, so that they were not defrauded, and it could not be said the money was stolen from them. No judgment was ever publicly pronounced in this case, but the prisoner was liberated.

By 7 & 8 G. 4. c. 29. § 49. it is made a misdemeanor, if any money, or security for payment of money, shall be entrusted to any banker, merchant, broker, attorney, or other agent, with directions in writing for the application thereof, and he shall, in violation of good faith, and contrary to the purpose so specified, convert to his own use or benefit such money, &c. or any part thereof. See this tit. *post*.

A letter containing a banker's check was sent by the post to *T. M.*, but the address to his place of residence being wrong, it was delivered by the postman to another *T. M.*, who appropriated it to his own use, though it clearly appeared that he knew it was not intended for him. The judges held the conviction to be wrong, as it did not appear that the prisoner had any *animus furandi* when he first received the letter. *E. T. 1827, R. v. Macklow, 1 R. & M. 160.*

If the owner has not parted with the *property* in the goods, but only with the *possession* of them, the question of larceny still remains open; and will depend upon the fact, whether, at the time of the alleged felonious taking, the owner had parted with the possession of the goods in such a manner, and to such an extent, as to exclude the idea of trespass. For if the owner of the goods parted with the possession of them without fraud practised by the taker, and if, after the owner had so parted with the possession of them, nothing was done to determine the privity of contract under which

R. v. Walsh. Brokers, bankers, or agents, embezzling securities deposited with them for security or any special purpose, are guilty of misdemeanor.

7 & 8 G. 4. c. 29., embezzlement by bankers, brokers, &c.

Letter containing a check delivered to a wrong person.

Delivery, where the owner does not part with the property, but only with the possession of the goods.

Goods examined by one pretending to become a purchaser, and set apart from the rest, but not actually bargained for or delivered, were afterwards carried off by him while the owner was sent away on pretence of getting more : held felony ; the property not being transferred.

Goods sent by a tradesman for selection.

Procuring goods by fraud from owner's servant.

Goods fraudulently taken at the East India House by pretending to be the person who

the taker had the possession of them delivered to him, no trespass, and therefore no larceny, can be committed by their conversion. 2 Russ. 118.

Sharpless and *Greatrix* were convicted of stealing six pair of silk stockings of *Owen Hudson* ; on which a case was reserved for the consideration of the judges ; which stated that *Greatrix*, in the character of servant to *Sharpless*, had left a note at *Hudson's* shop, who was a hosier, desiring that he would send an assortment of silk stockings to his master's lodgings, at the *Red Lamp*, in *Queen Square*. The hosier having taken them according to direction, *Greatrix* opened the door to him, and introduced him into a parlour, where *Sharpless* was sitting in a dressing-gown, his hair just dressed, and an unusual quantity of powder over his face. Having looked at some of the stockings, and asked the price, which he was told was 14s. a pair, he desired Mr. *Hudson* to fetch some silk pieces for breeches, and some black silk stockings with French clocks. *Hudson* hung the six pair of stockings, which *Sharpless* had looked out, on the back of the chair, and went home for the other goods ; but no positive agreement had taken place respecting the stockings. During *Hudson's* absence, the prisoners decamped with the goods, which were proved to have been afterwards pawned by one of them. The judges were of opinion that the conviction was right ; for the whole of the prisoners' conduct manifested a preconceived design to obtain a tortious possession of the property : and the verdict of the jury imported, that in their belief the evil intention preceded the possession of the goods by them. But that, even independent of that, there did not appear a sufficient delivery to change the property. *R. v. Sharpless & Greatrix, O. B. May, 1772, cor. Gould J. 2 East's P. C. 675. 1 Leach, 92.*

Prisoner was indicted for stealing two cream jugs, the property of *A.*, a silversmith : it appeared that prisoner had been the servant of a customer of *A.'s*, but was so no longer ; he came, however, to *A.*, as if he had been still in the service, saying that his master wanted a cream jug, and desired it might be put down to his account ; *A.* sent two jugs, that the master might take which he liked best, and the prisoner made away with both ; and per *Bayley J.*, as *A.* had parted with the possession only, and not with the right of property, it was larceny ; but if he had sent one jug only in execution of the pretended order, it would have been otherwise. *Cor. Bayley J. Sp. Ass. Newcastle, 1826, R. v. Devonport, Archbold's Peel's Acts, &c. p. 4.*

Where the owner of goods sent them by his servant to be carried to the house of *A.*, and the prisoner, meeting him in the street, fraudulently procured the delivery of them to himself, by pretending to be *A.*, it was holden to be larceny. *Wilkins's case, O. B. 1789, 1 Leach, 520. 2 East's P. C. 673.*

Obtaining possession from a person who has the charge of goods, by pretending to be the servant of a person who has bought them, is felony.

Robert Hench was indicted for stealing a chest and 59 pounds' weight of tea, which in one count of the indictment were stated as the property of *James Layton* and *William James Thompson* ; and in another count, as the property of the *East India Company*. The facts were, that Messrs. *Layton & Co.*, who were tea brokers,

had purchased the chest of tea in question, No. 7100, at the *East India House*, but had not taken it away, when the prisoner, who was no way employed by them, went thither, and going up to the place where the request papers were kept, selected one of them, and then proceeded with the paper in his hand, as if to look for a chest of tea corresponding with the number on the paper. The servant in the *India House*, who had the care of the request papers, seeing him so engaged, went up to him, took the paper which was in his hand, and seeing the number 7100 upon it, pointed to a chest with a corresponding number, and said that was the chest he wanted; and then returned the paper to him, in order that he might go to the permit office, from whence he shortly afterwards returned with a permit to the *India House*, where the same servant who had the care of the request papers received the permit from him, and asked him whose partner he was? and upon his answering "*Noton's*," returned the permit to him again, and entered the name of *Noton* in the book. The prisoner then took away the chest of tea. Upon this evidence, the jury found the prisoner guilty; when an objection was taken by his counsel, that as the possession of the property was obtained by a regular request note and permit, the offence could only be considered as a misdemeanor; and the court reserved the point for the consideration of the judges, who (*Hil. T. 1811*) were clearly of opinion that the offence amounted to felony. *Hench's case, O. B. Oct. 1810, cor. Sir J. Sylvester, Bart. Recorder, 2 Russ. 120. C. C. R. 163.*

R. v. Aickle, O. B. 1784, 2 East's P. C. 675. 1 Leach, 294. 2 Russ. 120. The prisoner agreed with the prosecutor to discount a bill of exchange for him, and the bill was delivered into the prisoner's hands. The prisoner then said, that if the prosecutor would come to his lodgings, he would give him the cash. The prosecutor did not go himself, but sent his clerk, whom he desired not to lose sight of the prisoner till he had got the money. The prisoner contrived to get away from the clerk with the bill, and without paying the money. This was holden to be larceny; the jury finding a preconcerted design by the prisoner to get the bill into his possession with intent to steal it.

It should be observed, that in this case the prosecutor never gave the prisoner credit for the property of the bill, and therefore did not part with the legal possession.

Where money or other property is parted with for the performance of a certain engagement, and the party, instead of complying with such engagement, converts the same to his own use, he is guilty of felony.

R. v. Oliver. The prisoner was indicted for stealing 35*l.*, the property of *William Smith*. The prosecutor had entrusted the prisoner with notes to the amount of 35*l.*, to procure him gold in lieu thereof; but having got possession of the notes, he went away with them, and did not return with the gold as he promised to do. *Wood B.* held, that the prosecutor having parted with his notes upon the faith of his having gold and silver in return, and the prisoner not having complied with the trust reposed in him, he was guilty of felony, if the jury believed that the intention of the prisoner was to take away the notes, and never to return with the gold. The learned judge further said, that a parting with the

had purchased them.

Bill delivered to prisoner to discount, and prisoner decamping with it.

Prisoner making away with notes delivered to him to exchange for gold.

property in goods could only be effected by contract, which required the assent of two minds, but that in this case there was not the assent of the mind, either of the prosecutor or of the prisoner; the prosecutor only meaning to part with his notes on the faith of having the gold in return, and the prisoner never meaning to barter, but to steal. *Northumb. Sum. Ass. 1811, cor. Wood B. MS. S. C. cited by Gurney arguendo, Walsh's case, 4 Taunt. 274. 2 Leach, 1072.*

Money taken under pretence of being lost at cards.

So where it appeared that the prisoners decoyed the prosecutor into a public house, and there introduced the play of cutting cards, and that one of them prevailed upon the prosecutor (who did not play on his own account) to cut the cards for him, and then, under pretence that the prosecutor had cut the cards for himself and had lost, another of them swept his money off the table and went away with it: it was considered to be one of those cases which should be left to the jury to determine *quo animo* the money was obtained, and which would be felony, in case they should find that the money was obtained upon a preconcerted plan to steal it. *R. v. Horner and others, 1 Leach, 270. Cald. 295.*

Several present and acting in concert, all guilty of the larceny.

If several persons act in concert to steal a man's goods, and he is induced by fraud to trust one of them in presence of the others with the possession, and another of them entices him away, so that the man who has his goods may carry them off, all are guilty of felony. The receipt by one is a felonious taking by all.

Money taken which was produced on account of a bet.

Standley, Jones, and Webster conspired to get some money from *M'Laughlin*. They pretended he could not produce 100*l.*: he produced that sum in notes: *J.* took them to count; handed them to *S.*, and *S.* and *W.* pretended to gamble for them. *J.* beckoned *M'L.* out of the room, and *S.* and *W.* immediately decamped with the money; and all three afterwards shared it. On case reserved, the judges were unanimous that this was larceny in all three. *R. v. Standley and others, Warwick Lent Ass. 1816, cor. N. G. Clarke, Esq. K. C. and before the Judges, E. T. 1816, C. C. R. 305.*

If credit be given for property for ever so short a time, no felony can be committed in converting it. *2 East's P. C. 677, 678.*

By way of pledge or security.

So, where the delivery is by way of pledge or security, the property in the thing pledged remains in the owner, and therefore larceny may be committed of it, if such delivery were obtained fraudulently and with intent to steal.

Pretending to find a jewel, in which the prosecutor as present at the time was to share, and inducing him to take charge of it, and to deposit with the finder his watch &c. until the latter should redeem the jewel by paying a certain sum of money; and this done with

John Patch was indicted for stealing a silver watch, gold seal, &c. and 7*s.*, the property of *J. Bumstead*. The prisoner and two others joined *Bumstead* in a street in London, and after walking a little way with him, one of them stooped down and picked up a purse, which contained a ring, and a receipt for 147*l.*, purporting to be the receipt of a jeweller for a rich brilliant diamond ring. The prisoner proposed that they should go into a public house, which they accordingly did, to consider in what manner the prize should be divided amongst them. After various proposals, the prisoner at length asked the prosecutor if it would be agreeable to him to take the ring into his own possession, and to deposit his money and watch, which he had before interrogated him about, as a security, to return it upon receiving his portion of its value. The prosecutor assented, and signed a written agreement, dictated by the prisoner, that when the prisoner or either of the two other

men returned the watch and money and 70*l.*, he would re-deliver to them the purse and the ring. The prosecutor accordingly laid the watch and money mentioned in the indictment on the table, and received the ring. The prisoner beckoned the prosecutor out of the room, upon pretence of speaking to him in private, and in the mean time the other two men went off with the property. Their abrupt departure alarmed the prosecutor, but the prisoner told him not to be uneasy, for he knew the two men very well, and would take care that he should have his watch and money again; and when the prisoner was apprehended he wanted to make it up. The ring was valued at 10*s.* It was objected that this amounted only to a fraud. But the court, upon the authority of *Pear's* case (*infra*) referred it to the jury to consider, whether the whole transaction were not a preconcerted scheme, feloniously to obtain the prosecutor's property? And *Gould J.*, who tried the prisoner, left it to the jury, whether the prisoner and the other two men were not all in concert together to procure by such a pretext any man's property whom they might meet, and to embezzle it; which in plain words was to steal it? The jury found the prisoner guilty, and he was sent to the *Thames* for three years. *Patch's case*, O. B. Feb. 1782, 2 *East's P. C.* 678. 1 *Leach*, 238.

intent to steal the watch, &c.: held larceny.

The principle of this case has been subsequently recognised in the cases of *Rex v. Humphrey Moore*, 1 *Leach*, 314. 2 *East's P. C.* 679. reserved by Mr. Serjeant Adair, recorder, at the O. B. Apr. Sess. 1784, and *Rex v. John Watson*, 2 *Leach*, 640. 2 *East's P. C.* 660, reserved by *Perryn B.* at the O. B. December Sess. 1794, for the opinion of the judges; and both prisoners were sentenced to transportation for seven years.

R. v. Robson, Gill, Fewster, and Nicholson, E. T. 1820. The prisoners were convicted before *Bayley J.* at the Lent assizes at Newcastle-upon-Tyne, 1820, of stealing, from the person of *John Younger*, twenty notes for one guinea each. The facts were as follows:—*R.*, by pretending to find a sixpence in a fair, decoyed *Y.* to a public-house; they were there joined by the three other prisoners. After a little time, *G.*, who pretended to be flush of money, began to play with *F.* at guessing at a halfpenny which *F.* hid under a pewter pot: *G.* was to guess three times right out of four. After losing twice, *G.* offered a wager of a pound that none of them could produce 10*l.* *F.* took the bet, and advised *Y.* to do the same: he had not money enough about him, but went and borrowed 20 guinea notes of a friend; and then it was conceded he had won. *G.* then offered *F.* to bet him 100*l.*, or 50*l.*, or any other sum, that he guessed the halfpenny right three times out of four; and *F.* betted him 40*l.* *G.* guessed wrong once out of the four times, and then went out. In his absence, *F.* advised *Y.* to go halves in the bet, as he was sure to win; and after some persuasion he consented; and on *G.*'s return he handed his 20 notes to *G.*, who passed them on to *R.*, who was to be stakeholder. *G.* then pretended to guess the remaining three times, and being right in each, *R.* gave him the stake, and he went away. *Bayley J.* told the jury, that if they thought, when *G.* took the notes from *Y.* and passed them to *R.*, there was a plan and concert between the prisoners that *Y.* should never have his notes back, but that they should keep them for themselves, under the

If there be a plan to cheat a man of his property under colour of a bet, and he parts with the possession only, to deposit as a stake to one of the confederates, the taking by such confederate is felonious.

false colour and pretence that G. won his bet, he thought it a felonious taking, and a felonious taking by all. The jury were of that opinion; and on case reserved, (*East. T. 1820.*) the judges (ten) held the conviction right; because at the time of the taking, the prosecutor parted with the *possession* only. *C. C. R. 413.*

N. B. R. v. Nicholson and others, 2 East's P. C. 669. antd, 433. was referred to: but that case is distinguishable from the above, the *property* having been parted with by the prosecutor: here the prosecutor parted with the *possession* only, and not the *property*.

It is peculiarly the province of the jury to determine with what intent any act is done; and therefore, though in general he who has a possession of any thing on delivery by the owner cannot commit felony thereof; yet that must be understood, first, where the possession is absolutely changed by the delivery, which has before been considered; and next, which is the present object of inquiry, whether such possession is not obtained by fraud, and with a felonious intent. For if, under all the circumstances of the case, it be found that a party has taken goods from the owner, though by his delivery, with an intent to steal them, such taking amounts to felony. *2 East's P. C. 685.*

This principle is illustrated by the following cases.

John Pear was indicted for stealing a black mare, the property of *Samuel Finch*. On the 2d July 1779, the prisoner hired the mare of *Finch*, who lived in *London*, for that day, in order to go to *Sutton* in *Surrey*, and told him that he should return at eight o'clock the same evening. *Finch*, before he let the prisoner the mare, inquired of him where he lived, and whether he were a housekeeper? to which he answered, that he lived at No. 25. in *King-street*, and was only a lodger. The prisoner not returning, as he had promised, the prosecutor went the next day to inquire for him according to the direction he had given; but no such person was to be found. It turned out that the prisoner had, in the afternoon of the same 2d of July, sold the mare in *Smithfield*. In summing up this evidence to the jury, Mr. Justice *Ashurst*, who tried the prisoner, told them, that if they were of opinion that the prisoner hired the mare with an intent of taking the journey mentioned, and afterwards changed that intention, then, as she was sold whilst the privity of contract subsisted, they ought to acquit the prisoner. But if they were of opinion that the journey was a mere pretence to get the mare into his possession, and that he hired her with an intention of stealing her, they ought to find him guilty; and he would save the point for the opinion of the judges. The jury found the prisoner guilty. This case was very solemnly discussed at *Ld. C. J. De Grey's* house on 4th Feb. 1780, and on the 22d of the same month, Mr. B. *Perryn* delivered the opinion of the judges at the *O. B.* at considerable length; a very copious and accurate report of which is given by Mr. *East*, in the 2d vol. of his *Treatise of the P. C.*, p. 685. A majority of the judges held, that the obtaining possession of the mare, and afterwards disposing of her in the manner stated, was, in the construction of the law, such a taking as would have made the prisoner liable to an action of trespass at the suit of the owner, if he had not intended to steal her; for she was delivered to the prisoner for a special purpose only, viz., to go to *Sutton*, which he never intended to do, but immediately sold her: that in this light the case would be similar to what was laid down by *Littleton*, § 71., who

Taking goods by delivery of owner, possession being obtained with a felonious intent.

Hiring a horse on pretence of taking a journey, but in truth with intent to steal it, and evidencing such felonious intent by immediately selling the horse as soon as the party obtained possession of it, is larceny.

says, "If I lend to one my sheep to dung his land, or my oxen to plough the land, and he killeth my cattle, I may have trespass, notwithstanding the lending:" that in the present case the original intention of the prisoner in hiring the horse had been properly left to the jury, and as they had found that it was felonious, the parting with the possession had not changed the nature of the property, and that the prisoner was therefore guilty of felony. (*a*) *Pear's case*, O. B. Sept. 1779, 2 *East's P. C.* 685. 2 *Leach*, 212.

George Charlewood was indicted at the O. B. Feb. Sess. 1786, before *Gould J.* and *Perryn B.*, for stealing a gelding of *John Houseman*. The prosecutor was a livery-stable keeper in *Crown Street, St. Ann's, Soho*; and, on the 4th October 1785, was applied to by the prisoner, a post-boy, for a horse, in the name of a *Mr. Ely*; saying that there was a chaise going to *Barnet*, and that *Mr. Ely* wanted a horse for his servant to accompany the chaise and return with it. The horse was accordingly delivered to the prisoner by the prosecutor's servant, about nine o'clock in the morning. The prisoner mounted him, and on going out of the yard, said he was going no further than *Barnet*. He accordingly proceeded towards *Tottenham Court Road*, which led to *Barnet*, and also, though in some degree circuitously, to *Mr. Ely's* house. Between three and four o'clock in the afternoon of the same day the prisoner sold the horse in *Goodman's Fields* for a guinea and a half, including the bridle and saddle. The horse was much injured, and appeared to have been rode very hard. The purchaser almost immediately sold his bargain for 2*l.* 15*s.* The court observed to the jury, that the judges in *Pear's case*, under similar circumstances with the present, had determined that if the jury were satisfied, under all the circumstances, that a person at the time he obtained another's property meant to convert it to his own use, it was felony. That there was a distinction, however, to be observed in this case, though it was so nice that it might not be obvious to common understandings: for that if they thought that the prisoner, at the time he hired the horse for the purpose of going to *Barnet*, really intended to go there, but finding himself in possession of the horse, afterwards determined to convert it to his own use, instead of proceeding to the place to which the horse was hired to go, it would not amount to a felonious taking. That there was yet another point for their consideration; for although the prisoner really went to *Barnet*, yet being obliged by the contract to redeliver the horse to the owner upon his return to *London*; if they thought he performed the journey and returned to *London* (*b*),

Obtaining a horse by pretending that another person wanted to hire it to go to *B.*, but in truth with intent to steal it; and not going to *B.*, but taking the horse elsewhere and selling him, held larceny.

(*a*) On the debate in this case, *Ashurst J.* said, Wherever there is a real and *bond fide* contract and a delivery, and afterwards the goods are converted to the party's own use, that is not felony. But if there be no real and *bond fide* contract, if the understanding of the parties be not the same, the contract is a mere pretence, and the taking is a taking with intent to commit felony. 2 *East's P. C.* 688.

And *per Eyre B.*, where goods are delivered upon a false token, and the owner meant to part with the property absolutely, and never expected to have the goods returned again, it might be difficult to reach the case otherwise than through the statutes *H. 8.* and *G. 2.* *Aliter*, where he parted with the possession only; for there, if the possession were obtained by fraud, and not taken according to the agreement, it was on the whole a taking against the will of the owner, and if done *animo furandi*, was a felony. 2 *East's P. C.* 689.

(*b*) *Quære?* For part of the contract was to return the horse to the owner in *London*; and, therefore, the contract, if genuine and valid in the first instance on the part of the prisoner, would subsist after his mere return to *London*.

and after such return, instead of delivering it to the owner, converted it to his own use, he was thereby guilty of felony; for the end and purpose of hiring the horse would be then over. The jury found the prisoner guilty on the first point, that at the time he hired the horse he intended to steal it: and he was afterwards executed. *Rex v. Charlewood*, 1 *Leach*, 409. *Sess. P. No. 200. 2 East's P. C. 689.*

One obtains possession of a chaise under pretence of hiring it for three weeks or a month, suggesting his intention to go on a tour, and he departs with it, and is not heard of for a year afterwards, when he is apprehended: and then he gives no account of the chaise: Held evidence from whence the jury may infer that he originally took it under the pretence of a hiring with intent to steal it.

Major *Semple* was indicted for larceny of a post-chaise; and the following facts appeared. The prosecutor, Mr. *Lycett*, was a coachmaker, who let out carriages to hire. The prisoner was a gentleman who lodged in the neighbourhood, and had before hired a carriage of the prosecutor, for which he had paid. On the 1st of *September*, 1785, the prisoner, who then passed by the name of Major *Harold*, hired the chaise in question of the prosecutor, saying that he should want it for three weeks or a month, as he was going a tour round the north; and it was agreed that he should pay at the rate of 5s. a-day during that time; and a price of 50 guineas was talked about in case he should determine to purchase it on his return to *London*, which was suggested by the prisoner; but no agreement took place on the subject of the purchase. In a few days afterwards the prisoner took the chaise from Mr. *Lycett's* with his own horses; and it was in evidence that he was driven in it from *London* to an inn at *Usbridge*, where he ordered a pair of horses, and went from thence to *Bulstrode*, and returned to the same inn, where he took fresh horses; but where he went with the chaise afterwards did not appear. No tidings were obtained of him till a year afterwards, when he was apprehended on another charge. It was attempted to distinguish this from *Pear's* case and *Aickle's* case, inasmuch as in those cases the parties had never obtained the legal possession of the property delivered to them: but that in the present case the prisoner had obtained the chaise upon a contract, which it was not proved that he had broken; for the chaise was hired generally for three weeks or a month, and not to go to any certain place: for the mere understanding that it was for the purpose of making a tour round the north made no part of the contract. During that time, therefore, he had a complete dominion over it, and the legal possession; and therefore a tortious conversion pending the contract would not be felony. Besides, there was no evidence of a tortious conversion; for *non constat* that the prisoner had disposed of the chaise. The court, however, said, that it was now settled that the question of intention was for the consideration of the jury; and that in the present case, if they should be of opinion that the original taking of the chaise was with a felonious intent to steal it, and the hiring a mere pretence to enable him to effectuate that design, without any intention to restore or pay for it, it would fall precisely within the principle of *Pear's* case, and the other decisions which had been made; and the taking would amount to felony. For if the owner only intended to give the prisoner a qualified use of the chaise, and the prisoner had no intention to make use of that qualified possession, but to convert it to his own use, he did not take it upon the contract, and therefore did not obtain the lawful possession of it; but if there were a *bonâ fide* hiring, and a real intention of returning it at that time, the subsequent conversion of it could not be felony; for by such contract and delivery the prisoner

would have acquired the lawful possession of the chaise ; in which case his subsequent abuse of that trust would not be felony. That, as to there being no proof of actual conversion in this case, it was not necessary ; but the jury must judge of it from the circumstances. If the prisoner had staid out six weeks, or two months, and on his return had offered to restore the chaise to the owner, or to pay him for it, such a conduct would have been evidence of an honest intention at the time of the hiring : but there was no account given of it, even up to that moment : that therefore raised a presumption against the prisoner which it was incumbent on him to repel ; and if he could not, the jury would have to consider from all the facts in proof, whether the taking were with a felonious intent or not. If it were, the case fell directly within the principle which governed that of *Pear's*, from which it could not be distinguished. A case was also then mentioned as having been determined very lately by the judges, where a man ordered a pair of candlesticks from a silversmith to be sent to his lodgings, whither they were sent accordingly, with a bill of parcels, by a servant ; and the prisoner, contriving to send the servant back under some pretence, kept the goods (a) : and that was ruled to be felony ; although they were delivered with the bill of parcels ; such delivery being made under an expectation by the owner of being paid the money ; for the jury found that it was a pretence to purchase, with intent to steal. Finally, the question of intention being left to the jury in the principal case, they found the prisoner guilty ; and he received sentence of transportation for seven years. *Major Semple's case*, *O. B. Sept. 1786*, cor. *Gould J. and Adair Serj. Rec., Sess. Pap. 671.* *2 Leach, 420.* *2 East's P. C. 691.*

Major Semple's case.

It may be collected from the above cases, that if a person obtain the goods of another by a lawful delivery without fraud, although he afterwards convert them to his own use, he cannot be guilty of felony. As if a tailor have cloth delivered to him to make clothes with ; or a carrier receive goods to carry to a certain place ; or a friend be entrusted with property to keep for the owner's use ; which they afterwards severally embezzle. So, if plate be delivered to a goldsmith to work or to weigh, or as a deposit, his conversion of it will not be felony. But if such delivery be obtained by any fraud or falsehood, and with an intent to steal, though under pretence of a hiring, or even a purchase ; if in the latter case no credit were intended to be given ; the delivery in fact by the owner will not pass the legal possession so as to save the party from the guilt of felony. But if the property were intended to pass by the delivery, there can be no felonious taking. *2 East's P. C. 693.* *1 Hale, 504.* *Staundf. 25. a.* *1 Haw. c. 33. § 3.* *1 Show. 50.* *Kel. 82.*

Review of the above cases.

Besides the *animus furandi*, it is also necessary that the taking of the goods shall be without the consent of the owner, "*invito domino.*" This is of the very essence of the crime of larceny ; and therefore, where one *Salmon* conspired with *Macdaniel* and

Against the owner's will.

(a) It must be understood that the prisoner ran away with them, or did some other act to denote an intention of withdrawing himself from any account for them ; and that no credit was intended to be given to him ; but that it was meant as a sale for ready money only.

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Robbery (Armed with Fire-arms) [Criminal

other persons to procure for others, ignorant of the design, to rob him in the highway, in order to procure to themselves the reward given by act of parliament for apprehending robbers on the highway; and he accordingly went, in pursuance of such agreement, to the place appointed, where the supposed robbery was effected; the case was holden not to amount to felony. *R. v. Macdaniel and others, O. B. 1755, Fost. 121. 2 East's P. C. 665.*

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Yes in another case one Norden, having been informed that one of the early stage coaches had been frequently robbed near the town by a single highwayman, resolved to use his endeavours to apprehend him; for which purpose he put a little money and a pistol into his pocket, and attended the coach in a post-chaise till the highwayman approached the carriages, and presenting a weapon, demanded the money of the passengers. Norden gave him his money; and then jumping out of the chaise with a pistol in his hand, with the assistance of some others, took the highwayman. This was ruled clearly to be robbery, and the felon was convicted. For this case differed widely from the former: there was no previous concert with the highwayman, directly or through the medium of others, that the robbery should be effected, or any thing to lessen the danger of the attempt. *Norden's case, O. B. 1754, Fost. 129.*

The owner of goods, knowing of an intention in the prisoners to steal them, they having plotted so to do with his servant, directed his servant to carry on the business, with a view to the detection of the thieves. In consequence of which the servant, with the consent of his master, agreed with the prisoners to open the outer door to them, and let them into the house, where they broke open inner apartments and took the goods: Held larceny by a majority; one doubting, because of the owner's assent and partial encouragement to the felony by means of his servant.

In *Eggington's* case, who was indicted for burglary and larceny, it appeared that the prisoners, intending to rob Mr. Boulton's manufactory at Soho, had applied to one Phillips his servant, who was employed there as a watchman, to assist them in the robbery. Phillips assented to the proposal of the prisoners in the first instance; but immediately afterwards gave information to Mr. Boulton, the principal proprietor, and in whom the property of the goods taken (together with other persons, his partners) was laid, telling him what was intended, and the manner and time the prisoners were to come; that they were to go into the counting-house, and that he was to open the door into the front yard for them. In return, Mr. Boulton told him to carry on the business; that he (Boulton) would bear him harmless; and Mr. Boulton also consented to his opening the door leading to the front yard, and to his being with the prisoners the whole time. In consequence of this information, Mr. Boulton removed from the counting-house every thing but 150 guineas and some silver ingots, which he marked, to furnish evidence against the prisoners; and lay in wait to take them, when they should have accomplished their purpose. On the 23d of December, about one o'clock in the morning, the prisoners came, and Phillips opened the door into the front yard, through which they went along the front of the building, and round into another yard behind it, called the middle yard, and from thence they and Phillips went through a door which was left open, up a staircase in the centre building leading to the counting-house and rooms where the plated business was carried on: this door the prisoners bolted, and then broke open the counting-house, which was locked, and the desks, which were also locked; and took from thence the ingots of silver and guineas. They then went to the story above, into a room where the plated business was carried on, and broke the door open, and took from thence a quantity of silver, and returned down stairs; when one of them unbolted the door at the bottom of the stairs which had been

bolted on their going in, and went into the middle yard ; where all (except one who escaped) were taken by the persons placed to watch them. On this case two points were made for the prisoners : *first*, that no felony was proved, as the whole was done with the knowledge and assent of Mr. *Boulton*, and that the acts of *Phillips* were his acts ; *secondly*, that if the facts proved amounted to a felony, it was but a simple larceny, as the building broke into was not the dwelling-house of any of the persons whose house it was charged to be ; and that there was no breaking, the door being left open. After conviction, the case was argued before the judges in the Exchequer Chamber ; and all the judges agreed that the prisoners were not guilty of the burglary. But with respect to the larceny, a majority thought there was no assent in *Boulton* : that his object being to detect the prisoners, he only gave them a greater facility to commit the larceny than they otherwise might have had : and that this could no more be considered as an assent, than if a man, knowing of the intent of thieves to break into his house, were not to secure it with the usual number of bolts. That there was no distinguishing between the degrees of facility a thief might have given to him. That it could only be considered as an apparent assent. That *Boulton* never meant that the prisoners should take away his property. And the circumstance of the design originating with the prisoners, and *Boulton's* taking no step to facilitate or induce the offence until after it had been thought of, and resolved on by them, formed with some of the judges a very considerable ingredient in the case ; and differed it much from what it might have been if *Boulton* had employed his servant to suggest it originally to the prisoners. *Lawrence J.* doubted, whether it could be said to be done *invito domino*, where the owner had directed his servant to carry on the business ; to open the door ; and meant that the prisoners should be encouraged by the presence of that servant, and that by his assistance they should take the goods, so as to make a complete felony ; though he did not mean they should carry them away. Finally, the prisoners were recommended to mercy on condition of being transported for seven years, the punishment they would have been liable to for the larceny. *Rex v. Eggington and others, Staffordshire Spr. Ass. 1801, M.S. C. C. R. 2 East's P. C. 666. 496. 2 Leach, 913. 2 Rus. 105. 2 Bos. & Pull. 508.*

Eggington's case.

Dannelly, being one of a gang of robbers, agreed with *Vaughan*, a police officer, to betray his associates, and gave him intimation of a robbery they designed, bargaining that he was to receive a part of the reward on their apprehension. *Vaughan* encouraged the proceeding, and at the same time gave information to the owner of the house which it was intended to attack. *Dannelly* was present when the robbery was committed, and *Vaughan*, who was on the watch with another officer, secured two of the thieves, who were tried and convicted : afterwards, *Dannelly* was indicted as a principal and *Vaughan* as accessory ; and after conviction, a majority of the judges held it wrong, for that *Dannelly* was not present to aid and assist (though the other offenders thought he was), but to detect, and that, as he had no intent that the felony should be successful, he had not the felonious intention necessary to make him a principal ; although he acted from a bad motive, *viz.*

Party to a robbery who had betrayed his accomplices for the reward, and assisted in detecting them.

Person procuring others to rob himself.

Person voluntarily placing himself in the way of a highwayman.

The owner of goods, knowing of an intention in the prisoners to steal them, they having plotted so to do with his servant, directed his servant to carry on the business, with a view to the detection of the thieves. In consequence of which the servant, with the consent of his master, agreed with the prisoners to open the outer door to them, and let them into the house, where they broke open inner apartments and took the goods: Held larceny by a majority; one doubting, because of the owner's assent and partial encouragement to the felony by means of his servant.

other persons to procure two others, ignorant of the design, to rob him on the highway, in order to procure to themselves the reward given by act of parliament for apprehending robbers on the highway; and he accordingly went, in pursuance of such agreement, to the place appointed, where the supposed robbery was effected; the case was holden not to amount to felony. *R. v. Macdaniel and others*, O. B. 1755, *Fost.* 121. 2 *East's P. C.* 665.

Yet in another case one *Norden*, having been informed that one of the early stage coaches had been frequently robbed near the town by a single highwayman, resolved to use his endeavours to apprehend him; for which purpose he put a little money and a pistol into his pocket, and attended the coach in a post-chaise till the highwayman approached the carriages, and presenting a weapon, demanded the money of the passengers. *Norden* gave him his money; and then jumping out of the chaise with a pistol in his hand, with the assistance of some others, took the highwayman. This was ruled clearly to be robbery, and the felon was convicted. For this case differed widely from the former: there was no previous concert with the highwayman, directly or through the medium of others, that the robbery should be effected, or any thing to lessen the danger of the attempt. *Norden's case*, O. B. 1754, *Fost.* 129.

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the reward. *M. T.* 1816, *R. v. Dannelly and Vaughan*, *C. C. R.* 310. 2 *Marsh.* 571.

What shall be deemed a carrying away.

Sheets from a bed.

Horse in a close.

Plate from a trunk.

Parcel moved from head to tail of waggon.

Parcel not moved, but opened, and its position changed.

Purse attached to keys which hung in the pocket.

Girdle breaking.

Goods fastened by a string to the counter.

The least removing of the thing taken from the place where it was before, is a sufficient asportation to constitute larceny, though it be not quite carried off. And upon this ground, the guest, who having taken off the sheets from his bed, with an intent to steal them, carried them into the hall, and was apprehended before he could get out of the house, was adjudged guilty of larceny. So also was he, who having taken a horse in a close, with an intent to steal him, was apprehended before he could get him out of the close. And such was the case of him who, intending to steal plate, took it out of the trunk wherein it was, and laid it on the floor, but was surprised before he could remove it any further. 2 *Haw. c.* 33. § 18. 2 *East's P. C.* 555.

Henry Coslet was indicted for stealing a quantity of currants which were packed in the fore-part of a waggon, and the prisoner had laid hold of this parcel of currants, and had got near the tail of the waggon with them when he was apprehended; the parcel was afterwards found near the middle of the waggon. On this case being referred to the twelve judges, they were unanimously of opinion that, as the prisoner had removed the property from the spot where it was originally placed, with intent to steal, it was a taking and carrying away. *Coslet's case*, *O. B.* Feb. 1782, 1 *Leach*, 236. 2 *East's P. C.* 556.

But where *William Cherry* was indicted (*Oxford Lent Ass.* 1781, and *East. Term*, 1781) for stealing a wrapper and some pieces of linen cloth; and it appeared that the linen was packed up in the wrapper in the common form of a long square, which was laid length-way in a waggon; that the prisoner set up the wrapper on one end in the waggon for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose; but was apprehended before he had taken any thing: all the judges agreed that this was no larceny; although his intention to steal was manifest. For a carrying away, in order to constitute felony, must be a removal of the goods from the place where they were; and the felon must for the instant at least have the entire and absolute possession of them. 2 *East's P. C.* c. 16. § 4. p. 556.

One had his keys tied to the strings of his purse in his pocket, which *Elizabeth Wilkinson* attempted to take from him, and was detected with the purse in her hand; but the strings of the purse still hung to the owner's pocket by means of the keys. This was ruled to be no asportation: the purse could not be said to be carried away, for it still remained fastened to the place where it was before. *Wilkinson's case*, 1 *Hale*, 508. 2 *East's P. C.* 556. 1 *Leach*, 321. (n.)

So where *A.* had his purse tied to his girdle, and *B.* attempted to rob him, in the struggle the girdle broke, and the purse fell to the ground; *B.* not having previously taken hold of it, nor picking it up afterwards, it was ruled to be no taking. 1 *Hale*, 533.

In the conference upon *Cherry's case* above referred to, *Eyre B.* mentioned a case before him, where goods in a shop were tied to a string, which was fastened by one end to the bottom of the counter. A thief took up the goods, and carried them to-

wards the door as far as the string would permit, and was then stopped: this he held not to be a severance, and consequently no felony.

James Lapier was convicted (*O. B. May, 1784*) of robbing *Mrs. Hobart* on the highway, and taking from her person a diamond ear-ring. The fact was, that as *Mrs. H.* was coming out of the opera-house she felt the prisoner snatch at her ear-ring and tear it from her ear, which bled, and she was much hurt: but the ear-ring fell into her hair; where it was found after she returned home. Judgment being respited for the opinion of the judges, whether this were such a taking from the person as to constitute robbery; they were all of opinion that it was: it being in the possession of the prisoner for a moment, separate from the lady's person, was sufficient, although he could not retain it, but probably lost it again the same instant: and it was taken by violence. *R. v. Lapier, 2 East's P. C. 557. 1 Leach, 320. Tr. T. 1784.*

But in the case of *Edward Farrell*, who upon an indictment for robbery was found to have stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down or he would shoot him; on which the prosecutor laid the bed on the ground; but before the prisoner could take it up, so as to remove it from the spot where it lay, he was apprehended; the judges were of opinion that the offence was not completed, and the prisoner was discharged. *Farrell's case, O. B. July, 1787, 1 Leach, 322. 2 East's P. C. 557.*

R. v. James Walsh, 1 R. & M. 14. The prisoner was tried at the *O. B. Jan. Sess. 1824*, before Mr. Denman, Common Serjeant, for stealing a leathern bag, containing small parcels, the property of *William Ray*, the guard to the *Exeter* mail. It appeared that the bag was placed in the front boot of the coach, and the prisoner, sitting on the box, took hold of the upper end of the bag, and lifted it up from the bottom of the boot, on which it rested. He handed the upper part of the bag to a person who stood beside the wheel on the pavement, and both had hold of it, endeavouring to pull it out of the boot, with a common intent to steal it. Before they were able to obtain complete possession of the bag, but while engaged as above mentioned, they were interrupted by the guard, and dropt the bag.—The prisoner was convicted; but the facts above stated were found specially by the jury, in answer to questions put to them by the Common Serjeant. The question propounded to the judges was, whether the prisoner could be said to have stolen, taken, and carried away the bag? The judges present (*East. T. 1824*) thought there was a sufficient removal, and could not distinguish this from *Vane's case, Worcester Summer Assizes, 1804*, before Mr. J. Lawrence, and afterwards before the judges in *Mich.* term following, and that therefore *Walsh* was rightly convicted.

If the thief once take possession of the thing, the offence is complete, though he afterwards return it. As if a robber, finding little in a purse which he had taken from the owner, restore it to him again, or let it fall in struggling, and never take it up again, having once had possession of it. *1 Hale, 533. 3 Inst. 69. 2 East's P. C. 557.*

Or as in *Peat's case*, who having robbed Mr. Downe of his purse returned it again, saying, if you value your purse, take it back

A momentary possession, though lost again in the same instant, the thing being found about the owner's person, is sufficient.

Owner stopped and made to lay down goods he was carrying.

Where two persons had hold of a bag, which they were at the same time endeavouring to pull out of a boot of a coach, but dropt it on being interrupted by the guard, this was held a sufficient removal.

The offence is complete where the thief once takes possession of the thing, though he afterwards returns it. Offer to return.

again, and give me the contents; but before Mr. D. could do this, his servant secured the robber: the offence was ruled to be complete by the first taking. *Peat's case*, O.B. 1781, *cor. Hotham B. and Willes J.*, 2 *East's P. C.* 557.

Where distinct asportations by several.

Where it is one continuing transaction, though there be several distinct asportations in law by several persons, yet all may be indicted as principals who concur in the felony before the final carrying away of the goods from the virtual custody of the owner. 2 *East's P. C.* 557.

By whom larceny may be committed.

Regularly, a man cannot commit felony of the goods wherein he hath a property. 1 *Hale*, 513.

Joint tenants.

If A. and B. be joint tenants or tenants in common of a horse, and A. take the horse, possibly *animo furandi*, yet this is not felony. 1 *Hale*, 513.

A man stealing his own goods.

But under certain circumstances a man may commit felony of his own goods; as if A. bail goods to B., and afterwards *animo furandi* steal the goods from B., with design to charge him for the value of them: this is felony. *Staunf.* 26. 1 *Hale*, 513. 2 *East's P. C.* 558.

S. P.

So if A., having delivered money to his servant to carry to a certain place, disguises himself, and robs the servant on the road, with intent to charge the hundred, this is robbery in A. 2 *East's P. C.* 558.

If a man steal his own goods, from his own bailee, though he has no intent to charge the bailee, but his intent is to defraud the king, yet if the bailee had an interest in the possession, and could have withheld it from the owner, the taking is a larceny. As if the bailee were bound to the crown for a specific appropriation of the goods.

Rex v. Nowell Wilkinson and Joseph Marsden, O.B. October Sess. 1821, *cor. Park J.* Present Ld. C. J. *Abbot*. C. C. R. 470. The prisoners were indicted for stealing 6696 pounds' weight of *nux vomica*, value 90*l.*, the property of *James Marsh*, *Henry Coombe*, and *John Young*, in a certain boat belonging to them, in the port of *London*, being a port of entry and discharge. Upon the evidence, the case was thus: The prosecutors are lightermen and agents, and were employed by a Mr. *Cooper*, a merchant, who delivered them the warrants filled up, to enable them to pass the *nux vomica* through the custom-house, for exportation to *Amsterdam*. The quantity was 30 bales of *nux vomica*; consisting of 750 bags. For exportation this commodity pays no duty; but for home consumption, there is a duty of 2*s.* 6*d.* on the pound weight; though the article itself is not worth above one penny per pound. Messrs. *Marsh & Co.* entered the bales for a vessel about to sail to *Amsterdam*, called the *York Merchant*, then lying in the *London Docks*; and having done what was necessary, delivered back the cocket, bill, and warrants to *Cooper*, considering him as the owner; and *Marsh and Co.* gave bond to government, with *Cooper*, under a penalty to export these goods. *Marsh & Co.* were to be paid for lighterage and for their services. After this Messrs. *Marsh & Co.* employed the prisoner *Wilkinson* as their servant, who was a lighterman, (and who had originally introduced *Cooper* to them to do the needful respecting the *nux vomica*), to convey the goods from *Bow Creek*, where they were, to the *York Merchant*, at the *London Docks*, and lent their boat, with the name of *Marsh & Co.* upon it, to enable him so to do. *Wilkinson*, the prisoner, accordingly went and got the *nux vomica* by an order, commanding the person who had the possession of it to deliver it to Mr. *John Cooper*. The bales were marked C. 4. to 33. When *Wilkinson* received the cargo, instead of taking it to the *York Merchant*, he, one *William Marsden*, and the other prisoner, *Joseph*

Marsden, took the boat to a Mr. *Brown's*, a wharfinger at *Lea Cut*, in the county of *Middlesex*, and there unloaded it into a warehouse which *William Marsden* had hired three weeks before, and which they had used once before; and there the two prisoners and *William Marsden* were employed 18 hours in unpacking the bales, taking out the *nux vomica*, repacking it in smaller sacks, and sending it by a waggon to *London*, and refilling the market bales with cinders and other rubbish which they found on the wharf. The prisoner *Wilkinson* then put the bales of cinders, &c. on board the boat, took them to the *York Merchant*, hailed the vessel, and said he had 30 bales of *nux vomica*, which were put on board, and remained so for two or three days, when the searcher of the customs discovered the fraud. *Marsh & Co.* admitted that they had not been called on for any duties, nor sued upon their bond, though the bond still remains uncanceled. The defence was, and proved by *Cooper*, that the goods were not his; that he had, at *William Marsden's* desire, lent his name to pass the entry; that he had done so, but did not know why; and he swore he did not know it was a smuggling transaction, or that the object was to cheat government of the importation duties. If these were to be considered as the goods of *Cooper*, then it should seem a felony was committed upon them by *Wilkinson* and the two *Marsdens*, by taking them in the manner described out of the hands of *Marsh & Co.* without their knowledge or consent, who, as lightermen or carriers, had a special property in them, and who were also liable to government to see to the due exportation of them. Even if they were the goods of *William Marsden*, who superintended the shifting of them from the bales to the sacks, the question is, whether this can be done by an owner against a special bailee, who has made himself responsible that a given thing shall be done with the goods, and which the owner, without the knowledge or consent of such bailee, has, by a tortious act, entirely prevented. The learned judge told the jury, that Lord *C. J. Abbott* and he wished to take the opinion of the judges upon this question, but desired them to say whether they thought the general property in the goods was in *Cooper*, or *W. Marsden*. The jury found the prisoners guilty, and that the property was *W. Marsden's*. On case, four judges doubted whether this were larceny, because there was no intent to cheat *Marsh & Co.*, or to charge them, but the intent was to cheat the crown; but seven judges (*absente Best J.*) held it a larceny; for *Marsh & Co.* had a right to the possession; till the goods reached the ship, they had an interest in that possession; the intent to deprive them of their possession wrongfully and against their will, was a felonious intent as against them, because it exposed them to a suit upon their bond; and had there been no intent, as against them, the intent to cheat the crown was, in the opinion of most of the seven judges, sufficient to make it a larceny.

R. v. Phæbe Bramley, C. C. R. 478. The prisoner was convicted before *N. G. Clarke, Esq. K. C.* at *Derby Lent Ass. 1822*, upon an indictment for burglary in the dwelling-house of *Thomas Noon*, at *Ilkeston* in that county, and stealing a box, two purses, 22l. 10s. in silver, 6s. 3d. in copper, a promissory note for the payment of 10l., and eighteen promissory notes for the payment of 1l. each, the property of the said *Thomas Noon*. In another count,

Rex v. Wilkinson and Marsden.

If the owner, or part owner, of goods, steal them from the person in whose custody they are, and who is responsible for

their safety, he is guilty of larceny.

the property was stated to belong to *Sarah Sisson, Ann Fretwell, and Ann Noon*. The box and the other articles (which were in the box when taken by the prisoner) were the property of a female friendly society, established under the statute of the 33 G. 3. c. 54, of which the rules, orders, and regulations have been exhibited to and allowed and confirmed by the sessions, as directed by that statute. The society held their meetings at a public-house kept by the said *Thomas Noon*. The funds of the society were kept in the box; the box with such funds in it was always, after the meeting of the society broke up, deposited in a bedchamber in the house of the said *Thomas Noon*. The said *Sarah Sisson, Ann, Fretwell, and Ann Noon*, were stewardesses of the society, appointed according to its rules. The box, as directed by the rules of the society, had three different locks upon it, each stewardess having one key. The stewardesses are by the rules to serve for one year, and then to resign their keys, cash, and books to the new stewardesses. It is directed by the rules of the society, that the box shall remain in the custody of the landlord of the house, or any other person whom the society shall appoint, he being responsible for whatever effects were lodged therein. The society met the evening the offence was committed, and the box, with the funds in it, was, after the meeting broke up, deposited in the usual place in *Thomas Noon's* house, from whence it was afterwards taken by the prisoner, who gained admission to the chamber by means of a ladder, and breaking open the window. The prisoner had been for some time a member of the society. One of the rules of the society is, that each member shall pay sixpence to the stock every fourth *Monday*, and if a member fail to pay for four successive nights, she shall be excluded. The prisoner had failed to pay for four successive nights, the last of which was the night the property was taken, but no order for excluding her had been made by the society. A doubt arose whether, considering the situation the prisoner stood in with respect to the property taken, the conviction was proper. And on case, ten judges (two absent) were clear, that as the landlord was responsible to the society for the property, the conviction was right.

Wife stealing the money of a friendly society to which her husband belonged.

The prisoner was a married woman, and was convicted of breaking open a box, and stealing money, belonging to a friendly society: her husband kept a public house, at which the society met, and he was a subscriber to it; and the box holding their money was always left at his house, under locks, of which the stewards had the keys. After conviction, a case being reserved, the judges were of opinion that the conviction was wrong, on account of her husband having a joint property in the money. *E. T. 1833, R. v. Willis, 1 M. 375.*

Wife taking husband's goods; giving them to her paramour.

A wife may be guilty of larceny by stealing the goods of a stranger; but not by stealing her husband's goods from his own possession, because in law they are considered but as one person, and she has a kind of interest in his goods. On which account not even a stranger can commit larceny of such by the delivery of the wife, although he knew they were the husband's goods. *1 Haw. c. 33. § 19. 2 East's P. C. 558.*; unless he be her adulterer. *Dalt. c. 104. pp. 268, 269.*

Wife giving husband's goods to the person

The prisoner was a lodger at the house of the prosecutor, and during his absence took away prosecutor's child and boxes of his

goods, which he carried to other lodgings which he had hired, and where he was soon joined by prosecutor's wife, who lived with the prisoner there till he was apprehended; at his trial for stealing the goods, prosecutor's wife proved that all the goods carried away were either taken by herself or given by her to the prisoner. On case reserved, the judges held, that it was larceny; for, though the wife consented, it must be considered that it was done *invito domino*, and the conviction was affirmed. *R. v. Tolfree*, 1 R. & M. 243.

Nathaniel Harrison was indicted for stealing some plate: and it appearing that the prosecutor's wife had the constant keeping of the key of the closet where the plate was usually locked up, and that the prisoner could not have taken it without her privacy and consent (which appeared probable from other circumstances, although no direct evidence of the fact could be produced); the court, thinking that it might be presumed that he had received it from her, directed him to be acquitted; which was accordingly done. *Harrison's case*, O. B. Feb. 1756, 2 East's P. C. 559.

But a wife may steal the goods of her husband which have been bailed or delivered to another person; for he has a temporary special property in them. 1 *Hale*, 513.

The wife cannot commit larceny in the company of her husband; for it is deemed his coercion, and not her own voluntary act. Yet, if she do it in his absence and by his mere command, she is then punishable as if she were sole. 1 *Hale*, 45. *Staunf.* 26. See tit. *Gift*.

If a woman insist that she is the wife of the man in whose company the felony was committed, she may be indicted by her husband's name and her own, with an *alias* and the addition of a spinster; and it will lie upon her to prove her coverture, or else she may be found guilty. 2 *East's P. C.* 559.

It is said by Mr. *Dalton* and others, that it is no felony for one reduced to extreme necessity to take so much of another's victuals as will save him from starving; but this can never be admitted as a legal defence in a country like this, where such humane laws prevail for the care and maintenance of the poor. Even if the case existed in fact, it would in truth be but little excuse that the party preferred this method of satisfying his necessity, rather than apply to the persons charged with carrying those laws into execution, because perhaps of some trouble or apprehension of reproof. Yet still, in apportioning the punishment, the court will have a tender regard to cases of real necessity, which may, and do sometimes exist, under the best-regulated governments. A false sense of shame has sometimes tempted persons, otherwise well disposed, to the commission of these offences. Sometimes, it is to be feared, they have been driven to it by the cruel and unfeeling conduct of others, who are in such instances more just objects of severity than the unhappy sufferers. 2 *East's P. C.* 699.

If one stealth another man's goods, and afterwards another stealth the same from him, the owner may charge the first or second felon at his choice. *Dalt. c.* 162.

The real owner of goods will not be deprived either of the property or possession in law of them by a felonious taking; if therefore *A.* steal the goods of *B.*, and afterwards *C.* steal the same goods from *A.*, in such case *C.* is a felon both as to *A.* and

with whom she is cohabiting.

Prisoner receiving goods from the wife of the owner; presumption of.

Wife stealing from husband's bailee.

Wife stealing in company with her husband.

Woman must prove her coverture: how to be named in indictment.

Stealing through extreme necessity.

One thief stealing from another.

Owner does not lose the property by felonious taking.

as to *B.*, and he may be indicted for stealing the goods of *B.* 1 *Hale*, 507. 2 *East*, *P. C. c.* 16. § 90. p. 654. 2 *Russ.* 156.

Nor by fraudulently taking, *semb.*

And *Gould J.* stated it to be his opinion, that the doctrine would also hold where the goods are taken from the possession of the true owner by fraud, as otherwise a man might derive an advantage from his own wrong. In *Wilkins's case*, *O. B.* 1790, 1 *Leach*, 522, 523. 2 *Russ.* 156.

Case of *B.* stealing from *A.*, and *C.* taking from *B.*, but not feloniously.

A distinction is taken in the following case:—If *A.* steals the horse of *B.*, and afterwards delivers it to *C.*, who was no party to the first stealing, and *C.* rides away with it *animo furandi*, yet *C.* is no felon to *B.*; because, though the horse was stolen from *B.*, yet it was stolen by *A.*, and not by *C.*, for *C.* did not take it; neither is he a felon to *A.*, for he had it by delivery. 1 *Hale*, 507. 2 *Russ.* 156.

Stealing things that savour of the realty.

By the common law larceny cannot be committed of things which savour of the realty, and are at the time they are taken part of the freehold; whether they be of the substance of the land, as lead, or other minerals; of the produce of the land, as trees, corn, grass, apples, or other fruits; or things affixed to the land, as buildings, and articles, such as lead, &c. annexed to buildings. 2 *East*, *P. C. c.* 16. § 27. p. 587. 2 *Russ.* 136. But it is larceny to take them, being severed from the freehold, as wood cut, grass in cocks, stones digged out of the quarry; and this, whether they are severed by the owner or even by the thief himself, if he severs them at one time, and then come again at another time and take them. 1 *Haw. c.* 39. § 21. 1 *Hale*, 510.

Things belonging to the realty, but severed from it.

Thus, though, "if a thief severs a copper, and instantly carries it off, it is no felony at common law; if *indeed* he lets it remain after it is severed any time, then the removal of it becomes a felony, if he comes back and takes it; and so of a tree which has been some time severed." *Per Gibbs C. J.* in *Lee v. Risdon*, *M. T.* 57 *G. 3.* 7 *Taunt.* 191.

7 & 8 *G. 4. c.* 29. Stealing certain minerals.

By 7 & 8 *G. 4. c.* 29. § 37., If any person shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese or mundick, or any wad, black cawke, or black lead, or any coal, or cannel coal, from any mine, bed, or vein thereof respectively, every such offender shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny.

Stealing fixtures from buildings or any thing made of metal from land.

§ 44. If any person shall steal, or rip, cut, or break, with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in case of any such thing fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person. See *R. v. Finch*, *post*, p. 455.

Tenants and lodgers stealing

§ 45. If any person shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the

contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in every such case of stealing any chattel it shall be lawful to prefer an indictment in the common form as for larceny, and in every such case of stealing any fixture to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire.

§ 38. If any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure-ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound) shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and if any person shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations herein-before mentioned, every such offender (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of five pounds) shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny. See *R. v. Hodges, infra*.

§ 39. If any person shall steal, or shall cut, break, root up, or otherwise destroy, or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, where-soever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, every such offender, being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the value of the article or articles stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny.

§ 40. If any person shall steal, or shall cut, break, or throw down with intent to steal, any part of any live or dead fence, or any wooden post, pale, or rail set up, or used as a fence, or any stile or gate, or any part thereof respectively, every such offender,

7 & 8 G. 4. c. 29.

from the apartments they hire.

Stealing trees, shrubs, &c. growing in parks, gardens, &c.; to the value of 1*l*;

elsewhere 5*l*.,

felony.

Stealing trees, shrubs, &c. growing elsewhere.

1*s*. value. First conviction.

Second conviction.

Third offence felony.

Stealing, &c. live or dead fence, &c.

7 & 8 G. 4. c. 29.

First offence.

being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding five pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly whipped, after the expiration of four days from the time of such conviction.

Suspected persons in possession of wood, &c.

§ 41. If the whole or any part of any tree, sapling, or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, rail, stile, or gate, or any part thereof, being of the value of two shillings at the least, shall, by virtue of a search warrant, to be granted as herein-after mentioned, be found in the possession of any person, or on the premises of any person, with his knowledge, and such person, being carried before a justice of the peace, shall not satisfy the justice that he came lawfully by the same, he shall, on conviction by the justice, forfeit and pay, over and above the value of the article or articles so found, any sum not exceeding two pounds.

Stealing, &c. plant, root, fruit or vegetable in a garden, &c.

§ 42. If any person shall steal, or shall destroy or damage with intent to steal, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six calendar months, or else shall forfeit or pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding twenty pounds, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny. See *R. v. Hodges, infra*.

Second offence felony.

Stealing, &c. vegetable growing elsewhere.

§ 43. If any person shall steal, or destroy or damage with intent to steal, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or enclosed, not being a garden, orchard, or nursery-ground, every such offender, being convicted before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one calendar month, or else shall forfeit and pay over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money, not exceeding twenty shillings, as to the justice shall seem meet, and in default of payment thereof, together with the costs (if ordered), shall be committed as aforesaid, for any term not exceeding one calendar

month, unless payment be sooner made; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding six calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after expiration of four days from the time of such conviction.

7 & 8 G. 4. c. 29.
Second offence.

Prisoner was indicted on 7 & 8 G. 4. c. 29. § 38., for stealing pear trees, stating in one count, that they were growing in a garden, and in another that they were growing in ground adjoining to a dwelling-house. It appeared that the ground was separated from the back of the house by a paved entry or walk of about a yard in width; and it was ruled by *Parke J.* that the statute must be construed strictly, and that not being *absolutely contiguous*, it could not be considered *adjoining* to the house. Another question having arisen whether the ground was a garden or only a nursery, it was held to be a question for the jury, and the prisoner was acquitted.

Ground is not adjoining to a dwelling-house, if there is any interval: whether it be a garden or nursery is a question for the jury.

Plants, &c. in 7 & 8 G. 4. c. 29. § 42. do not apply to young fruit trees in a nursery on sale.

The trees taken were grafted seedlings about seven feet high, and *Parke J.* held they came within the description of tree described in § 38., and that § 42. did not apply to them. *Hereford Sept. Ass., 1829, R. v. Hodges, 1 M. & M. 341.*

The prisoner was tried and convicted at *Norwich* for stealing six feet of copper pipe, which the indictment stated to be the property of *John Symonds*, and to be fixed to the dwelling-house of *Elizabeth Drummee* and *Sarah Allen*; and a second count stated it to be the property of *E. D.* and *S. A.*, and fixed to their dwelling-house. It appeared that the dwelling-house was the property of *John Symonds*, in the same yard with, and adjoining to, his own house; and it consisted of two rooms, one on the ground floor, the other up one pair of stairs; one of these was occupied by *E. D.* and the other by *S. A.*, as separate tenants to *J. S.*, and the pipe which was stolen, ran longitudinally down these two rooms to carry off the water from the roof. The question was, whether the dwelling-house was properly described; and on case reserved, the judges were of opinion that the conviction was wrong, there being neither a joint possession nor a joint property of the dwelling-house. *M. T. 1834, R. v. Francis Finch, MS.*

Where part of a house is occupied by A. and part by B., it cannot be described as the dwelling house of A. and B.

With regard to domestic animals, such as horses, oxen, sheep, and the like, there is no doubt whatever that they were the subjects of larceny at common law. And the stealing of many of these animals has been made a capital offence, by the provisions of several statutes, which have been or will be treated of under their respective titles. Domestic birds also, as ducks, hens, geese, turkeys, peacocks, &c. are clearly the subjects of larceny. So also larceny may be committed of their eggs or young ones. *2 Russ. 150. 1 Hale, 511. 1 Haw. c. 33. § 43.*

Domestic animals, horses, cattle; see the respective titles.

And as the stealing of such animals is larceny, it is also larceny to steal the produce of them, though taken from the living animals. Upon this ground it was holden by all the judges, on a case reserved for their opinion, that milking a cow at pasture and stealing the milk, was larceny; and it was also holden, that larceny may

Produce of animals.

Milk.

Wool.

be committed by pulling wool from the bodies of live sheep and lambs with a felonious intent. 2 *East*, P. C. c. 16. § 49. p. 616, 617. 2 *Russ*. 150.

Deer, hares,
&c.; fish.

In regard to hunting, carrying away, killing, &c. deer, or taking or killing hares and conies in warren, &c., see tit. *Game*. As to taking or destroying fish, see tit. *Fish*.

Killing, &c.
house pigeons.

The stat. 7 & 8 G. 4. c. 22. § 33., enacts, "that if any person shall unlawfully and wilfully kill, wound, or take any house dove or pigeon, under such circumstances as shall not amount to larceny at common law, every such offender, being convicted thereof before a justice of the peace, shall forfeit and pay, over and above the value of the bird, any sum not exceeding two pounds."

Animals *feræ*
naturæ.
At common
law.

It is however certain, that larceny cannot at common law be committed of such animals in which there is no property, as of beasts that are *feræ naturæ* and unreclaimed; such as deers, hares, and conies in a forest, chase, or warren; fish in an open river or pond; old pigeons out of the house; or wild fowls at their natural liberty; although any person may have an exclusive right *ratione loci aut privilegii* to take them if he can in those places. But if they are

Dead, reclaim-
ed, or confined.

dead, reclaimed, and known to be so, or confined and may serve for food, it is otherwise even at common law. For of deer so enclosed in a park, which may be taken at pleasure; fish in a trunk or net, or as it should seem in any other enclosed place which is private property, and where they may be taken at the pleasure of the owner at any time; pheasants or partridges in a mew; young pigeons, or old ones when shut up; young hawks in a nest, and even old ones, or falcons reclaimed and known by the party to be so; larceny may be committed. The same as to peacocks: so of swans marked and pinioned, or swans unmarked, if tame, kept in a mote, pond, or private river; but if they range out of the royalty, it is no felony to take them though marked, because it cannot be

Vide 3 *Inst.* 97, 98, 99. 1 *Hale*, 642.

Hawks, swans;
their eggs.

known that they belong to any person. Nor can larceny be committed of the eggs of these, or of hawks; because the stat. 11 H. 7. c. 17. has appointed a less punishment, namely, fine and imprisonment. 2 *East*, P. C. 607. 3 *Inst.* 109, 110. 4 *Blac. Com.* 235, 236. 1 *Hale*, 510, 511. 1 *Haw. c.* 33. §§ 25—28. *Hal. Sum.* 67, 68. *Davies v. Powell*, *Will. Rep.* 49. But the stealing of a stock of bees seems to be admitted to be felony. *Tibbs v. Smith*, *T. Ray*. 33.

Bees.

Indictment for
stealing an
animal *feræ*
naturæ, must
state it to be
dead, reclaimed,
&c.

John Rough being convicted on an indictment for stealing a pheasant, value 40s., of the goods and chattels of H. S., all the judges, on a second conference in *Easter* term 1779, after much debate and difference of opinion, agreed that the conviction was bad; for in cases of larceny of animals *feræ naturæ*, the indictment must shew that they were either dead, tame, or confined; otherwise they must be presumed to be in their original state; and that it is not sufficient to add "of the goods and chattels" of such a one. *Rough's case*, *Surrey Lent. Ass.* 1779, 2 *East*, P. C. 607.

Stealing pheas-
ants from an
unqualified
person.

Thomas Jones was indicted for stealing five pheasants restrained of their natural liberty, the property of *A. Fountain*. It appeared on the evidence that *Fountain* was an alehouse-keeper, and not a qualified person to keep or to shoot game; and that he bred these pheasants for sale. And it was objected on behalf of the prisoner, that *F.*, not being a qualified person, could have no property in

the pheasants, nor any legal possession sufficient to support the indictment; that by the several statutes relating to the game laws, unqualified persons are forbidden, under certain penalties, to have pheasants in their possession, and that by one of those statutes authority is given to a justice of the peace to *take away* from such person any pheasant he may have in his possession. But *Grose J.* held, that it was sufficiently legal possession for the purposes of the indictment, and the prisoner was convicted. *Jones's case, Buckingham Lent Ass. 1809, cor. Grose J. MS. (K.)*

But there are some animals which, though they may be reclaimed, yet are considered of so base a nature, that no larceny can be committed of them; such as bears, foxes, monkeys, cats, ferrets, and the like: and the same doctrine extends to the whelps or young of such animals. *3 Inst. 109.*

John Searing was indicted for stealing "five live tame ferrets, confined in a certain hutch," &c. the property of *Daniel Flower*. The evidence brought the fact of taking the ferrets, clearly home to the prisoner, and it was also proved that ferrets are valuable animals, and that those in question were sold by the prisoner for nine shillings. But, the jury having found the prisoner guilty, the case was submitted to the consideration of the judges, upon the question whether ferrets must be considered as animals of so base a nature (a) that no larceny can be committed of them. And the judges held the conviction wrong. *Searing's case, Hertford Lent Ass. 1818, cor. Wood B., C. C. R. 350.*

By 7 & 8 G. 4. c. 29. § 31., If any person shall steal any dog, or shall steal any beast or bird ordinarily kept in a state of confinement, not being the subject of larceny at common law, every such offender, being convicted thereof before a justice of the peace, shall, for the first offence, forfeit and pay, over and above the value of the dog, beast, or bird, such sum of money not exceeding 20*l.* as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction.

§ 32. If any dog, or any such beast, or the skin thereof, or any such bird, or any of the plumage thereof, shall be found in the possession or on the premises of any person, by virtue of a search-warrant to be granted as herein-after mentioned, the justice by whom such warrant was granted may restore the same respectively to the owner thereof; and the person in whose possession or on whose premises the same shall be so found (such person knowing that the dog, beast, or bird has been stolen, or that the skin is the skin of a stolen dog or beast, or that the plumage is the plumage of a stolen bird), shall, on conviction before a justice of the peace, be liable, for the first offence to such forfeiture, and for every

Animals of a base nature.

Ferrets are animals of a base nature, and not the subject of larceny.

7 & 8 G. 4. c. 29. Stealing dog, beast, or bird ordinarily kept in a state of confinement.

Second offence.

Skin, &c. found on premises; by search warrant.

(a) The ferret was originally a native of Africa, but has for a long time been bred, kept, and sold in this country as a tame animal.

Deeds, &c. concerning land, and the box, &c. containing them.

7 & 8 G. 4. c. 29. Stealing or fraudulently destroying, or concealing any will, codicil, &c.

Not necessary to allege property or value.

Stealing any paper or parchment being part of title.
7 & 8 G. 4. c. 29.

Not necessary to allege value.

Provision in regard to a civil proceeding in respect to the same;

and to evidence on indictment.

subsequent offence, to such punishment as persons convicted of stealing any dog, beast, or bird, are herein-before made liable to.

Larceny could not by the common law be committed of written instruments relating to real estate; for the taking of them was considered as merely a trespass, and no felony, upon a principle allied to those already mentioned, viz. that they concern the land, or (in technical language) savour of the realty, and are considered as part of it by the law, and descend with it to the heir. 2 *East*, P. C. c. 16. s. 34. p. 596. 2 *Russ*. 141. *Wesbeer's case*, O. B. 1739, 2 *East*, P. C. ib. It was also holden that the box or chest in which the charters were held was not the subject of larceny. 1 *Hale*, 510. 3 *Inst*. 109. 2 *Russ*. 142.

7 & 8 G. 4. c. 29. § 22. If any person shall, either during the life of the testator or testatrix, or after his or her death, steal, or for any fraudulent purpose destroy or conceal, any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal estate, or to both, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to any of the punishments which the court may award, as herein-before last mentioned (a); and it shall not in any indictment for such offence be necessary to allege that such will, codicil, or other instrument, is the property of any person, or that the same is of any value.

§ 23. If any person shall steal any paper or parchment, written or printed, or partly written and partly printed, being evidence of the title, or of any part of the title, to any real estate, every such offender shall be deemed guilty of a misdemeanor; and, being convicted thereof, shall be liable to any of the punishments which the court may award, as herein-before last mentioned; and in any indictment for such offence, it shall be sufficient to allege the thing stolen to be evidence of the title, or of part of the title, of the person or of some one of the persons having a present interest, whether legal or equitable, in the real estate in which the same relates, and to mention such real estate, or some part thereof; and it shall not be necessary to allege the thing stolen to be of any value.

§ 24. Provided always, and be it enacted, that nothing in this act contained relating to either of the misdemeanors aforesaid, nor any proceeding, conviction, or judgment to be had or taken thereupon, shall prevent, lessen, or impeach any remedy at law or in equity, which any party aggrieved by any such offence might or would have had if this act had not been passed; but nevertheless the conviction of any such offender shall not be received in evidence in any action at law or suit in equity against him; and no person shall be liable to be convicted of either of the misdemeanors aforesaid by any evidence whatever, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.

§ 21. If any person shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure, or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or any original document whatsoever of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or any bill, answer, interrogatory, deposition, affidavit, order, or decree, or any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and it shall not in any indictment for such offence be necessary to allege that the article, in respect of which the offence is committed, is the property of any person, or that the same is of any value.

7 & 8 G. 4. c. 29.
Stealing or fraudulently taking, or maliciously injuring, &c. any record, &c.

Punishment.

Not necessary to allege property or value.

Written instruments which concerned mere choses in action, as bonds, bills, and notes, were considered at common law not to be goods whereof larceny could be committed, as being of no intrinsic value, and not importing any property in the possession of the person of whom they were stolen. 2 *East*, P. C. c. 16. § 36. p. 597. 2 *Russ*. 141.

Bonds, bills, &c.

The legislature, however, found it necessary to interfere in regard to many instruments which concerned mere choses in action, and to make the stealing of them larceny and felony. See 2 G. 2. c. 25. § 3. 2 *Russ*. 143.

Statutes relating thereto.

This stat. is now repealed by 7 & 8 G. 4. c. 27., except so far as such repeal may be qualified by § 2., which enacts, "That nothing in this act contained shall in anywise affect or alter such part of any act as relates to the post office, or to any branch of the public revenue, or to the naval, military, victualling, or other public stores of his Majesty, &c. except the acts of 31 *Elix*. c. 4. § 22. *Car*. 2. c. 5., which are herein-before repealed, or shall affect or alter any act relating to the Bank of *England* or *South Sea Company*."

2 G. 2. c. 25. repealed, except, &c.

7 & 8 G. 4. c. 29. § 5. If any person shall steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of *Great Britain*, or of *Ireland*, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings' bank, or shall steal any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of this kingdom, or of any foreign state, or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing, every such offender shall be deemed guilty of felony, of the same nature, and in the same degree, and punishable in the same manner, as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen or secured thereby and remaining unsatisfied, or with the

7 & 8 G. 4. c. 29.
Stealing public or private securities for money, or warrants for goods.

Bond, bill, note, &c.

value of the goods or other valuable thing mentioned in the warrant or order; and each of the several documents herein-before enumerated, shall throughout this act be deemed for every purpose to be included under and denoted by the words "valuable security."

A bill payable to order, but not indorsed.

At a conference of the judges in *Easter* term 1781, *Nares* J. mentioned, that a person was convicted before him for privately stealing from the person of another a pocket-book containing a note of the *Bristol* bank, signed by some one on behalf of himself and partners, promising to pay to the prosecutor or order a sum of money, but which the prosecutor had not indorsed. All the judges were of opinion that this was a capital felony within the stat. 2 G. 2. c. 25. (now repealed), which makes the stealing promissory notes, &c. felony, with the same consequences as goods of the like purported value; that this was a promissory note, and its not being indorsed was immaterial. 2 *East's* P. C. 598.

Indorsement made after the taking.

So, an indictment for stealing a bill of exchange upon the same statute was sustained by proof that when found in the prisoner's possession there, it had an indorsement (made afterwards) and not laid in the indictment; for the addition of a third name made no difference; it being the same bill that was originally stolen. *Austin and King's case, Leicester Lent Ass. 1783, 2 East's* P. C. 602.

Exchequer bill signed by unauthorised person.

In an indictment on 15 G. 2. c. 13., relating to embezzlements by servants of the Bank of *England*, the prisoner was charged with stealing certain bills called exchequer bills: and as it appeared that the person who signed them on the part of government was not legally authorised to do so, the court held they were not good exchequer bills, and that the prisoner could not be convicted. *R. v. Aslett, 2 Leach, 954. 2 Russ. 145.*

Country bank notes paid, but about to be re-issued, subjects of larceny at common law.

Where the notes of a country bank had been paid by their correspondent bank in *London*, but were reissuable, and being stolen while they were *in transitu* for the purpose of being reissued, held, that they were subjects of larceny at common law (though they were extinct as promissory notes) as valuable property of the country bankers, under the description of pieces of paper each respectively stamped with a stamp, &c. *R. v. Clarke, E. T. 1810, C. C. R. 181.*

Chattel valuable to the owner only.

And in the above case the principle was laid down, that if a chattel be valuable to the possessor, though not saleable, and of no value to any one besides, it may still be the subject of larceny. 2 *Russ. 147. n (t.)*

Paid notes that are re-issuable may be called goods and chattels.

Prisoner was indicted for the receiving of stolen notes of a country bank which had been paid by a *London* bank, who were their agents, and were stolen while in the course of being sent down again to the country bankers for the purpose of being reissued; they were described in some counts as pieces of paper of great value, being stamped, &c. of the goods and chattels of *J. W.*, and in others as valuable securities, of the property of *J. W.*; on case reserved, some of the judges doubted whether they could properly be called valuable securities; but, if not, they all thought they were goods and chattels; and that the conviction was right. *M. T. 1829, R. v. Vyse, 1 R. & M. 218.*

Country bank notes, not in circulation, not within 2 G. 2.

A case is cited on which it was ruled that it was not felony within 2 G. 2. c. 25. (now repealed) to steal bankers' notes completely executed, but which had never been put into circulation;

on the ground that no money was due upon them. *Anon. cor. as promissory notes.*
Ld. Ellenb. C. J., Carlisle, 1802, 2 Leach, 1061. n. (b) 2 Russ. 147.

In a prosecution on 7 G. 3. c. 50., relating to larcenies and embezzlements in the post office, it appeared that country bank notes having been paid by the bankers in London, were purloined at the post office, while on their passage back to the country bank for the purpose of being reissued: it was objected, that being "paid notes" they did not fall within the act, having no longer the value or force of promissory notes. A majority, however, of the judges were of opinion, that the notes fell within the description of promissory notes mentioned in the act; that they were not cancelled, and would be available in the hands of holders for valuable consideration against the makers. *Tr. T. 1812, R. v. Ranson, C. C. R. 292.*

But where one was compelled by duress to make a promissory note on stamped paper, before prepared by the prisoner, who was present during the time, and withdrew the note as soon as it was made, this was holden not to be a felony within the statute 2 G. 2. (now repealed); for, according to some of the judges, that is confined to available securities in the hands of the party robbed, which this was not, being of no value while in the hands of the maker himself. Yet, even if it were, according to others, this was never in his possession; his signature having been procured by duress to a paper which during the whole continuing transaction was in the possession of the prisoner. *Phipoe's case, 2 Leach, 679. 2 East's P. C. 599.*

The prisoner was indicted under 2 G. 2. (now repealed) for having stolen a bank post bill; but it was not set out, and it appeared that no bank post bills were in use at the time of the passing of 2 G. 2. Held, that the court could not take notice that this instrument fell within any of the descriptions mentioned in the statute; that when the statute passed it was not properly a bill but a promissory note, and that the conviction of the prisoner was thereof wrong. *Tr. T. 1822, R. v. Chard, C. C. R. 488.*

Though the note charged to be stolen need not be set out, yet the indictment must follow the description given in the statute; where, therefore, in a case under 2 G. 2. (now repealed), it was stated to be "a note commonly called a bank note," it was held bad. *R. v. Craven, C. C. R. 14.*

An indictment for larceny of a promissory note may describe it generally, as (*ex. gr.*) "One promissory note for the payment of one guinea," without setting forth the note; and if the value of the thing stolen in the dwelling-house (including the note) be 40s., clergy is ousted. *Milne's case, Worcester Sum. Ass. 1800, 2 East's P. C. 602. 3 B. & P. 145.*

Special Property or Possession.

Any one who has a special property in goods stolen may lay them to be his in an indictment for larceny, as a bailee, pawnee, lessee for years, carrier, or the like; *a fortiori*, they may be laid to be the property of the respective owners (a), and the indictment is good either way. *2 East's P. C. 652.* But if it appeared in evi-

(a) But see *infra*, as to a lessor, next page.

dence, that the party whose goods they are laid to be, had neither the property nor the possession (and for this purpose the possession of a *feme covert* or servant is, generally speaking, the possession of the husband or master), the prisoner ought to be acquitted on that indictment. The same rule prevails in the case of goods belonging to a guest (*Jane Todd's case*, *O. B. July, 1711*, 2 *East's P. C.* 653.) stolen at an inn; they may be laid to be the property either of the innkeeper or the guest. So goods stolen from a washerwoman (*Packer's case*, *O. B. April, 1714*, 2 *East's P. C.* 653.) who takes in the linen of other persons to wash, may be laid to be her goods: by *Parker C. J.*, *Tracy* and *Bury Js.* For persons of this description have a possessory property, and are answerable to their employers. So an agister has a possession and property against all but the right owner.

Woodward's case.
Property laid in agister of cattle.

In *John Woodward's case*, *Leicester Sum. Ass. 1796*, 2 *East's P. C.* 653., who was indicted for maliciously and feloniously killing two sheep the property of *W. Dalton*, it was proved that the prosecutor had only taken the sheep in to agist for another. Whereupon it was objected, that the property was not well laid in the agister; and upon reference to the judges in *M. T. 1796*, one of them doubted at first, because an agister of cattle is not liable for them at all events, like an innkeeper for the goods of his guest. The majority, however, thought the conviction right. But the matter stood over till *H. T. 1797*, when, upon reference to 4 *Inst.* 293., shewing that an agister has a possession, and 2 *Roll. Abr.* 551., that he may maintain trespass against any who takes the beasts; all the judges agreed that the conviction was right.

Special property. Owner of yard in which a carriage stood.

In a prosecution for stealing a window glass and hammercloth from a carriage, the prosecutor in whom the property was laid, was a coachmaster, who had the care of the carriage, which stood in a coach-house in his yard, when the articles were stolen, and an objection that the property should have been laid in the owner of the carriage was overruled. *O. B. 1785*, *Taylor's case*, 1 *Leach*, 350. 2 *Russ.* 157.

S. P.

In another case, the prisoner was convicted of stealing a chariot glass from a lady's chariot, which had been placed in a coach-yard at *Chelsea* while the owner was at *Runelagh*, and the property was laid in the master of the yard. *Statham's case*, *O. B. 1773*, 1 *Leach*, 357. 2 *Russ.* 157.

Stealing goods let with lodgings.

In the case of stealing from ready-furnished lodgings, the property must be laid in the lodger and not in the original owners.

Prisoner was indicted for stealing in the house of *J. A.* goods the property of *J. A.*; it appeared that *J. A.* occupied only part of the house, and let out the rest in lodgings, and that the goods stolen were part of the furniture let to a lodger. The judges held the conviction wrong; for that the property ought to have been laid in the lodger, for that *J. A.* was not entitled to possession, and could not have maintained trespass. *R. v. Belstead*, *C. C. R.* 411. *acc. R. v. Brunswick*, 1 *R. & M.* 26.

Principle in respect of goods that are in the possession of a lessee;

In 2 *East's P. C. c.* 16. § 90. p. 652., it is stated that "any one who has a special property in goods stolen may lay them to be his in an appeal or indictment for larceny, as a bailee, pawnee, lessee for years, carrier, or the like; *a fortiori*, they may be laid to be the property of the respective owners, and the indictment is good either way."

The like principle is laid down in 2 *Russ.* 156.: "There is no doubt that there may be a sufficient ownership of the goods stolen in a person who has only a special property in them; and that they may be laid as the goods and chattels of such persons in the indictment. A lessee for years, a bailee, a pawnee, a carrier, and the like, have such special property; and the indictment will be good if it lay the property of the goods either in the real owners, or in the persons having only such special property in them."

The law so declared in two text-books of standard authority is unquestionably not reconcilable, in all its parts, with the decisions cited above in *R. v. Belstead* and *R. v. Brunswick*. The following clear and succinct observations, which have been allowed to appear in this work, will, it is conceived, be deemed valuable in pointing out the true legal distinctions which govern cases of this nature: "If the owner parts with the right of possession for a time, so as to be deprived of the legal power to resume the possession during that time, and the goods are stolen during that time, they cannot be described as the goods of such owner; but if the owner parts with nothing but the actual possession, and has a right to resume the possession when he thinks fit, the goods may be described either as his goods, or his bailee's. In the latter case he does not for an instant part with the general right of possession; he confers a qualified right only, which he may put an end to when he will; in the former case, he parts with the whole right of possession for the time. The bailee for safe custody, the carrier, the tailor, the pawnee, have never more than a partial right; the owner may resume the goods, on satisfying their lien, when he will. The agister is in the same situation, and the decision as to him, in *R. v. Woodward*, only is, that the cattle *may* be described as his, not that they *must*. The ground of decision in *R. v. Belstead* and *R. v. Brunswick* was, that the owner had parted with the right of possession for the time, he had nothing but a reversionary interest, and could not have brought trespass." *MS. observations of Bayley B.*

Where goods taken under a *fi. fa.* are stolen, they may be laid as the goods of the party against whom the writ issued; for though they are in *custodia legis*, the original owner continues to have a property in them until they are sold; and the sheriff is accountable to him for the goods so seized. A sheriff's officer seized goods under a *fi. fa.* against *J. S.*, and afterwards stole part of them; the indictment described them as the goods of *J. S.*, and it was objected, that they ought to have been described as the goods of the sheriff; but the point being saved, the judges held that, notwithstanding the seizure, the general property lay in *J. S.*, as the loss would fall upon him if they did not go to liquidate the debt, and that the debt continued. *M. T.* 1822, *R. v. Eastall*, 2 *Russ.* 158.

But if it appear in evidence that the party, whose goods they are laid to be, had neither the property nor the possession, as is usually the case of a *feme covert* or servant, who have in their custody the goods of the husband or master, the prisoner ought to be acquitted. 2 *East's P. C. c.* 16. § 90. pp. 652, 653.

Rex v. Thomas Hutchinson and *Joseph Boffey*, *C. C. R.* 412. The prisoners were tried before *Richardson J.*, at *Stafford Lent Ass.* 1820. *Hutchinson* was convicted of stealing, and *Boffey* of receiving, *scienter*, &c., a quantity of brass, which in the first count was laid to be the property of *Thomas Penn*, and 20 other persons

They must be laid as the property of the lessee.

Goods taken under *fi. fa.* ownership continues in person against whom writ issued.

Servant or *feme covert*.

The goods in a dissenting chapel vested in trustees, cannot be described as the goods of a

servant, who has merely the care of the chapel and things in it, to clean and keep in order, though he has the key of the chapel, and no other person, but the minister, has any other.

therein named, and in the second count, to be the property of *Samuel Evans*. The property stolen formed the brass chandelier and sconces (not fixed to the freehold) of a chapel of protestant dissenters, and the persons named in the first count were the trustees of the chapel; but the prosecutors were not prepared to prove the trust deed whereby they were appointed, nor that all of them had acted in the trust or management, some of them residing at a distance. *Samuel Evans*, in whom the property was laid in the second count, stated that he was servant to the managers, and had a salary of 5*l.* a-year. That he for many years had had the care of the chapel, and of the things in it to clean and keep in order. That he kept the keys, and that no person except himself had a key of the chapel, but the minister had a key of the vestry, through which he could enter the chapel. The trustees had no key. The witness received his orders sometimes from the trustees and sometimes from the minister. No one resided in the chapel. On case, the judges thought the property could not be considered as *Evans's*, and therefore that the conviction was wrong. *E. T.* 1820.

Case of special property in a servant.

Property laid in stage coachman.

Yet there are some cases where a kind of special property has been considered to exist in the servant; as where the master disguised himself and robbed his servant, with intent to charge the hundred. 2 *East's P. C. c.* 16. § 5. p. 558. and § 90. p. 654.

Rex v. Deakin and Smith, O. B. April 1800, cor. Grase J. 2 *Leach*, 875. 2 *East's P. C.* 653. *James Deakin* and *William Smith* were indicted for stealing spoons and other articles, laid in the second count (on which alone they were convicted), to be the property of one *Markham*. The goods had been sent by a tradesman in *London* to *Mr. Broderick* at *Spalding*, by the *Spalding* coach, and were stolen by the prisoners at *Pondersend*, out of the boot behind the coach. The question was, whether they were properly laid to be the property of *Markham*, who was not the owner but only the driver of the coach, there being no contract between him and the proprietors, that he should be liable for any thing stolen, and it not appearing that he had been guilty of any laches. The case being referred to the judges, it stood over for some time, but finally the conviction was holden right, the coachman having the possession and a special property in the goods committed to his charge.

Property laid in owner, though in possession of an agent.

Property may be laid as belonging to the real owner, though it never was actually in his possession, but in the possession of his agent only. *Turner*, as agent for *Nash*, sent up by his direction some notes to *Morgan*, another of *Nash's* agents; and *Morgan*, as agent to *Nash*, sent them by the coach to one *Walker* in *Worcestershire*, to pay workmen there; and the prisoner stole them from the coach. The indictment described them as the property of *Nash*, and after conviction all the judges were of opinion that the property was well laid. *R. v. Remnant, C. C. R.* 136.

There must be either actual or constructive possession.

But *aliter*, where the person, in whom the property is laid, has had neither the actual nor constructive possession of it.

Thus, where *Paul* had ordered a hat of *Beer*, and the prisoner sent for it in *Paul's* name and got it, and was indicted for stealing *Paul's* hat, the judges held that the property could not be said to be in *Paul*. *E. T.* 1807, *R. v. Adams, C. C. R.* 225. See *antè*.

Clothes and other necessities provided for children by their parents, are often laid to be the property of the parents, especially while the children are of tender age; but it is holden good either way. At the sessions at the O. B. after E. T. 1701, *Tracy* and *Tarton* Js., and *Lovell* Recorder, doubted whether the property of a gold chain, which was taken from a child's neck, who had worn it for four years, ought not to be laid to be in the father. But *Tanner*, who had been an ancient clerk of the court, said, that it had always been usual to lay it to be the goods of the child in such case, and that many indictments which had laid them to be the property of the father had been ordered to be altered by the judges. 2 *East's P. C.* 654. 12 *Rep.* 113. 2 *Russ.* 160.

But where the prisoner was charged with stealing wearing apparel, and it was laid as the property of *J. W.*, it appeared it was the clothes of *G. W.*, aged nineteen, who was bound apprentice to his father *J. W.*, and that *J. W.* had covenanted to find his son in clothing; under these circumstances it was held, that the indictment was bad, and that the clothes were exclusively the property of the son. *Forsgate's case*, O. B. 1787, 1 *Leach*, 463. 2 *Russ.* 160.

In a prosecution for stealing sheep, they were laid to be the property of *S. D.* and eight other persons, being his grandchildren. It appeared, that many years before *S. D.* and his son held a farm together, and that the flock was their joint concern. The son, and also the son's wife died, leaving eight children, after which *S. D.* continued to use the stock as before, considering himself as acting, in respect of one moiety, for his grandchildren, who were infants. After conviction, the judges held, that the property was well described; and that it was not necessary that the property of the thing taken should be the strict legal property. *R. v. Scott*, C. C. R. 13. 2 *Russ.* 160.

It has been held, that the property in reclaimed pheasants might be laid in a person who was not qualified to keep or kill game. *R. v. Jones*. See *antè*, and 2 *Russ.* 161.

R. v. Eleanor Gaby, C. C. R. 178. The prisoner was tried and convicted before *Chambre J.*, at *Taunton Lent Ass.* 1810, for grand larceny, in stealing some drapery goods, the property of *Benjamin Dodge* and *Sarah Chilcott*, widow. It was objected, that the indictment had misdescribed the property by alleging it to be in *Benjamin Dodge* and *Sarah Chilcott*, concerning which the evidence was, that the goods had been part of the joint stock in trade of the said *Benjamin Dodge* and ——— *Chilcott*, the late husband of the said *Sarah Chilcott*, and were so at the time of *Chilcott's* death, which happened three or four days before *Christmas* last. He died, as the witness *Dodge* understood, without a will, leaving his said widow and some young children, and no administration had been granted of his effects. But the widow, from the death of her husband, acted as partner, and regularly attended the business of the shop. The goods mentioned in the indictment were stolen on the 6th of *January*, and on the 20th of the same month a division was made of the remaining stock, the widow taking one half, and *Dodge* the other half. It was contended, on the part of the prisoner, that the children, in respect of their interest under the statute of distributions, should have been named with the other two as joint proprietors, or that the pro-

Necessaries for children; good either way as the property of them or of their parents.

Where the father contracted to furnish clothes to his son, an infant.

Property laid in surviving partner and infant children of deceased partner.

Game in possession of an unqualified person.
Gaby's case.
The actual possession of the goods by a surviving partner, and the widow of a deceased partner, holden to be a sufficient ownership.

perty should have been alleged to be in the Ordinary and the surviving partner. But the learned judge held, that the *actual possession* in *Benjamin Dodge* and *Sarah Chilcott*, as owners, was sufficient, upon which the prisoner was convicted; and the judges, on case, held the property well laid, and therefore the conviction right.

Waifs, wreck,
&c.

It is generally said that larceny cannot be committed of that wherein none have any determinate property, as of treasure-trove, waifs, &c. till seized. The same was said of wreck; but now the legislature have protected the owners of property in this state against the plunderers of it. And indeed there seems to be some incorrectness in the generality of the position with respect to the other things mentioned. As to waifs, treasure-trove, &c. the lord has no determinate property in them till seizure; but the true owner, though unknown, who has lost or been robbed of the things themselves, has still a property in them. 1 *Haw. c. 33. § 24.* 1 *Hale*, 510. 2 *East's P. C.* 606. 2 *Russ.* 1138. Also 1 & 2 *G. 4. c. 75. § 12. 15. 22, 23.* See tit. ~~Wreck~~.

Property abandoned.

Where indeed the circumstances of the case furnish a presumption of an intended dereliction of such property on the part of the owner, there no larceny can be committed before seizure by the lord, because the taking is not *invito domino*.

Ownership where the person of the owner is unknown.

It is well settled that larceny may be committed by stealing goods, the owner of which is *not known*: and that it may be stated in the indictment that the things stolen were the goods of a person to the jurors unknown. But upon prosecutions of this kind, some proof must be given sufficient to raise a reasonable presumption that the taking was felonious, or *invito domino*; and *Ld. Hale C.J.* said, that he never would convict any person for stealing the goods *cujusdam ignoti*, merely because the person would not give an account how he came by them, unless there were due proof made that a felony had been committed of those goods. See 2 *Russ.* 162. 1 *Hale*, 512. 2 *Hale*, 290. It is said, therefore, 2 *East's P. C.* 651., with respect to these cases, that the true ground upon which persons so indicted may, in any instance, claim to be acquitted, when the other facts necessary to constitute the crime of larceny appear upon the evidence, seems to be a want of the proper proof that the taking was felonious, or *invito domino*, and not the want of any property in the true owner, who, by losing his goods, does not lose his property in them until seizure by some other person having a right to seize in such cases.

An indictment cannot be sustained for stealing the goods of a person unknown, if it appear that the owner is really known.

Walker's case, Glouc. Sum. Ass. 1812, 3 Campb. 264. 2 *East's P. C.* 651. It should be well observed, however, with respect to prosecutions for stealing goods of a person unknown, that an indictment, alleging the goods to be the property of a person unknown, will be improper *if the owner be really known*: and that in such case the prisoner must be discharged of the indictment so framed, and tried upon a new one for stealing the goods of the owner by name. This principle was acted upon in a case, where the indictment charged the prisoner as an accessory before the fact to a larceny; and stated, that "*a certain person to the jurors unknown*," committed the larceny; and that the prisoner procured the said "*person unknown*" to commit it; and it appeared, from the opening of the case by the counsel for the prosecution, that the grand jury had found the bill upon the evidence

of the thief, who was about to be called as a witness to establish the guilt of the prisoner. *Le Blanc J.* interposed, and directed an acquittal, saying, that he considered the indictment wrong in stating that the goods were stolen by "a person unknown;" and he asked how the person, who was the principal felon, could be alleged to be unknown to the jurors, when they had him before them, and his name was written on the back of the bill. This doctrine has been also holden to apply to the case of a receiver of stolen goods, an indictment against whom should state the name of the principal thief, if it be known. *R. v. —, per Dallas J. Worcester Lent Ass. 1815, 2 Russ. 258. Acc. R. v. Robinson, 1 Holt, 595.*

He who steals goods belonging to a parish church may be indicted for stealing the goods of the parishioners. *1 Haw. c. 33. § 29. 2 Russ. 45.* Goods belonging to a parish-church.

It is said, that he who takes goods from a chapel, or abbey, during vacation, may be indicted for stealing *bona capellæ* or *bona ecclesiæ*, being in the custody of such and such. *2 East P. C. 651. 2 Russ. 46.* Goods of a chapel or abbey.

The offence of sacrilege, under *1 Edw. 6. c. 12.* (now repealed), was held not to be confined to articles used for divine worship. *R. v. Rourk, C. C. R. 386. N. B.* The property was there laid in the churchwardens.

Several persons were convicted of stealing leaden coffins from the vaults of a church, the property being laid in the executors. *2 East's P. C. 652.* Coffins from a church.

Where a leaden coffin was stolen, which had lain in the ground sixty years, it was held sufficient to describe it as the property of a person unknown, though it was objected that the family of the deceased continued in the place, and that the personal representative might have been traced. *Anon. cor. Buller J. Exeter Lent Ass. 1794, 2 East's P. C. 652.* S. P.

In the same case it was held, that laying the coffin as the property of certain persons being the then churchwardens was bad. *Ibid.* S. P.

If a man die intestate, and the goods of the deceased be stolen before administration granted, such goods shall be supposed to be the goods of the ordinary; but if a man die, having made a will and appointed an executor, the goods shall be supposed to be the goods of the executor, even before probate is granted to him. *1 Hale, 514. 2 East's P. C. c. 16. § 89. p. 652. 2 Russ. 164.* Goods of a person deceased.

Neither an ordinary, nor executor, nor administrator need shew their title specially, it being founded on their own possession, in which case a general indictment lies, without naming themselves ordinary, executor, or administrator. *1 Hale, 514. 2 Russ. 164.* Property laid in executor, administrator, &c.

And it hath been adjudged, that he who takes off a shroud from a dead corpse, may be indicted as having stolen it from the executors of, or those who buried, the deceased, and not of the deceased himself. *2 East's P. C. 652.* Stealing a shroud:

But though in corpses there can be no property, wherefore to steal a dead corpse is no felony; yet it is a very high misdemeanor. *2 East's P. C. 652. Rex v. Lynn, 2 T. R. 733. Acc. R. v. Gilles, C. C. R. 366. (n).* Or a corpse.

Property vested in a body of persons ought not to be laid as the property of that body, unless such body is incorporated, but should be described as belonging to the individuals who compose the body. *2 Russ. 164.* Goods of a body, not incorporated.

7 G. 4. c. 64.
Name of
office or descrip-
tion, sufficient
after verdict.

But now by stat. 7 G. 4. c. 64. § 20., judgment shall not be stayed or reversed, on the ground that any persons mentioned in an indictment or information are designated by a name of office or other descriptive appellation, instead of their proper names. This statute, however, does not apply to objections taken upon demurrer. 2 Russ. 164.

Property vested
in trustees.

Where by statute a certain workhouse, with all its fixtures, &c. was vested in trustees, and it was enacted that, in all indictment for larceny committed there, the property should be laid in "the trustees of the poor of the old Artillery Ground," held, that it was necessary to lay the property as belonging to *A. B. and C.* by name, subjoining the words, "trustees of the poor, &c.," as a description of their legal capacity; for, as the statute had not incorporated the trustees, it had not given them collectively a public name. *O. B.* 1789, *R. v. Sherington and Bulkey*, 1 Leach, 513. 2 Russ. 165.

Property vested
in directors
named by a
corporate body.

"Guardians of the poor" of seven parishes were incorporated by a local act, and were directed to name twelve directors, in whom was vested all the property of the concern; in an indictment for the embezzlement of some of their money, it was laid to be the property of "the directors of the poor, &c.;" after conviction, the judges held that it was wrong, for that it ought to have been described either as the money of the "guardians of the poor" by their corporate name, or of the individuals by name who formed the body of directors. *E. T.* 1824, *R. v. Beacall*, 1 R. & M. 15.

Property vested
in a corporate
body.

The prisoners were indicted for cutting down trees growing on a close, which by statute was vested in "the churchwardens of *E.*," who were incorporated by such name, and the indictment laid the property in "*A. and B.* then being churchwardens of *E.*" Held bad, for that their corporate name alone ought to have been given; and farther, that the private names could not be expunged as surplusage. *O. B.* 1783, *R. v. Patrick and Pepper*, 1 Leach, 253. *East's P. C.* c. 22. § 7. p. 1059.

Ownership
under parti-
cular acts.

There are some cases where the ownership of goods and the mode of describing the property in them, have been regulated by the provisions of particular acts of parliament.

7 G. 4. c. 64.
Property of
partners, and
joint-owners;
7 G. 4. c. 64.

Thus, by 7 G. 4. c. 64. § 14., 'to remove the difficulty of stating the names of all the owners of property in the case of partners and other joint owners,' it is enacted, "That in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to, or be in the possession, of more than one person, whether such persons be partners in trade, joint tenants, parceners, or tenants in common; it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever in any indictment or information for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any partners, joint tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and this provision shall be construed to extend to all joint stock companies and trustees."

of counties, &c.;

§ 15. "In any indictment or information for any felony or misdemeanor, committed in, upon, or with respect to any bridge,

court, gaol, house of correction, infirmary, asylum, or other building erected or maintained, in whole or in part, at the expense of any county, riding, or division, or on or with respect to any goods or chattels whatsoever, provided for or at the expense of any county, riding, or division, to be used for making, altering, or repairing any bridge, or any highway at the ends thereof, or any court or other such building as aforesaid, or to be used in or with any such court or other building, it shall be sufficient to state any such property, real or personal, to belong to the *inhabitants* of such county, riding, or division, and it shall not be necessary to specify the names of any of such inhabitants.”

inhabitants.

§ 16. “In any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any workhouse or poorhouse, or on or with respect to any goods or chattels whatsoever provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, or to be used in any workhouse or poorhouse in or belonging to the same, or by the master or mistress of such workhouse or poorhouse, or by any workmen or servants employed therein, it shall be sufficient to state any such property to belong to the overseers of the poor, *for the time being*, of such parish or parishes, township or townships, hamlet or hamlets, place or places; and it shall not be necessary to specify the names of all or any of such overseers; and in any indictment or information for any felony or misdemeanor, committed on or with respect to any materials, tools, or implements, provided for making, altering, or repairing any highway within any parish, township, hamlet, or place otherwise than by the trustees or commissioners of any turnpike-road, it shall be sufficient to aver that any such things are the property of the surveyor or surveyors of the highways for the time being of such parish, township, hamlet, or place, and it shall not be necessary to specify the name or names of any such surveyor or surveyors.”

Property for the use of work-houses, &c.

Materials, tools, &c. for use of highways.

§ 17. “In any indictment or information for any felony or misdemeanor, committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or *other thing*, erected or provided in pursuance of any act of parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road; it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any of such trustees or commissioners.”

Property of turnpike trustees.

§ 18. “In any indictment or information for any felony or misdemeanor committed on or with respect to any sewer or *other matter* within or under the view, cognizance, or management of any commissioners of sewers, it shall be sufficient to state any such property to belong to the commissioners of sewers, within or under whose view, cognizance, or management any such things shall be; and it shall not be necessary to specify the names of any of such commissioners.”

Matters relating to sewers.

Stat. 55 G. 3. c. 137. § 1. enacts, “That the property of and in all and singular the goods, chattels, furniture, provisions, clothes, linen, and wearing apparel, tools, utensils, materials, and things

55 G. 3. c. 137. Property in goods, &c. provided for the

use of the poor to be vested in overseers.

Not to repeal provisions in local acts.

Went's case. An indictment for stealing goods may, under 55 G. 3., state them to be the goods of the overseers of the poor for the time being of this parish of A.

whatsoever, had and to be had, bought, procured, or provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, shall be, and the same is hereby vested in the overseers of the poor of such parish or parishes, township or townships, hamlet or hamlets, place or places, for the time being, and their successors in office, for the purposes of this act, who are hereby empowered to bring or cause to be brought any action or actions, or to prefer or order the preferring of any bill or bills of indictment against any person or persons who shall steal, take, or carry away, or buy or receive any such goods, chattels, provisions, clothes, linen, furniture, wearing apparel, tools, utensils, materials, or things whatsoever as aforesaid, or any part thereof; and in every such action and indictment the said goods, chattels, provisions, clothes, linen, wearing apparel, tools, utensils, materials, and things shall be laid or described to be the property of the overseers of the poor for the time being of such parish or parishes, township or townships, hamlet or hamlets, place or places, without stating or specifying the name or names of all or any of such overseers: Provided always, that nothing herein contained shall extend to repeal any of the provisions contained in any act or acts of parliament, whereby the property of and in any such goods, chattels, furniture, provisions, clothes, linen, wearing apparel, tools, utensils, materials and things is or may be vested in any other person or persons jointly with, or independent of, the overseers of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places."

Thomas King Went was tried before *Burrough J.* at *Hereford Spring Ass.* 1818, on an indictment which charged that he on 29th January, 58 G. 3. with force and arms, at the parish of *Kington* in the said county, six pounds weight of pork of the value of 4s. (and other goods, specifying the goods and value), of the goods and chattels and property of the overseers of the poor for the time being of the parish of *Kington* aforesaid, then and there being found, feloniously did steal, take, and carry away, against the peace, &c. The prisoner at the time the felony was committed was governor of the workhouse of the parish of *Kington*. And it was proved by witnesses, and by the confession of the prisoner, that he had committed a felony by stealing goods which were the property of the overseers at the time the felony was committed. But, on attending to the form of the indictment, a doubt arose whether it was not uncertain, inasmuch as it alleges that the stolen goods were the goods, chattels, and property of the overseers of the poor of the parish of *Kington* for the time being, and not that they were so at the time of the felonious stealing, taking, and carrying away the same. The jury found the prisoner guilty of the felony, and upon reference to the judges, they thought that the indictment sufficiently imported that the goods were at the time of the theft the property of the then overseers. Conviction right. *R. v. Went, Hereford Sp. Ass.* 1818, *E. T.* 1818, *C. C. R.* 359. And see *per Burrough J.* in *Addey v. Woolley*, 3 *Moore*, *C. P.* 22.

II. Indictment, Trial, and Punishment.

Description of property taken.

The property stolen should be described with sufficient certainty to enable the jury to know, whether the article proved to

have been stolen is the same with that on which the indictment is founded, and so as to enable defendant to plead his acquittal or conviction to a subsequent indictment on the same charge: it is necessary, also, that it should appear on the face of the indictment, that the thing taken is such whereof larceny may be committed; as in case of stealing a pheasant, it must state that it was either dead, tame, or confined. (a) 2 Russ. 168.

Prisoner being indicted for stealing one bushel of oats, one of chaff, and one of beans, it was proved, that when he stole them they were all mixed together; and Bayley J. directed an acquittal, on the ground that the indictment ought to have described it as a certain mixture, consisting of, &c. *Chelmsford Sp. Ass.* 1819, *R. v. Kettle*, 3 Chitt. Cr. L. 947. n. a.

The prisoners were indicted for stealing six handkerchiefs: it appeared they were new, and all in one piece, but each several handkerchief was designated by the pattern, and it was customary to charge them as a piece of so many handkerchiefs. The judges held the description proper. *Tr. T.* 1824, *R. v. Nibbs and Yeums*, 1 R. & M. 25.

Where a statute used a general and also a more specific term of description, the former including the latter, as cow and heifer; held, that an indictment for stealing a cow was not sustained by proof that he stole a heifer. *Cooke's case*, 1 Leach, 105. 1 Russ. 169.

Where the prisoner was indicted for stealing two colts, and it appeared that one of the animals stolen was a mare rising four years old, and the other a yearling filly, on ca. res., the judges held, that as colts were not named in the statute, they could not take notice that they were of the horse species, and consequently that clergy was not taken away. (b) *E. T.* 1820, *R. v. Beaney*, C. C. R. 416.

In another case, however, the judges held that an indictment for stealing a mare, was supported by evidence of stealing a mare filly; for that foals and fillies are included in the terms of the above stat. *M. T.* 1822, *R. v. Welland*, C. C. R. 494.

An indictment for stealing 10*l.* in monies numbered is not sufficient; it ought to specify the pieces of which it consisted. *E. T.* 1822, *R. v. Fry*, C. C. R. 482.

It has been decided, that an indictment for stealing notes, or other securities, must follow correctly some of the descriptions of property given in the statute. Thus, an indictment for stealing "a note, commonly called a bank-note," was held bad. *R. v. Craven*, C. C. R. 14. 2 Russ. 170.

The prisoner was indicted under 39 G. 3. c. 85. (now repealed), for embezzling "divers (to wit) nine bank-notes for the payment of divers sums, &c. amounting to a certain sum, to wit, the sum of 9*l.*, &c., and of the value of 9*l.*, &c." It was held, upon writ of error, that this was sufficient; and *per Le Blanc J.*, "Where a specific thing is made the subject of larceny, it is only necessary to describe it as such specific thing, it being a species of thing that is the subject of larceny: for instance, it is not necessary in charging a larceny of sheep, to describe it either as a wether, ewe, or lamb; so also, it may be said of bank-notes, it is not necessary to describe a bank-note particularly, as a bank-

Articles mixed together, described as separate, bad.

Several handkerchiefs in one piece.

Statute using general and specific terms.

Indictment for stealing a colt not within 2 & 3 Edw. 6.

A filly may be described as a mare.

Money, description of.

Notes, &c.

Acc. bank-notes.

(a) See ante, p. 456.

(b) 2 & 3 Edw. 6. c. 33., which mentions "horse, gelding, or mare."

note for payment of 1*l.*, 5*l.*, or 20*l.*, because, for whatsoever sum it may be payable, it is still a bank-note. In like manner, in an indictment for stealing a handkerchief, it is not necessary to describe it as a handkerchief of any specific make or materials, as that it is of silk, linen, or any other particular quality. The argument has arisen from the practice that has prevailed of describing the particular sum for which the note is payable, and that the money secured thereby is unsatisfied. But the answer to such an argument is this, that whether it be payable for one sum or for another, it is equally a bank-note, and a bank-note is the subject of larceny." *R. v. Johnson*, 3 *M. & S.* 539. 552, 553.

Dead animal must be so stated.

An indictment for stealing a dead animal must state that it was dead; for, upon a general statement that a party stole the animal, it is to be intended that he stole it alive. *Per Holroyd J., R. v. Edwards and another*, C. C. R. 498. 2 *Russ.* 171. acc. *R. v. Holloyay*, 1 C. & P. 128. *per Hullock B.*

A fortiori, where the indictment charges the stealing of a live animal, evidence of taking a dead one will not support it.

The prisoners were indicted in *Hertfordshire* for stealing four live turkeys, and it appeared that they took them in *Cambridgeshire*, where they killed them, and afterwards carried them into *Hertfordshire*. The case being reserved, it was held, that the conviction could not be supported; and, further, that the word *live* in the description could not be rejected as surplusage. *H. T.* 1823, *R. v. Edwards and Walker*, C. C. R. 497. See S. C. *infra*.

Aliter where the offence is the same whether dead or alive.

But where the prisoner was indicted for having knowingly received a lamb that had been stolen, and it appeared that the lamb had been killed before the prisoner received it; a case being reserved, the judges all agreed, that the conviction was good, it being immaterial to the prisoner's offence whether the lamb were alive or dead, the offence and punishment being in both cases the same. *R. v. Puckering*, E. T. 1829, 1 *R. & M.* 242.

Case of stolen goods carried into several counties.

In larceny, the offender may be tried in any county into which the stolen goods are carried. 2 *East's P. C. c.* 16. § 156. p. 771. 2 *Russ.* 173.

On a trial, in the county of *Kent*, for horse-stealing, it appeared that the horses were stolen in *Sussex*, and the prisoner apprehended with them at *Croydon*, in *Surrey*. He said he had been to *Dorking* to fetch them, and that they belonged to his brother, who lived at *Bromley*. The police officer offered to go to *Bromley*. They took the horses and went as far as *Beckingham* church, when the prisoner said he had left a parcel at the *Black Horse* at some place in *Kent*; the police officer accordingly went thither with him, each riding one of the horses: when they got there, the policeman gave the horses to the ostler, and the prisoner made his escape, and was again apprehended in *Surrey*. After conviction, a case was reserved, whether there was any evidence to support the indictment in *Kent*, and it was held unanimously that the conviction was wrong. *E. T.* 1834, *R. v. Charles Simmonds*, M.S.

Compound larceny.

But where a compound larceny has been committed, as, where the prisoner robbed the mail in *Wiltshire* of a letter, which he carried into *Middlesex*: held, that he could not be tried capitally for robbing the mail in the latter county. *H. T.* 1795, *R. v. Thomson*, 2 *Russ.* 174.

Stolen goods changed in character.

Where the article stolen is changed in character when carried into another county, an indictment in the second county must de-

scribe it according to its altered state. Thus, where live turkeys were taken and killed in *Cambridgeshire*, and afterwards carried into *Hertfordshire*, it became in *Hertfordshire* the larceny of dead turkeys, and must be so charged. *H. T. 1823, R. v. Edwards and Walker, C. C. R. 497. See ante.*

But the intervention of a considerable length of time before the stolen property is carried into a second county, will not prevent the larceny being tried there; as, where a note was stolen in *November* in one county and carried into another in *March*, it was held, the prisoner might be tried in the latter. *M. T. 1824, R. v. Parkin, 1 R. & M. 45.*

Where it appeared that a joint larceny was committed by four persons on board a barge in the county of *Gloucester*, and some of the stolen property was found in the possession of each of the prisoners afterwards in the county of *Worcester*: held, that the prisoners could not be tried for a joint larceny in the latter county, but were each there chargeable with a several offence only. *R. v. Barnett and others, cor. Holroyd J., Worcester Sum. Ass. 1818, 2 Russ. 175.*

Where two persons join in a larceny, and one only carries the stolen goods into another county, but the other afterwards concurred in taking measures for securing them in such second county: held, that the indictment might be laid against both in the latter county, for that the subsequent concurrence might connect the larceny in the one county with the possession in the other. *E. T. 1816, R. v. County, 2 Russ. 175.*

But where goods are stolen at sea, of which the common law cannot take cognizance, no indictment will lie in a county into which they may have been carried. *3 Inst. 113. 2 Russ. 175.*

By 7 G. 4. c. 64. § 12., "for the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another, be it enacted, That where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein."

§ 13. "And, for the more effectual prosecution of offences committed during journeys from place to place, be it enacted, That, where any felony or misdemeanor shall be committed on any person, or on or in respect of any property in or upon any coach, waggon, cart, or other carriage whatever, employed in any journey, or shall be committed on any person, or on or in respect of any property on board any vessel whatever employed on any voyage or journey upon any navigable river, canal, or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any county, through any part whereof such coach, waggon, cart, carriage, or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river,

Length of time intervening.

Joint larceny by several, but carrying into another county by each separately.

Joint larceny by two; one alone carrying it into another county, both joining in securing it there.

Where goods are stolen out of common law jurisdiction.

7 G. 4. c. 64. Offences committed on the boundaries of counties may be tried in either county. (59 G. 3. c. 96. s. 2.)

Offences committed during a journey or voyage may be tried in any county through which the coach, &c. passed. (59 G. 3. c. 27. and c. 96.)

When side, &c. of highway constitute bound-

7 & 8 G. 4. c. 29. shall be liable at the discretion of the court to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

48 G. 3. c. 129. repealed. By 48 G. 3. c. 129. § 2. (now repealed), any person who should feloniously steal, take, and carry away any money, goods, or chattels from the person of any other, whether privily, without his knowledge or not, but without such force or putting in fear as is sufficient to constitute the crime of robbery, was made liable to the punishments therein mentioned.

Prisoner indictable for stealing from the person, though in fact he committed a robbery.

R. v. Pearce, O. B. April Sess. 1810, cor. Ld. Ellenborough C. J., C. C. R. 174. 2 Russ. 182. Joseph Pearce was tried at the O. B. April Sess. 1810, before Ld. Ellenborough C. J., upon an indictment founded on stat. 48 G. 3. c. 129., for stealing the pocket-book, &c. belonging to one Charles Thompson from his person. Upon the evidence it appeared that the things were taken from the person of Thompson by the prisoner and three accomplices, under such circumstances of force as were sufficient to constitute the crime of robbery in them all, and the question reserved was, whether the offence thus charged and proved was not expressly excepted out of the provision of the act, and therefore only punishable as a common larceny, the description in the indictment not applying to the case of a robbery. The case being reserved, the general opinion of the judges was, that the meaning of the act was only to leave the case of robbery from the person by force or by threats as it stood before; and that where force and fear were not charged in the indictment, the existence of force or fear would not exempt the party from the statutable punishment, and, as all the indictment charged was proved, the proving what made the offence greater would not entitle the prisoner to a smaller punishment.

Acc. with the preceding.

*Charles Robinson and William Perry were indicted at Lancaster Sum. Ass. 1816, before Wood B., for feloniously stealing from the person of James Castelow one bank note for 1*l.*, one hat of the value of 5*s.* and five sixpences, his property, against the form of the statute and against the peace. Upon the trial the case clearly appeared to be that of highway robbery, by knocking the prosecutor down in the public street at Manchester at night, rifling his pockets, and stealing the property mentioned in the indictment from his person. The prisoners were convicted, and sentenced to transportation for life, but the following questions were submitted to the judges, 1st, Whether the indictment was good, as it did not aver or allege that the stealing from the person was without such force or putting in fear as was sufficient to constitute the crime of robbery, being an indictment on the statute, and the above-mentioned exception being in the enacting part of the statute and not by way of separate proviso. If the indictment was not good, whether judgment ought not to have been arrested though no such motion was made. Secondly, whether, if the indictment were not good on the statute, it were a good indictment as for simple larceny; and if so, whether the sentence of transportation ought to have been for life, or for seven years only, as for simple larceny. The judges were unanimous that the indictment need not and ought not to negative force and fear; that the*

existence of such force and fear was no answer to the charge; and that the statutable punishment was rightly inflicted. *H. T. 1817, R. v. Robinson and another, C. C. R. 321.*

Where it appeared that the prosecutor's pocket-book was drawn out of his inside coat pocket a little way, but was returned immediately again into the pocket, probably by the pressure of the prosecutor's arm upon the hand and arm of the prisoner, with whom and his accomplices the prosecutor had a severe struggle; it was held by a majority of the judges, that the prisoner was not rightly convicted of stealing from the person, because from first to last the book remained about the person of the prosecutor, but they were unanimous that the simple larceny was complete. *R. v. Thompson, 1 R. & M. 78. See tit. Robbery.*

To constitute larceny from the person, there must be a complete removal from the person.

IV. Larceny from the House, &c.

Larceny from the house is not distinguished at common law from simple larceny, unless where it is accompanied with the circumstance of breaking the house at night, when it falls under another description of offence — that of burglary.

But by 7 & 8 G. 4. c. 29. § 12., if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security to any value whatever; or shall steal any such property to any value whatever in any dwelling-house, any person therein being put in fear; or shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of five pounds or more; every such offender, being convicted thereof, shall suffer death as a felon. But see stats. 2 & 3 W. 4. c. 62. and 3 & 4 W. 4. c. 44. *infra*.

7 & 8 G. 4. c. 29. Breaking and stealing in a dwelling house, putting in fear, stealing to 5l. value.

By § 13., no building, although within the same curtilage with the dwelling-house and occupied therewith, shall be deemed part of such dwelling-house for the purpose of burglary or for any of the purposes aforesaid, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other.

Building within curtilage.

It seems that, subject to such provision, the question of what constitutes a dwelling-house, will be governed by the same rules as apply in cases of burglary. 2 *Russ.* 48, 49.

It should seem, also, that property might be considered as stolen in the dwelling-house within the meaning of the statute, if a delivery of it out of the house should be obtained by threats or assaults upon the house, putting the inmates in fear. 2 *Russ.* 49.

What constitutes a dwelling-house. Obtaining by force from the house.

The putting in fear must either be proved or be implied from circumstances. 2 *East's P. C. c. 16. § 71. p. 635. 2 Russ.* 50.

Putting in fear.

Where an indictment under 3 W. & M. c. 9. (now repealed), which took away clergy from larcenies in dwelling-houses, if any person therein were put in fear, stated certain persons (naming them) to have been therein, and to have been put in fear, it was held bad, as it ought to have stated that the persons therein were put in fear by the prisoners. *R. v. Etherington and another 2 Leach, 671. 2 East's P. C. 635.*

Putting in fear must be by the persons stealing.

By the same section of the same statute (see *supra*), it is made a capital offence to steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of 5l. or more.

Stealing in dwelling-house, 5l.

7 & 8 G. 4. c. 29. shall be liable at the discretion of the court to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

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IV. Larceny from the House, &c.

Larceny from the house is not distinguished at common law from simple larceny, unless where it is accompanied with the circumstance of breaking the house at night, when it falls under another description of offence — that of burglary.

But by 7 & 8 *G. 4. c. 29. § 12.*, if any person shall break and enter any dwelling-house, and steal therein any chattel, money, or valuable security to any value whatever; or shall steal any such property to any value whatever in any dwelling-house, any person herein being put in fear; or shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of five pounds or more; every such offender, being convicted hereof, shall suffer death as a felon. But see stats. 2 & 3 *W. 4. c. 62.* and 3 & 4 *W. 4. c. 44. infra.*

7 & 8 *G. 4. c. 29.*
Breaking and stealing in a dwelling house, putting in fear, stealing to 5*l.* value.

By § 13., no building, although within the same curtilage with the dwelling-house and occupied therewith, shall be deemed part of such dwelling-house for the purpose of burglary or for any of the purposes aforesaid, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other.

Building within curtilage.

It seems that, subject to such provision, the question of what constitutes a dwelling-house, will be governed by the same rules as apply in cases of burglary. 2 *Russ.* 48, 49.

It should seem, also, that property might be considered as stolen in the dwelling-house within the meaning of the statute, if a delivery of it out of the house should be obtained by threats or assaults upon the house, putting the inmates in fear. 2 *Russ.* 49.

The putting in fear must either be proved or be implied from circumstances. 2 *East's P. C. c. 16. § 71. p. 635.* 2 *Russ.* 50.

Where an indictment under 3 *W. & M. c. 9.* (now repealed), which took away clergy from larcenies in dwelling-houses, if any person therein were put in fear, stated certain persons (naming them) to have been therein, and to have been put in fear, it was held bad, as it ought to have stated that the persons therein were put in fear by the prisoners. *R. v. Etherington and another* 2 *Leach*, 671. 2 *East's P. C.* 635.

What constitutes a dwelling-house.
Obtaining by force from the house.

Putting in fear.

Putting in fear must be by the persons stealing.

By the same section of the same statute (see *supra*), it is made a capital offence to steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of 5*l.* or more.

Stealing in dwelling-house, 5*l.*

2 & 3 W. 4.

c. 62.

Capital part repealed.

3 & 4 W. 4.

c. 44.

So, as to breaking and entering a dwelling-house and stealing.

Punishment.

Imprisonment, &c. previous to transportation.

12 Ann. (repealed).

Person stealing in his own house.

Wife stealing in husband's house.

Lodger stealing in the house where he lodged.

Lodger stealing goods wrongly brought for him.

Lodger stealing a bank-note given him to change.

But by 2 & 3 W. 4. c. 62. § 1., this offence is no longer punishable capitally, but the offender, and those counselling, aiding, and abetting, are to be transported for life.

By 3 & 4 W. 4. c. 44. § 1., reciting the clause of 7 & 8 G. 4. c. 29., whereby it is made a capital offence if any person shall break and enter a dwelling-house and steal therein any chattel, money, or valuable security, so much thereof as inflicts the punishment of death is repealed.

By § 2., every person convicted of such offence, as principal or accessory before the fact, shall be liable to be transported for life, or for any term not less than seven years, at the discretion of the court, and previously to transportation to be imprisoned, with or without hard labour, in gaol or house of correction, or to be confined in the penitentiary for any term not exceeding four years, or shall be liable to be imprisoned with or without hard labour for any term not exceeding four years, nor less than one year.

By § 3., all persons punishable by transportation for life under 2 & 3 W. 4. c. 62. and c. 123. shall be liable, previously to their being transported, at the discretion of the court, to be imprisoned, with or without hard labour, in gaol or house of correction, or to be confined in the penitentiary for any term not exceeding four years, nor less than one year.

By 12 Ann. c. 7. (now repealed) persons stealing money, goods, &c. of the value of 40s., being in a dwelling-house, or out-house belonging thereto, were deprived of clergy.

On this last-mentioned statute it was decided, that it did not extend to a person who stole property being in his own house, for that the statute was not intended to protect property which might happen to be in a house from the owner of the house, but from the depredations of others. *O. B.* 1784, *R. v. Thompson and another*, 2 *East's P. C.* c. 16. § 81. p. 644. *Russ.* 51.

And the same was held, where the prisoner (who was a *female covert*) stole goods in her husband's house. *O. B.* 1780, *R. v. Gould*, 2 *East's P. C.* 644. 2 *Russ.* 52.

The prisoner was a lodger at the house of one *Wakefield*, and invited prosecutor, who was an old acquaintance, to take part of his bed; but *Wakefield* knew nothing of his being there. The prisoner stole the prosecutor's watch from the bed head. The case being reserved, a majority of the judges held that it fell within the statute, and that the conviction was right. *E. T.* 1820, *R. v. Taylor*, *C. C. R.* 418.

Where two boxes, intended for the prosecutrix, who lodged at another house, were delivered at the house where the prisoner lodged, for the prisoner, who stole the contents, held that the property was sufficiently under the protection of the dwelling-house to bring it within the statute, and that the conviction was proper. *E. T.* 1825, *R. v. Carroll*, 1 *R. & M.* 89.

On the same statute (12 *Anne*), it appeared that the prisoner was a lodger in the house of the prosecutrix, who sent to his apartment requesting change for a 25*l.* bank-note, and prisoner went away with it, saying, he would take it to his banker's for that purpose, but never returned. Held, that this was not a case within the statute, which was considered as having been made to protect such property as might have been deposited in the house, and not

property which was on the person of the party. *O. B. 1792, R. v. Campbell, 2 East's P. C. c. 16. § 8. p. 644, 645.*

So where prosecutor was decoyed by the prisoner (a ring-dropper) into a public-house, and was induced to lay a sum of money on the table, which the prisoner immediately made off with. This was held not to be a case within the statute; a majority of the judges being of opinion that the meaning of the statute was that the property stolen must be under the protection of the house, and deposited therein for safe custody, as the furniture, plate, or money kept in the house, and not things immediately under the eye or personal care of some one who happened to be in the house. *O. B. 1792, R. v. Owen, acc. R. v. Castledene, O. B. 1792, and R. v. Watson, O. B. 1794, 2 Russ. 53. 2 East's P. C. c. 16. § 82. p. 645, 646. and § 107. p. 680, 681.*

It is necessary that the name of the owner of the house should be stated with correctness in the indictment; and if there is a material variance in the proof, the prisoner will be acquitted of the capital part of the charge. *R. v. White, 1 Leach, 25. R. v. Woodward, ib. 253. n. (a) 2 Russ. 54.*

In a joint indictment against several it will be competent, as in most other cases, to convict one, and to acquit the others: but they cannot each be found guilty of separate offences. *A. & B.* were indicted for stealing penknives of the value of 6*l.* 10*s.*, from a dwelling-house; the jury found that *A.* was guilty of stealing to the value of 6*l.*, and *B.* to the value of 10*s.*; the point being reserved, the judges held that judgment could not be entered on this verdict against both; but that if *B.* were pardoned, or a *nolle pros.* entered as to him, judgment might then be given against *A.* *R. v. Hempstead and another, C. C. R. 344. See tit. Burglary.*

§ 14. If any person shall break and enter any building, and steal therein any chattel, money, or valuable security, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof according to the provision herein-before mentioned (*a*), every such offender, being convicted thereof, (either upon an indictment for the same offence, or upon an indictment for burglary, housebreaking, or stealing to the value of five pounds in a dwelling-house, containing a separate count for such offence,) shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

This enactment specifies expressly a building within the curtilage of a dwelling-house, and appears not to apply to many of those buildings and outhouses which, though not within any common inclosure or curtilage, were deemed, by the old law of burglary, parcel of the dwelling-house, from their adjoining to such dwelling-house and being in the same occupation. The inquiry, under this provision of this statute, will be, simply, whether the building in question is within the curtilage or homestall. *1 Russ. 55.*

§ 15. If any person shall break and enter any shop, warehouse, or counting-house, and steal therein any chattel, money, or valuable security, every such offender, being convicted thereof, shall be

Swindler taking the money of a person whom he had decoyed into a house.

Property must be under the protection of the house.

Name of owner of house must be stated.

Judgment cannot be given against two, for separate offences, on one indictment.

7 & 8 G. 4. c. 29.

Breaking and entering a building within the same curtilage as the house, but not privileged as part of the house, and stealing therein; punishment.

Curtilage.

Breaking and stealing from a shop, &c.

liable to any of the punishments which the court may award as herein-before last mentioned.

V. Larceny and Embezzlement from Lodgings.

It was long doubted whether, as a lodger had a special property in the goods which were let with his lodgings, the stealing of them was felony: and it was at length decided by a majority of the judges that it was not. *Raven's case*, *Kel.* 24. *Meer's case* *Show.* 50.

Stealing chattel or fixture by lodger or tenant.

The legislature therefore interfered by 3 *W. & M.* c. 9. § 5 (now repealed), to protect such property; and now by 7 & 8 *G. 4.* c. 29. § 45., if any person shall steal any chattel or fixture let to be used by him or her, in or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband, every such offender shall be guilty of felony, and punishable as in case of simple larceny.

Indictment.

And in every such case of stealing a chattel it shall be lawful to prefer an indictment in the common form as for larceny; and in every such case of stealing a fixture, to prefer an indictment in the same form, as if the offender were not a tenant or lodger; and in either case to lay the property in the owner or person letting to hire.

Property.

VI. Larceny on board Vessels, &c. on a River, Canal, &c. or from Vessels wrecked, &c.

7 & 8 *G. 4.* c. 29. Stealing from vessels, &c. in port, river, &c.;

By 7 & 8 *G. 4.* c. 29. § 17., If any person shall steal any goods or merchandise in any vessel, barge, or boat, of any description whatsoever, in any port of entry or discharge, or upon any navigable river or canal, or in any creek belonging to or communicating with any such port, river, or canal, or shall steal any goods or merchandise from any dock, wharf, or quay adjacent to any such port, river, canal, or creek, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award as herein-before last mentioned. (a)

or from dock, &c.

Captain stealing from his own vessel.

It has been decided, that where the captain of a vessel stole from his own vessel articles belonging to another person which were shipped on board, it did not fall within 24 *G. 2.* c. 45. (now repealed), for the prevention of thefts from vessels. *R. v. Madar*, *C. C. R.* 92.

Stealing from vessel wrecked or in distress, death:

if of small value, &c. simple larceny.

§ 18. If any person shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, every such offender, being convicted thereof, shall suffer death as a felon: Provided always, that when articles of small value shall be stranded or cast on shore, and shall be stolen without circumstances of cruelty, outrage, or violence, it shall be lawful to prosecute and punish the offender as for simple larceny; and in either case the offender may be indicted and tried, either in the county in which the offence shall have been committed, or in any county next adjoining. See further as to wreck, tit. *Wreck*.

VII. Larceny of Manufactures.

§ 16. If any person shall steal, to the value of ten shillings, any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed, during any stage, process, or progress of manufacture, in any building, field, or other place, every such offender, being convicted thereof, shall be liable to any of the punishments which the court may award as herein-before last mentioned.

7 & 8 G. 4. c. 29.
Stealing certain
goods in pro-
cess of manu-
facture.

VIII. Of other Embezzlements, &c.

By 2 W. 4. c. 4., repealing 50 G. 3. c. 59., except as to acts of embezzlement of the public money committed before the passing of this act, it is enacted by § 1., that, "if any person employed in the public service of his majesty, and entrusted by virtue of such employment with the receipt, custody, management, or control, of any chattel, money, or valuable security, shall embezzle the same, or any part thereof; or in any manner fraudulently apply or dispose of the same or any part thereof to his own use or benefit, or for any purpose whatsoever except for the public service, every such offender shall be deemed to have stolen the same, and shall in *England* and *Ireland* be deemed guilty of felony, and in *Scotland* of a high crime and offence, and on being thereof convicted in due form of law shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years nor less than seven years, or to be imprisoned with or without hard labour, as to the court shall seem meet, for any term not exceeding three years."

2 W. 4. c. 4.
Persons in the
public service
embezzling any
money or valu-
able securities
with which they
are entrusted,
to be deemed
guilty of felony,
&c.

§ 2. "Every tally, order, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the united kingdom, or of *Great Britain*, or of *Ireland*, or of any foreign state, or to any share or interest in any fund of any body corporate, company, or society, or to any deposit in any savings bank, and every debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of this kingdom or of any foreign state, and every warrant or order for the delivery or transfer of any goods or valuable thing, shall throughout this act be deemed for every purpose to be included under and denoted by the words 'valuable security;' and if any person so employed and entrusted as aforesaid shall embezzle or fraudulently apply or dispose of any such valuable security as aforesaid, he shall be deemed to have stolen the same within the intent and meaning of this act, and shall be punishable thereby in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which such security may relate, or with the money due on such security or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing mentioned in such security."

What to be
included under
the words
"valuable se-
curities."

2 W. 4. c. 4.
Different acts
of embezzle-
ment may be
charged in the
same indict-
ment.

As to allegation
and proof of
the property
embezzled.

Property to be
described as the
king's.

Venue.

7 & 8 G. 4. c. 29.
Embezzlements
by bankers'
agents, &c.

Misdemeanor.
Transportation
for fourteen
years, or fine
and imprison-
ment.

Property de-
posited for safe
custody or
special purpose.

§ 3. "It shall be lawful to charge in the indictment to be preferred against any offender under this act, and to proceed against him for any number of distinct acts of embezzlement or of fraudulent application or disposition as aforesaid, not exceeding three, which may have been committed by him within the space of six calendar months from the first to the last of such acts and in every such indictment where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement or fraudulent application or disposition to be of money, without specifying any particular coin or valuable security and such allegation, so far as it regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved, or if he shall be proved to have embezzled any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and although such part shall have been returned accordingly."

§ 4. "In every such case of embezzlement or fraudulent application or disposition as aforesaid of any chattel, money, or valuable security, it shall be lawful in the order of committal by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money, or valuable security as aforesaid in the king's majesty."

§ 5. "Every offender against this act may be dealt with, indicted, tried, and punished either in the county or place in which he shall be apprehended, or in the county or place where he shall have committed the offence."

The stat. 7 & 8 Geo. 4. c. 29. § 49., "For the punishment of embezzlement committed by agents intrusted with property," enacts, "That if any money, or security for the payment of money, shall be intrusted to any banker, merchant, broker, attorney, or other agent, with any direction *in writing* to apply such money, or any part thereof, or the proceeds, or any part of the proceeds of such security, for any purpose specified in such direction, and he shall, in violation of good faith, and contrary to the purpose so specified, in any wise convert to his own use or benefit such money, security, or proceeds, or any part thereof respectively, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas, for any term not exceeding fourteen years, not less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; and if any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of this kingdom, or of *Great Britain*, or of *Ireland*, or of any foreign state, or in any fund of any body corporate, company, or society, shall be intrusted to any banker, merchant, broker, attorney, or other agent for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge,

and he shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney, shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award, as herein-before last mentioned."

§ 50. provides and enacts, "That nothing herein-before contained, relating to agents, shall affect any trustee, in or under any instrument whatever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee, in relation to the property comprised in or affected by any such trust or mortgage, nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed, nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand, entitling him by law so to do, unless such sale, transfer, or other disposal, shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand."

§ 51. enacts, "That if any factor or agent intrusted, for the purpose of sale, with any goods or merchandize, or intrusted with any bill of lading, warehouse keeper's or wharfinger's certificate, or warrant or order for delivery of goods or merchandize, shall, for his own benefit, and in violation of good faith, deposit or pledge any such goods or merchandize, or any of the said documents, as security for any money or negotiable instrument borrowed or received by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment by fine or imprisonment, or by both, as the court shall award; but no such factor or agent shall be liable to any prosecution for depositing or pledging any such goods or merchandize, or any of the said documents, in case the same shall not be made a security for, or subject to the payment of any greater sum of money than the amount which, at the time of such deposit or pledge, was justly due and owing to such factor or agent from his principal, together with the amount of any bill or bills of exchange drawn by or on account of such principal, and accepted by such factor or agent."

§ 52. provides and enacts, "That nothing in this act contained, nor any proceeding, conviction, or judgment to be had or taken thereupon, against any banker, merchant, broker, factor,

7 & 8 G. 4. c. 29.

Misdemeanor.
Transportation for fourteen years, or fine and imprisonment.

Not to affect trustees and mortgagees;

Nor bankers, &c. receiving money due on securities;

Nor securities on which they have a lien, &c. unless the transfer be of a greater number than necessary.

Embezzlement by factor or sale agent, &c.

Misdemeanor.

Transportation for fourteen years, or fine and imprisonment.

Proviso for the extent of what is due to the factor, and his acceptances.

Saving of remedies at law and in equity.

7 & 8 G. 4. c. 29.

Conviction not evidence.

Banker, &c. exempt from conviction if the act be previously disclosed on oath by compulsory process.

attorney, or other agent as aforesaid, shall prevent, lessen, or impeach any remedy at law or in equity, which any party aggrieved by any such offence might or would have had if this act had not been passed; but nevertheless the conviction of any such offender shall not be received in evidence, in any action at law or suit in equity against him; and no banker, merchant, broker, factor, attorney, or other agent as aforesaid, shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act done by him, if he shall at any time previously to his being indicted for such offence have disclosed such act, on oath, in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bona fide* instituted by any party aggrieved, or if he shall have disclosed the same in any examination or deposition before any commissioners of bankrupt.

IX. Taking Rewards or advertising for Return of Stolen Goods.

7 & 8 G. 4. c. 29.
Taking reward for return of stolen goods.

Felony.
Punishment.

Though prisoner did not know felon, nor could apprehend him, nor restore the goods.

Persons advertising reward for stolen property, and no questions to be asked, &c.

By 7 & 8 Geo. 4. c. 29. § 58., "Every person who shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall, by any felony or misdemeanor, have been stolen, taken, obtained, or converted, as aforesaid, shall (unless he cause the offender to be apprehended and brought to trial for the same) be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

On an indictment for this offence under the now repealed stat. 4 Geo. 1. c. 11. § 4., the prisoner might have been convicted though he had no acquaintance with the felon, and did not pretend that he had, and though he had no power to apprehend the felon, and though the goods were never restored, and the prisoner had no power to restore them. *R. v. Ledbitter*, 1 R. & M. 76.

On the repealed stat. 4 Geo. 1. c. 11., the noted *Jonathan Wild* was convicted and executed; the principal felon being examined as a witness on the part of the crown. *Old Bailey*, 1725, 4 Blac. Com. 132.; 2 East's P. C. 770. 783.

By § 59., "If any person shall publicly advertise a reward for the return of any property whatsoever, which shall have been stolen or lost, and shall, in such advertisement, use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement, purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer, in any such public advertisement, to return to any pawnbroker or other per-

ion, who may have bought or advanced money by way of loan upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property, or if any person shall print or publish any such advertisement; in any of the above cases every such person shall forfeit the sum of fifty pounds for every such offence, to any person who will sue for the same by action of debt, to be recovered with full costs of suit."

7 & 8 G. 4. c. 29.

or printing such advertisements, 50*l*. penalty and full costs.

X. Offering for Pawn or Sale Goods suspected to have been stolen.

By stat. 30 G. 2. c. 24. § 7., "In case any person or persons, who shall offer by way of pawn, pledge, exchange, or sale any goods or chattels, shall not be able, or shall refuse to give a satisfactory account of himself, herself, or themselves, or of the means by which he, she, or they became possessed of such goods or chattels; or if there shall be any other reason to suspect that such goods or chattels are stolen, or otherwise illegally or clandestinely obtained; it shall and may be lawful for any person or persons, his, her, or their servants or agents to whom such goods or chattels shall be so offered, to seize and detain such person or persons and the said goods or chattels, and to deliver such person or persons, as soon as conveniently may be, into the custody of the constable, or other peace officer, who shall and is hereby required, immediately to convey such person or persons, and the said goods or chattels, before some justice or justices of the peace of the county, riding, division, city, liberty, or place, wherein the offence shall be committed: and if such justice or justices shall, upon examination and inquiry, have cause to suspect that the said goods or chattels were stolen, or illegally or clandestinely obtained, it shall and may be lawful for such justice or justices to commit such person or persons into safe custody, for any time not exceeding the space of six days, in order to be further examined; and if upon either of the said examinations, it shall appear to the satisfaction of such justice or justices, that the said goods or chattels were stolen, or illegally or clandestinely obtained, the said justice or justices is and are hereby authorised and required to commit the party or parties offending to the common gaol or house of correction of the county, riding, division, city, liberty, or place wherein the offence shall be committed, there to be dealt with according to law." *Vide* stat. 39 & 40 G. 3. c. 99. § 10., tit. Pawnings.

§ 8. provides, "That in case such goods or chattels so seized and detained as aforesaid, shall afterwards appear to be the property of the person or persons who offered the same to be pawned, pledged, exchanged, or sold, or that he, she, or they was or were authorised by the owner or owners thereof to pawn, pledge, exchange, or sell the same, then and in such case the person or persons who shall so seize or detain the party or parties who offered the said goods or chattels, shall be, and he, she, and they is and are by this act, indemnified for having so done."

30 G. 2. c. 24. Persons offering goods to sale, &c. not giving a good account of themselves,

liable to be detained;

and committed for six days for re-examination.

Persons detaining party, &c. indemnified.

XI. Of further Enactments in 7 & 8 G. 4. c. 29., concerning Larceny.

By this statute, which has introduced so many and such important changes into the law of larceny, the following general enactments are provided respecting offences punishable under the act, either by summary conviction or by indictment, and respecting the proceedings thereon:—

Receivers of property, where the original offence is punishable on summary conviction.

§ 60. "Where the stealing or taking of any property whatsoever is by this act punishable on summary conviction, either for every offence, or for the first and second offence only, or for the first offence only, any person who shall receive any such property, knowing the same to be unlawfully come by, shall, on conviction thereof before a justice of the peace, be liable, for every first, second, or subsequent offence of receiving, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence of stealing or taking such property is by this act made liable."

Principals in the second degree and accessories.

§ 61. "In the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death, or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act (except only a receiver of stolen property) shall on conviction be liable to be imprisoned for any term not exceeding two years; and every person, who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender."

Abettors in misdemeanors.

Abettors in offences punishable on summary conviction.

§ 62. "If any person shall aid, abet, counsel, or procure the commission of any offence which is by this act punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, every such person shall, on conviction before a justice of the peace, be liable for every first, second, or subsequent offence of aiding, abetting, counselling, or procuring, to the same forfeiture and punishment to which a person guilty of a first, second, or subsequent offence, as a principal offender, is by this act made liable."

Punishment.

A person in the act of committing any offences under this act may be apprehended without a warrant.

§ 63. "For the more effectual apprehension and discovery of all offenders punishable under this act, be it enacted, that any person (a) found committing any offence punishable, either upon indictment or upon summary conviction, by virtue of this act, except only the offence of angling in the day-time, may be immediately apprehended without a warrant by any peace officer, or by the owner of the property on or with respect to which the offence shall be committed, or by his servant or any person authorised by him, and forthwith (a) taken before some neighbouring justice of the peace, to be dealt with according to law; and if any credible witness shall prove, upon oath before a justice of the peace, a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever, on or with

A justice upon good grounds of suspicion proved on oath, may grant a search warrant.

(a) See *R. v. Curran*, *post*, p. 491.

respect to which any such offence shall have been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods; and any person, to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorised and, if in his power, is required to apprehend and forthwith to carry before a justice of the peace the party offering the same, together with such property, to be dealt with according to law."

§ 64. "The prosecution for every offence punishable on summary conviction under this act shall be commenced within three calendar months after the commission of the offence, and not otherwise; and the evidence of the party aggrieved shall be admitted in proof of the offence, and also the evidence of any inhabitant of the county, riding, or division in which the offence shall have been committed, notwithstanding any penalty or forfeiture incurred by the offence may be payable to the general rate of such county, riding, or division."

§ 65. "And, for the more effectual prosecution of all offences punishable on summary conviction under this act, where any person shall be charged, on the oath of a credible witness, before any justice of the peace with any such offence, the justice may summon the person charged to appear at a time and place to be named in such summons, and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person, by delivering the same to him personally, or by leaving the same at his usual place of abode) the justice may either proceed to hear and determine the case *ex parte*, or issue his warrant for apprehending such person, and bringing him before himself or some other justice of the peace, or the justice before whom the charge shall be made, may (if he shall so think fit), without any previous summons (unless where otherwise specially directed), issue such warrant, and the justice before whom the person charged shall appear or be brought shall proceed to hear and determine the case."

§ 66. "And, with regard to the application of all forfeitures and penalties upon summary convictions under this act, every sum of money, which shall be forfeited for the value of any property stolen or taken, or for the amount of any injury done, (such value or amount to be assessed in each case by the convicting justice,) shall be paid to the party aggrieved, if known, except where such party shall have been examined in proof of the offence, and in that case, or where the party aggrieved is unknown, such sum shall be applied in the same manner as a penalty; and every sum which shall be imposed as a penalty by any justice of the peace, whether in addition to such value or amount, or otherwise, shall be paid to some one of the overseers of the poor, or to some other officer (as the justice may direct) of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division in which such parish, township, or place shall be situate, whether the same shall or shall not contribute to such general rate: Provided always, That where several persons shall

Any person to whom stolen property is offered, may seize the party offering it.

Limitation as to summary proceedings.

Competency of witnesses.

Mode of compelling the appearance of persons punishable on summary conviction.

Application of forfeitures and penalties on summary conviction.

Proviso, where several join, in commission of some offence.

If a person summarily convicted shall not pay, &c. the justice may commit him.

Scale of imprisonment.

Justice may discharge the offender if first conviction.
On making satisfaction to party aggrieved for damages, &c.

Pardon for nonpayment of money.

A summary conviction shall be a bar to any other proceeding for the same cause.

Form of conviction.

join in the commission of the same offence, and shall upon conviction thereof, each be adjudged to forfeit a sum equivalent to the value of the property or to the amount of the injury, in every such case no further sum shall be paid to the party aggrieved than that which shall be forfeited by one of such offenders only; and the corresponding sum or sums forfeited by the other offender or offenders shall be applied in the same manner as any penalty imposed by a justice of the peace is herein-before directed to be applied."

§ 67. "In every case of a summary conviction under this act, where the sum which shall be forfeited for the value of the property stolen or taken, or for the amount of the injury done, or which shall be imposed as a penalty by the justice shall not be paid, either immediately after the conviction, or within such period as the justice shall, at the time of the conviction, appoint, it shall be lawful for the convicting justice (unless where otherwise specially directed) to commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion of the justice, for any term not exceeding two calendar months, where the amount of the sum forfeited, or of the penalty imposed, or of both (as the case may be), together with the costs, shall not exceed five pounds; and for any term not exceeding four calendar months, where the amount with costs shall not exceed ten pounds; and for any term not exceeding six calendar months, in any other case; the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs."

§ 68. "Provided always, that where any person shall be summarily convicted before a justice of the peace of any offence against this act, and it shall be a first conviction, it shall be lawful for the justice, if he shall so think fit, to discharge the offender from his conviction, upon his making such satisfaction to the party aggrieved for damages and costs, or either of them, as shall be ascertained by the justice."

§ 69. "It shall be lawful for the king's majesty to extend his royal mercy to any person imprisoned by virtue of this act, although he shall be imprisoned for nonpayment of money to some party other than the crown."

§ 70. "In case any person convicted of any offence punishable upon summary conviction by virtue of this act, shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the crown, or shall have suffered the imprisonment awarded for nonpayment thereof, or the imprisonment adjudged in the first instance, or shall have been discharged from his conviction in the manner aforesaid, in every such case he shall be released from all further or other proceedings from the same cause."

§ 71. "The justice before whom any person shall be convicted of any offence against this act, may cause the conviction to be drawn up in the following form of words or in any other form of words to the same effect, as the case shall require; *videlicet*,

"*BE it remembered, that on the* _____ *day of* _____
in the year of our Lord _____ *at* _____ *in the county*
of _____, [*or, riding, division, liberty, city, &c., as the case may*

be,] A. O. is convicted before me J. P., one of his majesty's justices of the peace for the said county [or, riding, &c.], for that he the said A. O. did [specify the offence and the time and place when and where the same was committed, as the case may be; and on a second conviction state the first conviction]; and I, the said J. P. adjudge the said A. O. for his said offence to be imprisoned in the ——— [or, to be imprisoned in the ——— and there kept to hard labour] for the space of ——— [or, I adjudge the said A. O. for his said offence to forfeit and pay ——— [here state the penalty actually imposed, or state the penalty, and also the value of the articles stolen, or the amount of the injury done, as the case may be], and also to pay the sum of ——— for costs, and in default of immediate payment of the said sums, to be imprisoned in the ——— [or, to be imprisoned in the ——— and there kept to hard labour] for the space of ——— unless the said sums shall be sooner paid; [or, and I order that the said sums shall be paid by the said A. O. on or before the ——— day of ———]; and I direct that the sum of ——— [i.e. the penalty only] shall be paid to ——— of ——— aforesaid, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; [or, that the said sum of ——— [i.e. the penalty] shall be paid to, &c. [as before], and that the said sum of ——— [i.e. the value of the articles stolen or the amount of the injury done] shall be paid to C. D. [the party aggrieved, unless he is unknown or has been examined in proof of the offence, in which case state that fact and dispose of the whole like the penalty, as before]; and I order that the said sum of ——— for costs shall be paid to ——— [the complainant]. Given under my hand and seal, the day and year first above mentioned."

§ 72. "In all cases where the sum adjudged to be paid on any summary conviction shall exceed five pounds, or the imprisonment adjudged shall exceed one calendar month, or the conviction shall take place before one justice only, any person, who shall think himself aggrieved by any such conviction, may appeal to the next court of general or quarter sessions, which shall be holden not less than twelve days after the day of such conviction, for the county, riding, or division wherein the cause of complaint shall have arisen: Provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or enter into a recognizance with two sufficient sureties, before a justice of the peace, conditioned personally to appear at the said sessions and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into, shall liberate such person if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal, or the affirmance of the conviction, shall order and adjudge the

Appeal.

If sum adjudged exceed 5*l.*, or imprisonment more than a month, or conviction before one justice.

Notice in writing.

Costs.

offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment."

No certiorari,
&c.

§ 73. "No such conviction or adjudication made on appeal therefrom shall be quashed for want of form, or be removed by certiorari or otherwise into any of his majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same."

Warrant of
commitment,
when defective.

Convictions to
be returned to
the quarter
sessions.

§ 74. "Every justice of the peace, before whom any person shall be convicted of any offence against this act, shall transmit the conviction to the next court of general or quarter sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against, until the contrary be shewn."

How far evi-
dence in future
cases.

Venue, in pro-
ceedings against
persons acting
under this act.

§ 75. "And for the protection of persons acting in the execution of this act, all actions and prosecutions to be commenced against any person for any thing done in pursuance (a) of this act shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action, and of the verdict obtained thereupon."

Proceedings to
be commenced
within six
months.

Notice of
action.

General issue,
&c.

Tender of
amends.

In case of ver-
dict for defend-
ant, or plaintiff
become non-
suit.

Verdict for
plaintiff, in
what case car-
ries costs.

This act not
to extend to
Scotland or
Ireland, except
in two cases.

§ 76. "Provided always, That nothing in this act contained shall extend to *Scotland or Ireland*, except as follows; (that is to say), that if any person, having stolen or otherwise feloniously taken any chattel, money, valuable security, or other property whatsoever, in any one part of the united kingdom, shall after-

(a) See *Mills v. Collett*, *post*, tit. *Palpable Injuries to Property*.

wards have the same property in his possession in any other part of the united kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the united kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the united kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever, which shall have been stolen or otherwise feloniously taken in any other part of the united kingdom, such person knowing the said property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried and punished for such offence in that part of the united kingdom where he shall so receive or have the said property, in the same manner as if it had been originally stolen or taken in that part."

§ 77. "Where any felony or misdemeanor punishable under this act, shall be committed within the jurisdiction of the Admiralty of England, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony or misdemeanor committed within that jurisdiction."

To extend to offences committed at sea.

On an indictment for cutting *R. S.*, with an intent to murder, it appeared that *R. S.* was the servant of a farmer, who had directed him to apprehend prisoner for stealing his turnips. *R. S.* found prisoner with turnips on his person in a field adjoining his master's turnip-field, and took him, first to his master's house, and then was taking him to the constable's: when the prisoner took out his knife and wounded him severely. *Vaughan B.* held that this case was not brought within the provision of the statute 7 & 8 G. 4. c. 29. § 63.: 1. Because the prisoner was not found committing the offence; and, 2. Because he was not taken forthwith to a magistrate: he therefore directed an acquittal. *Staffordshire Sp. Ass.* 1828, *R. v. Curran*, 3 C. & P. 397.

Apprehension under 7 & 8 G. 4. c. 29. § 63., prisoner not found committing the offence, and not carried forthwith before a magistrate.

For Receivers of Stolen Goods, see tit. *Accessory*.

For the Costs and Expences of Prosecution, see tit. *Costs*.

Information for Larceny.

County of } *THE* information and complaint of A. B. of the
parish of _____ in the county of _____, esquire,
taken this _____ day of _____ in the year of our Lord one
thousand eight hundred and _____, before me _____ one of
H. M.'s justices of the peace for the said county, who being upon
oath saith, that on the _____ day of _____ now last past, at the
parish of _____ in the said county [20 silver spoons, or as the case
may be] of the goods and chattels of this informant were feloniously
stolen, taken, and carried away; and that he hath just cause to
suspect and does suspect and verily believes that C. D. late of the
parish last aforesaid, in the county aforesaid, labourer, did then and
there feloniously steal, take, and carry away the same, against the
peace, &c.: And thereupon this informant prayeth me the said
justice to issue my warrant to apprehend the said offender, in order
that he may be dealt with according to law, and justice done in the
premises. A. B.

Taken and sworn the day and year first
above written, before J. P.

Warrant for Larceny.

County of _____. To the constable of _____.

FORASMUCH as A. I. of _____ in the county of _____ yeoman, hath this day made information and complaint upon oath before me _____ one of his majesty's justices of the peace for the said county, that this present day divers goods of him the said A. I., to wit, _____, have feloniously been stolen, taken, and carried away from the house of him the said A. I. at _____ aforesaid, in the county aforesaid, and that he hath just cause to suspect, and doth suspect, that A. O. late of _____, yeoman, feloniously did steal, take, and carry away the same: These are therefore to command you forthwith to apprehend him the said A. O., and to bring him before me to answer unto the said information and complaint, and to be further dealt with according to law: herein fail you not. Given under my hand and seal the _____ day of _____ in the year _____.

Form of a Search Warrant.

To the constable of _____, &c.

County of _____ } **WHEREAS** it appears unto me _____, esquire,
to wit. } one of the justices of our lord the king, assigned
to keep the peace in the said county, by the information on oath of _____, of _____, in the county aforesaid, yeoman, that the following goods, to wit, _____, have within _____ days last past, by some person or persons unknown, been feloniously taken, stolen, and carried away, out of the house of the said _____, at _____ aforesaid, in the county aforesaid; and that the said _____ hath probable cause to suspect, and doth suspect, that the said goods, or part thereof, are concealed in the dwelling-house of _____, of _____, in the county aforesaid, yeoman: These are, therefore, in the name of our said lord the king, to authorise and require you, with necessary and proper assistants, to enter in the day-time into the said dwelling-house of the said _____, at _____ aforesaid, in the county aforesaid, and there diligently to search for the said goods; and if the same, or any part thereof shall be found upon search, that you bring the goods so found, and also the body of the said _____ before me, or some other of the justices of our said lord the king, assigned to keep the peace in the county aforesaid, to be disposed of and dealt with according to law. Given under my hand and seal, at _____, in the said county, the _____ day of _____, in the _____ year of the reign of, &c.

Information to obtain a Search Warrant for Stolen Goods.

County of _____ } **BE** it remembered that this _____ day of _____,
to wit. } in the year of our Lord _____, of _____, in his proper person cometh before me, _____, one of his majesty's justices of the peace, &c. and upon oath maketh complaint, that on the _____ day of _____, [or, within _____ days, as the fact may be,] divers goods and chattels of him the said _____,

of the value of ———, to wit, [describe the articles stolen,] were feloniously stolen, taken, and carried away, from and out of the dwelling-house of him the said ———, situate at ——— aforesaid, in the county aforesaid, by some person or persons unknown, and that he hath just and reasonable cause to suspect, and doth suspect that the said goods and chattels, or some part thereof, are concealed in the dwelling-house of ———, of ———, in the said county, labourer, for he the said ———, upon his oath, doth depose and say, that [here set forth the grounds of suspicion, which must be reasonable]; and thereupon the said ——— prayeth that justice may be done in the premises. Taken before me, &c.

The usual Form of a Summons.

County of } **WHEREAS** information and complaint upon oath
to wit. } have this day been made before me, ———, esquire,
one of his majesty's justices of the peace in and for the
said county and liberty, by ———, of ———, in the said county,
that you ———, of ———, [state the charge as in the information
and warrant,] contrary to the statute, &c. These are, therefore, in
his majesty's name to will and require you, personally to be and
appear before me the said justice, at ———, or such other justice
or justices of the peace as shall be then and there sitting, to answer
the ——— premises, as the law directs. Given under my hand and
seal, the ——— day of ———, in the year of our Lord one
thousand eight hundred and ———.

The like in another Form.

To ———, of ———, &c. [the party accused.]

County of } **WHEREAS** complaint and information have been
to wit. } made this day before me, ———, esquire, one, &c.
By ———, of ———, for that [state the crime or
offence charged]. These are, therefore, in his majesty's name to
will and require you personally to appear before me, or such other
justice or justices of the peace, as shall be present at ———, on
———, at ——— o'clock in the ——— noon, then and there to
answer the ——— premises, as the law directs. Given under my
hand and seal, the ——— day of ———, in the year of our Lord
one thousand eight hundred and ———.

Form of Summons directed to Constable.

County of } **FORASMUCH** as ———, of ———, in the said
to wit. } county of ———, yeoman, hath this day made in-
formation and complaint upon oath, before me ———,
esquire, one of his majesty's justices of the peace in and for the said
county of ———, that ——— [state the nature and circumstance of
the supposed offence, as in the information and complaint]; These
are, therefore, to command you, in his said majesty's name, forthwith
to summon the said ——— to appear before me at ———, in the
said county, on the ——— day of ———, at the hour of ———, in
the ——— noon of the same day, to answer unto the said complaint,
and further to do and receive what to the law doth appertain: And

be you then there to certify what you shall have done in execution hereof. Herein fail you not. Given under my hand and seal, the _____ day of _____, in the year of our Lord one thousand eight hundred and _____.

The common Form of a Warrant.

To the constable of _____, and all other peace officers in the said county of _____.

County of _____ } *WHEREAS* _____, of _____, in the said county, yeoman, hath this day made information and complaint upon oath, before me, _____, esquire, one of his majesty's justices of the peace in and for the said county, that _____, of _____, in the said county, labourer, on the _____ day of _____ instant, at _____, in the said county [here state the crime and offence charged in the information]. These are therefore to command you in his majesty's name, forthwith to apprehend and bring before me, or some other of his majesty's justices of the peace in and for the said county, the body of the said _____, to answer unto the said complaint, and to be further dealt with according to law. Herein fail you not. Given under my hand and seal this _____ day of _____, one thousand eight hundred and _____.

A general Form of a Commitment.

County of _____ } *J. P. esquire, one of the justices of our lord the king, assigned to keep the peace within the said county; to wit.* } *to the constable of _____ in the said county, and to the keeper of _____, at _____, in the said county: These are to command you the said constable, in his majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said _____, the body of _____, charged upon the oath of _____, of _____, in the said county of _____, before me with [specify the offence]. And you the said _____ are hereby required to receive the said _____ into your custody in the said _____, and him there safely to keep [set forth the time] or until he shall be thence delivered by due course of law. Herein fail you not. Given under my hand and seal the _____ day of _____, in the _____ year of the reign of his majesty king William the Fourth.*

Notices to Justices of Appeal against a Conviction.

To W. R. esquire and E. R. M. esquire, two of his majesty's justices of the peace in and for the county of _____.

T*AKE notice, that I intend at the next general quarter sessions of the peace, to be holden in and for the county of _____, to enter and lay an appeal against a certain conviction under your hand and seal, bearing date the _____ day of _____, one thousand eight hundred and _____, whereby I am convicted of [set out the particulars of the offence]; and the cause of my appeal is, that I have been convicted upon illegal and insufficient evidence, and that the said conviction is illegal and informal, inasmuch as it omits to specify the time and place where the supposed offence was committed.*

And further take notice that I shall attend you the said W.R. esquire at your house at ———, in the said county, to-morrow, at twelve o'clock at noon, with two sufficient sureties to enter into such recognizance as is by law required; and the names of my sureties are A. B. of ———, yeoman, and C. D. of ———, labourer.

See tit. Commitment and tit. Warrant.

By virtue of a commission issued by his majesty, June 23. 1833, certain commissioners therein named were appointed for the purpose (*int. al.*) of digesting into one statute all the statutes and enactments touching crimes and the trial and punishment thereof, and into one other statute all the provisions of the common or unwritten law touching the same. Their first Report was made, June 24. 1834, and related to the crime of theft; to which report was subjoined, by way of Appendix, a concise digest of the common law of *England* relating to that offence; and stating the same in so succinct, and clear, and methodical an arrangement, that it has been considered that its insertion here would prove a valuable addition to the preceding title, in presenting and explaining the principles which govern this description of crime in its various forms, and consequently being well worthy the perusal of all persons, whose attention is directed to the knowledge of this branch of our criminal law.

It seems almost needless to point out, that many and important changes of the common law, as stated in the following Digest, have been introduced by different statutes in regard to theft, and more especially by 7 & 8 G. 4. c. 29., being an Act for consolidating and amending the laws in *England* relative to larceny and other offences connected therewith.

DIGEST of the COMMON LAW relating to the Offence of THEFT.

THEFT is the *felonious* taking and carrying away of the personal goods of another.

Definition of theft.

Subjects of Theft.

1. ALL personal goods, save as hereafter excepted, are the subjects of theft.

Subjects of theft.

This rule includes money, plate, apparel, household stuff, stones dug out of quarries, grass in cocks, wood cut, plants rooted or dug up, fruits separated from the plants that produced them, and all moveable goods, save as herein-after excepted.

Chattels personal.

2. Theft cannot be committed by severing and immediately taking and carrying away any thing which is parcel of or annexed to the soil, or which is the *unsevered produce* thereof; although it be severed by the wrong-doer with intent to despoil the owner.

Parcel of freehold growing produce fixtures.

This rule includes soil, earth, stones, minerals, and whatever else is an *unsevered* portion of the land or realty.

Also, all trees, bushes, shrubs, plants, fruit, flowers, corn, grain, grass, roots, and other vegetable productions whatever unsevered from the realty.

Also, all buildings and fixtures annexed to the realty.

All iron, copper, lead, and other metals and materials whatsoever, annexed to any house or building, or otherwise fixed to the realty.

All rails, palings, hedges, fences, palisades, and other annexations to the realty whatsoever.

Interval between severance and removal.

3. Although a thing be parcel of the realty, or be any annexation to, or unsevered produce of, the realty; yet if any person sever it from the realty, and remove it with an intent to steal it, after an interval which so separates the acts of severance and removal that they cannot be considered as one continued act, the thing taken is a chattel the subject of theft, notwithstanding such previous connection with the realty.

4. If any parcel of the realty, or any annexation to or unsevered produce of the realty, be severed otherwise than by one who afterwards removes the same, it is the subject of theft, notwithstanding it be stolen instantly after such severance.

Accessories to realty:

5. Nothing which is accessory to or which savours of the realty, is the subject of theft at common law.

Charters.

This rule comprehends all commissions relating to the realty and returns thereto, all charters, deeds, muniments and written assurances whatsoever, concerning the realty; and all boxes in which any such writings that concern the realty are locked, sealed, or otherwise fastened up.

Box of charters.

This rule does not extend to heirlooms.

Choses in action.

5. Securities concerning choses in action, are not the subjects of theft.

Materials and stamps of written instruments.

6. The materials and stamps of any written instrument not relating to the realty, are the subjects of theft.

Human body. Things of value.

7. No human body, living or dead, is the subject of theft.

8. Theft can be committed of such things only as are of some intrinsic value.

9. Theft may be committed of things valuable to the owner, though not of value to any one else, nor saleable.

Domestic animals.

1. ALL domestic animals which are fit for food, or which are not of a base nature, whether living or dead, and also all parts of such animals, their young and their eggs, are the subjects of theft.

This rule includes horses, kine, sheep, swine, geese, hens, ducks, turkeys, and other animals whatsoever, which are tame and docile, and used for domestic purposes, and not of a base nature.

2. Domestic animals of a base nature and not fit for food, are not the subjects of theft.

This rule includes dogs and cats.

Wild animals reduced into possession, and fit for food.

3. Animals of a wild nature which are fit for food, including deer, hares, and conies; carp, tench, trout, eels, and other fish; swans, pigeons, pheasants, and all other birds and beasts which are fit for food, are the subjects of theft, when they have been reduced into possession, so long as that possession continues.

4. Animals are reduced into possession when they are restrained of their natural liberty, and confined in buildings, stalls, parks, paddocks, mews, nets, trunks, ponds, and other inclosures, of such

limited extent that they may be taken by the owner whenever he pleases.

Doves, being in a dovecote, are included within this rule.

5. Animals of a wild nature which are the subjects of theft when they are deprived of their natural liberty, and reduced into possession, are also the subjects of theft if they be reclaimed, and known to be reclaimed, although they go abroad and return at their pleasure.

Wild animals reclaimed and fit for food.

This rule includes deer and all other beasts, which having been wild by nature are reclaimed, and which from wearing a bell or collar, or from other notorious signs or circumstances, are known to be reclaimed.

The rule also includes swans, peacocks, and other birds which are reclaimed and known to be so.

6. Reclaimed hawks and falcons are the subjects of theft, although they are not fit for food.

Hawks, falcons, bees.

So also a stock of bees.

7. The young of such wild animals as are the subjects of theft when reduced into possession or reclaimed, are also the subjects of theft so long as they cannot run or fly and join the common stock, but remain in a house or several grounds, so that the owner of such house or grounds may take them at all times at his pleasure.

Young of wild animals which are the subjects of theft.

This rule includes, amongst others, young pigeons in a dove-house which cannot fly, young swans and cygnets which cannot fly, and are breeding in any parks or several grounds; young hawks or herons in the nest.

8. Where the animal itself is the subject of theft, the produce of the animal, if of any value, is also the subject of theft.

Produce of animals the subject of theft.

This rule extends to the taking of wool from the back of a sheep, milk from a cow, and all other cases whatsoever, where such produce is of value.

9. Wild animals which, when living, may be the subjects of theft, are, whether they have been actually reduced into possession or reclaimed, or not, the subjects of theft when dead.

Dead animals the subject of theft.

This rule includes all parts of the bodies of such animals.

10. Animals in a wild state are not the subjects of theft.

The rule includes deer, hares, conies, swans, pheasants, hawks, herons, pigeons, and all other birds and beasts not reclaimed or reduced into possession.

Wild animals not reduced or reclaimed, or reverting to a wild state.

The rule includes also wild animals, which, after having been reclaimed or reduced into possession, have reverted to their wild state.

11. Animals of a wild nature which are not fit for food, are not the subject of larceny, although they be reduced into possession or reclaimed.

Wild animals not fit for food.

This rule includes bears, foxes, apes, monkeys, pole-cats, cats, and dogs, ferrets, thrushes, singing birds in general, parrots, squirrels, and animals kept merely for pleasure. But not hawks or falcons, or bees as before specified.

12. The young of wild animals which are not the subjects of theft when reduced into possession or reclaimed, are not the subjects of theft, whether in the nest, kennel, den, or otherwise.

Young of wild animals not the subject of theft.

Taking and carrying away.

A taking requisite.

Duration of wrongful possession.

An *asportavit* necessary.

Of the Acts of taking and carrying away.

1. It is essential to the offence of theft, that the goods stolen be *taken* into the possession of the wrong-doer.

If by the cutting of a pocket or any other act done with intent to steal money or goods, such money or goods fall to the ground, but the wrong-doer does not pick them up, the taking into possession is not complete.

2. But, if possession be taken, the duration of the possession is immaterial; though it be momentary and be instantly relinquished, it is a sufficient possession.

3. A *carrying away* of goods is also essential; but any, the least removal of a chattel from the place which it occupied, is a sufficient carrying away.

It is not necessary that the property should have been carried away without the knowledge of the owner, or removed out of his sight.

4. There is no sufficient carrying away, when any part of the chattel continues to occupy the same place which it occupied before.

5. There is no sufficient carrying away, where the goods, although moved, remain attached by a string or otherwise to the place from which they were taken; or where any impediment whatsoever remains which in any mode or to any degree is an obstacle to the complete possession of the wrong-doer.

Of the Circumstances which make a taking Felonious.

Felonious taking and carrying away.

1. THE taking and carrying away are felonious, where the goods are taken against the will of the owner, either in his absence, or in a clandestine manner, or where possession is obtained by force or surprise, or by any trick, device, or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods; and where the taker intends, in any such case, fraudulently to deprive the owner of his entire interest in the property against his will.

This rule includes, amongst others, the cases hereafter mentioned, where the constructive possession remains in the owner, notwithstanding a voluntary parting with the actual possession, which has been obtained by some trick, device, or fraudulent expedient; the entire interest of the owner not being voluntarily parted with.

Also those where a constructive possession remains vested in the owner, notwithstanding the actual possession has been voluntarily parted with, and no trick, device, or fraudulent expedient has been practised to obtain possession; but the chattel is taken out of such constructive possession clandestinely or in the owner's absence.

Theft by owner.

2. Or, where the owner, in cases where he is himself the taker, takes the chattel in such manner with a design to despoil the person having lawful possession of it, of all his interest therein by reason of such possession; whether the consequence of despoiling the person having lawful possession be to subject that person or any other person to damages, or to defraud the crown.

This rule includes, amongst others, cases where the owner steals from his own bailee, agent, or servant, if either they or any other person would be liable to himself for the loss.

This rule does not include cases where a person takes property clandestinely from his joint-tenant or tenant in common.

3. The ulterior motive by which the taker is influenced in despoiling the owner of his property altogether, whether it be to benefit himself or another, or to injure any one by the taking, is immaterial. Ulterior motive.

4. Where the intention is merely to deprive the owner of the temporary possession and use of the chattel, it is not deemed to be felonious. Depriving of temporary possession.

This rule obtains whether the property be actually restored or abandoned by the taker without restoration; and whether the wrong-doer take the property with intent to make temporary use of it, or for some purpose merely collateral. But restoration does not purge a felony once committed.

5. The taking is without a felonious intent, wherever it results not from any intention to defraud or injure, but from *mistake*; whether such mistake be occasioned by misapprehension as to the owner's consent or otherwise, inadvertence, carelessness, or accident, or from an honest intent to enforce a supposed right or authority, although none such in fact exist. Excusable taking.

6. No pretence of enforcing any claim or right, or of acting under legal or other process whatsoever, where such process is fraudulently obtained and prosecuted, will negative or disprove the existence of a felonious intention, if it appear that such claim or process is used only as a colour for effectuating a fraudulent design. Pretence of right.
Colour of law.

7. Extreme necessity does not negative a felonious intention. Necessity.

8. The inference of a felonious intention is not necessarily excluded by the circumstance that property of equal value has been left in exchange for that taken. Exchange.

9. It is essential, that the felonious intention should exist at the time of the taking. Intention at time of taking.

10. The intention of a person taking property by *finding*, will be felonious or not, according as his conduct in omitting to use due diligence to discover the owner, or in concealing the property, or in other circumstances, shews that in the taking he had or had not a design to deprive the owner altogether of his property. Intent in cases of property found.

11. A chattel is taken against the will of the owner, although he *permits* the property to be taken, or affords facilities to the taking of it, with a view to bring parties engaged in a felonious design of stealing it to justice. Taking against the will of the owner.

12. But if the owner *procure* the chattel to be taken, it is not a taking against the will of the owner. Facilities afforded by owner.

13. If the wife take a chattel of which the husband is the sole or joint owner, the taking is not theft; because they are in law as one person, and she has a kind of interest in the goods. Assent of owner's wife.

14. A stranger cannot commit theft by taking the goods of the husband by the delivery of the wife, *unless* he be her adulterer. Theft by adulterer.

15. If the wife and a stranger jointly steal the goods of the husband, the stranger is guilty of theft.

Of the Ownership of Property stolen.

General and special owner.

1. THE owner of goods is either the general owner; or the special owner, having a lawful possession of the goods distinct from that of the general owner.

This rule, as regards special ownership, includes all cases of possession by bailees, whether they be or be not responsible to the owner in case of loss, by sheriffs and other ministers of justice under any writ or other legal authority, and by finders of goods, and all persons having an actual possession of property distinct from that of the owner, save as herein-after excepted.

This rule does not include persons who have only the bare charge, custody, or special use of goods, or persons who have let goods to hire, or are otherwise incapacitated from resuming the possession at pleasure, or on payment of a lien, except as herein-after mentioned.

2. The ownership of property, so far as regards the offence of theft, may be in an individual, a corporation, or any number of persons.

Owner, whilst goods in custody of law.

3. A person is deemed the owner of a chattel, although it is taken from him by authority of law, whilst it remains in the custody of the law.

Owner, whilst goods removed by tort.

4. A person is deemed the owner of a chattel, although it has, previously to the theft, been stolen or taken from his possession by fraud.

This rule includes, amongst others, cases where one person steals from another who has himself stolen the chattel from the owner.

Owner unknown.

5. Every chattel which is the subject of theft, is presumed to have an owner, though such owner cannot be ascertained.

Particular cases of ownership.

6. The ownership of some particular descriptions of property is as follows:—

Grave-clothes, in the personal representatives of the deceased, or in the person who was the owner when the corpse was buried, if they can be found.

Children's clothes, either in the parents or the children, according to circumstances, and the general rules regarding property.

Goods of church or chapel in vacation, in the church.

Goods of an intestate before administration granted, in the ordinary.

Of taking from the Possession of the Owner.

Taking from owner's possession.

1. EVERY theft includes a trespass, and is an injury to the actual or constructive possession of the owner.

Actual possession, though another has a bare charge or special use.

2. The owner is deemed to have the actual possession in all cases, where another has but a bare charge or special use of the chattel.

This rule includes, amongst others, all cases where money, household furniture, utensils, and other chattels whatsoever, are kept within the house or upon the lands of the owner; of such he is deemed to have the actual possession, although domestic or other servants, journeymen, or other workmen, clerks, foremen, book-keepers, or persons employed in such capacities, have the

custody and charge, or guests have the use of such goods and chattels.

Also, all cases where persons are intrusted in such capacities with the custody of money or goods, to be returned in specie to the owner, or to be otherwise specifically applied, according to his direction.

This rule also includes all cases where masters of ships, seamen, sorters of letters in the post office, and sheriffs' officers, are intrusted with the custody of goods by their employers.

3. This rule is subject to the exception, that if goods be delivered to any one, not by the owner, but by some other person for the owner, and the owner has neither property in, nor possession of, the goods previous to such delivery, the owner has not any possession of such goods as against the person receiving the same, for and on account of the owner, provided no act has been done by the person receiving the same to determine his own possession, by delivery to the owner.

No possession in owner, where goods received on his account.

4. But wherever the right of possession in a chattel has vested in the owner, by purchase or otherwise, previous to such delivery, the owner is deemed to have the possession, and the person receiving the same on his behalf, if he be his servant or act in that capacity, has a bare charge.

Property vested before delivery.

5. The actual possession is deemed to continue in all cases where it has not been changed by a delivery with intent to part with the possession.

Delivery, without intent to part with possession.

This rule includes all cases of money staked at play, which is feloniously taken before the event is decided; and all cases of goods feloniously taken by an expected purchaser, where it was not intended by the owner that he should take them without payment in ready money.

And all other cases where a chattel is feloniously taken without performance of the condition on which the owner intended to part with the possession.

6. Constructive possession is sufficient as against a mere wrong-doer.

Owner has constructive possession as against a wrong-doer.

This rule includes all cases where the owner by bailment, or by loss of a chattel, or by any other means being out of the actual possession of such chattel, but having a right to immediate possession, it is feloniously taken by a mere wrong-doer.

And cases where the owner has a right to immediate possession upon payment of a lien, as in the case of possession by a carrier.

And cases where the owner's goods are in the custody of the law, as where they are taken by the sheriff under a writ of *feri facias*.

And cases where the owner's servant receives goods on his account, the right to which is not previously vested in the owner.

The rule does not include the case of goods let to hire by the owner.

7. The owner has no constructive possession against one who has an actual possession, distinct from that of the owner, legal in its beginning, and remaining undetermined.

Not against a person having a subsisting lawful possession.

One who is not the owner may have actual legal possession distinct from the owner, by consent of the owner, by authority of law, or by finding.

Owner has not a constructive possession against a bailee.

8. The owner has not a constructive possession against any person who has a distinct lawful possession of a chattel by delivery under any bailment or contract, and the party having such possession does not commit theft by any taking or embezzlement of such chattel.

This rule comprehends all cases where goods are delivered to any banker, factor, carrier, whether a common carrier or otherwise, wharfinger, tailor, hirer of the goods, or other bailee whatsoever.

Constructive possession, as against bailee or trustee.

In cases of fraud.

9. But the owner has a constructive possession, notwithstanding such delivery upon a bailment or contract, in three cases; viz.

(1.) Where a person obtains the possession of a chattel by fraud, intending, at the time that he obtains such possession, to steal it, and the owner's consent is not obtained to a transfer of his entire interest in the property.

10. It is indifferent whether the possession be so obtained by fraud from the owner, or his servant or agent, or from his wife or bailee.

11. The intention on the part of the wife, servant, or bailee, in delivering the property, whether such wife, servant, or bailee intended to part with the entire property or not, is immaterial, unless such wife, servant, or bailee had authority to dispose of the entire property.

This rule includes cases where goods are obtained by the offender from a tradesman's servant, whilst such servant is carrying them according to his master's orders, under pretence of being the person entitled to receive them.

Fraudulent hiring.

12. Where the possession is obtained under the pretence of hiring, or other bailment of a chattel, it is not necessary that the agreement should be for any definite time.

Nor is an actual conversion essential.

The fact that the party used the chattel for the pretended purpose is not material.

Nor is it material that the first offer was made by the owner.

The existence of a previous felonious intention in all cases, is a question of fact for the decision of the jury.

Owner has not a constructive possession where he parts with his entire interest.

13. The owner has not a constructive possession, where he intends to part with his property in a chattel, and suffers it to be taken accordingly; and although the possession of goods be obtained with a felonious intent, the taking will not amount to theft if the owner intend to part with his entire interest in the goods, or if the money is not to be returned in specie.

This rule includes all cases of sales where credit is given, all cases where the property as well as the possession is meant to be parted with, and is obtained by false pretences, and all cases when money is parted with by way of loan, and not by way of deposit.

Bailment determined.

14. (2.) Where a bailment has been determined by breaking open a parcel committed to the trust of the bailee, contrary to the terms of the bailment, and the bailee steals the whole or part.

This rule includes carriers or other bailees who break bulk, and then appropriate the whole or part of the entire package, or the contents of any such box or the like; millers or others who appropriate part of the corn, or of other articles received by them, though not in any package or envelope.

This rule does not extend to the converting the whole of any parcel, or several distinct parcels.

15. (3.) Where the bailment has been determined according to the terms of the contract.

Contract of bailment expired.

This rule includes cases where the bailment has been determined by performance of the terms of the contract, as by the carriage of goods to the place appointed, by effluxion of time, by the performance of a journey, for which a horse or carriage has been hired.

16. A lawful possession by finding is determined by the finder breaking an entire parcel found, contrary to the implied trust in the finder.

Lawful possession by finding, determined.

As by opening a box found, with intent to embezzle part or the whole of the contents.

Letters (Threatening.)

[4 G. 4. c. 54. — 7 & 8 G. 4. c. 29.]

BY 4 G. 4. c. 54. § 3., which recites and repeals so much of 9 G. 1. c. 22. and of 27 G. 2. c. 15., and of 30 G. 2. c. 24. as relates to the sending and delivering letters in the cases therein respectively mentioned, "If any person shall knowingly and wilfully send or deliver any letter or writing, with or without any name or signature subscribed thereto, or with a fictitious name or signature, demanding money or other valuable thing, or threatening to kill or murder any of H. M.'s subjects, or to burn or destroy his or their houses, outhouses, barns, stacks of corn or grain, hay or straw, or shall procure, counsel, aid, or abet the commission of the said offences, or of any of them, or shall forcibly rescue any person being lawfully in custody of any officer or other person for any of the said offences, every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for such term, not less than seven years, as the court shall adjudge, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding seven years."

4 G. 4. c. 54. Recited acts, so far as relate to sending threatening letters, repealed; and persons sending such letters, and their accessories, to be liable to transportation or imprisonment.

By 7 & 8 G. 4. c. 29. § 8., If any person shall knowingly send or deliver any letter or writing, demanding of any person with menaces, and without any reasonable or probable cause, any chattel, money, or valuable security, or if any person shall accuse or threaten to accuse, or shall knowingly send or deliver any letter or writing, accusing or threatening to accuse any person of any crime punishable by law with death, transportation, or pillory, or of any assault with intent to commit any rape, or of any attempt or endeavour to commit any rape, or of any infamous crime, as herein-after defined (a), with a view or intent to extort or gain from such person any chattel, money, or valuable security; every such offender shall be guilty of felony, and be liable to be transported for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and if a male to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

7 & 8 G. 4. c. 29. Sending or delivering threatening letter demanding money, &c. or threatening to accuse of crime with intent to extort money, &c.

(a) See § 9. *infra*. Felony.

By § 9., for defining what shall be an infamous crime within the meaning of this act, the abominable crime of b——y,

Infamous crime.

7 & 8 G. 4. c. 29.

Conviction on the 27 G. 2. c. 15. for sending a letter to the prosecutor threatening "to set fire to his mill, and likewise to do all the public injury they were able to him in all his farms and seteres," held wrong, he not then having any mill to which the threat of burning would apply (having parted with it three years before), and the threat as to the farm, &c. not necessarily implying a burning.

Where the wife wrote a threatening letter, and the husband carried it to the party threatened: held that the husband, though privy to the writing, was not within the statutes 9 G. 1.

committed either with mankind or beast, and every assault with intent to commit the same, and every attempt or endeavour to commit the same, and every solicitation, persuasion, promise, or threat offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime, within the meaning of this act.

John Jepson and George Springett were indicted upon stat. 27 G. 2. c. 15. for sending to the prosecutor, Mr. *Woodgate*, a letter in the following terms, (viz.)

"Mar. th. 3. 1798."

"Mr. *Woodgate*, Sir. i. am varey Searey to acquaint you that "we are detarmed to set youre Mell on Fire and likewise to doal "the publake Ingrey that we are able to do you in all youre "Farmes and Seteres^(a) which you are in possion of without you "on next Farmes Day Release that *Ann Wood* which you put in "Confinemint Sir we mension in a few lines and we hope if you "have any Regard for you Wife and Famally you will take "owre meanen without any thing further and if you do not ve "will porsest as far as we posarple can so you may Lay youre "hand at your hart and strive you autermast Ruine. I shall not "mension nothing more to you untell sutch Time as you find the "few Lines a Fact with our Repest So no more at this Time "from me. "R. R."

It was proved that the letter was of the hand-writing of *Jepson*, and that it was thrown by the other prisoner into Mr. *Woodgate's* yard, from whence it was taken by a servant of Mr. *Woodgate*, and delivered to him. Mr. *Woodgate* swore, that he had a share in a mill three years before this letter was written, but had no mill at that time. That he held a farm when the letter was written and came to his hands, and still holds it, with several buildings upon it. It was objected, that this was not such a letter as comprehended the offence in the act of parliament. At a conference of the judges, after conviction, in *Mich. Term* 1798 (absent *Eyre C. J.*) it was agreed, that the prosecutor having no such property at the time as the mill which was threatened to be burnt, that part of the letter must be laid out of the question. That as to the rest of it, Lord *Kenyon C. J.* and *Buller J.* were of opinion that the letter must be understood as also importing a threat to burn the prosecutor's farm-house and buildings; but the other judges not thinking that a necessary construction, the conviction was holden wrong, and a pardon recommended. (b) *Rex v. Jepson and Springett, Essex Sum. Ass. 1798, cor. Ld. Kenyon C. J., 2 East's P. C. 1115.*

John Hammond and Mary Hammond were indicted at *O.B., May* 1787, on stats. 9 G. 1. c. 22. and 27 G. 2. c. 15., for feloniously sending a threatening letter to *D. Dancer*, demanding 10*l.* It appeared in evidence that the prisoners were husband and wife, and lived as servants with the prosecutor: that the wife wrote the letter, and that it was delivered to the prosecutor by the husband.

(a) Supposed to mean "settings and lettings." 2 *Russ.* 583.

(b) But in *Girdwood's* case, 2 *East's P. C.* 1120. and 1 *Leach*, 142., a letter accusing the prosecutor of having taken away the life of a friend of the writer's, who was come to revenge him, was ruled to be evidence to go to the jury upon a charge of sending a letter threatening to kill and murder the prosecutor.

who said he found it in the prosecutor's garden ; but there was no evidence that he had any knowledge of its contents. It was objected on behalf of the prisoners, that the offence described by the statutes on which the indictment was founded, was " knowingly sending a threatening letter : " whereas the evidence only shewed that the wife had written the letter, and that the husband had delivered it ; and that there was no proof of its having been sent to the prosecutor. The court (*Ashurst J. and Perryn B.*) agreed, that merely writing a threatening letter would not constitute the offence within these acts of parliament ; that carrying a letter could not be comprehended under the word " send " in the statutes ; that the legislature had it not in contemplation that any person would be the carrier of a threatening letter which he himself had written or contrived, and that the act of delivering a threatening letter was not the offence described in those statutes. That if any doubt could be entertained upon that point, the legislature itself had removed it ; for by the subsequent act, 30 G. 2. c. 24. the offence of *delivering* as well as *sending* a threatening letter was made a misdemeanor, punishable at the discretion of the court, according to the circumstances of the case. But the court further observed, that there was still a question for the consideration of the jury ; for though *Mary Hammond* were the wife of the other prisoner, yet, if the jury were of opinion that she wrote the letter herself without any intervention of her husband, and sent it by him, without his knowing any thing of the contents, to the prosecutor, she alone might be found guilty ; but that otherwise both the prisoners must be acquitted. The jury, on this direction, acquitted both the prisoners. *Rex v. John and Mary Hammond, O. B. May 1787, 1 Leach, 444. 2 East P.C. 1119.*

It was also holden in the same case, that a *bank-note* is a valuable thing within the meaning of stat. 9 G. 1. c. 22., and is sufficiently *demand*ed by signifying an intention to impute the crime of murder to the party from whom it is attempted to be obtained.

Proof of a prisoner's delivering a threatening letter sealed up to a person to carry to the post office, is evidence of his knowledge of its contents, if the jury so find it. *R. v. Girdwood, 2 East's, P. C. 1120. 1 Leach, 142.*

In *Lloyd's case, 2 East's P. C. 1122.*, the letter was dropped in a vestry-room frequented by the prosecutor every Sunday morning, where it was picked up by the sexton, and given to the prosecutor : and Mr. Justice *Yates* had no doubt but that this was a sending within the act.

So in *Jepson and Springett's case, ante*, the letter was thrown into the prosecutor's yard, from whence it was taken up by the prosecutor's servant and delivered to him.

So, it has been held, that dropping a letter in a person's way, in order that he might find it, was a sending. *R. v. Wagstaff, C. C. R. 398. 2 Russ. 585.*

So, sending a letter to *A.*, in order that he might send it to *B.*, is, if so delivered, a sending to *B.* *R. v. Paddle, C. C. R. 484. 2 Russ. ib.*

In this case, which was a prosecution under 27 G. 2. c. 15. (now repealed), it was held, that it was necessary to prove that the

nor could the wife alone be convicted, unless she wrote and sent it without the husband, who delivered it, being privy to the contents.

Bank note and valuable thing within 9 G 1. (now repealed).

Delivery of a sealed letter may be evidence of knowledge of contents.

Sending, what is.

S. P. :

Threatening letter must be

sent to the person threatened.

Letter making the writer known.

Sending a letter with initials only.

Charge of intent to extort money not supported by proof of intent to extort a bill.

Statute design by others to destroy A.'s property, and offering to discover them for a certain sum, held not to be a demanding of money from A. with menaces.

letter was sent to the person threatened, and it appears that the same should be charged in the indictment. 2 *Russ. ib. & n.* (a).

A threatening letter, in which the writer makes himself known to the person to whom it is sent, either from its hand-writing, or by the subject of its contents, though not signed by the writer in any name, is not within stats. 9 G. 1. or 27 G. 2.; for by making himself known in the letter, it is the same thing as if he had signed his name to it. *Hemming's case, Warwick Sum. Ass. 1799, cor. Chambre B., 2 East's P. C. 1116. 1 Leach, 445. (n.) (a).*

In the case of *Michael Robinson*, it was holden, that the sending a letter signed with initials only, is a sending a letter without a name within stat. 9 G. 1. c. 22. *Buller J.*, in delivering the opinion of the judges on this point, said, "Whether the letter be "with or without a name, is a simple fact appearing on the face "of the letter itself. It is signed with two letters, *R. R.*, which "are so far from being a name, that no man, on looking at the "letter only, can tell whether it meant to refer to any name, or "what that name was." *Robinson's case, 2 East's P. C. 1110. 2 Leach, 749. (a).*

In *Edward Major's case*, the indictment charged that the prisoner intending to extort and gain money from one *Augustine Rayner*, unlawfully, knowingly, and designedly sent to the said *AR.* a certain letter in writing, &c., thereby threatening, &c., and then set forth the letter as follows: "Sir, I received a letter "respecting the bill which I gave you when we parted; and as you "know I have it not in my power to pay it; and if I had, it is an "unjust demand; I have only to observe, that if you do not immediately return it to me as an acknowledgement for the obscene "offence of sodomy attempted upon me, &c. I am determined to "prosecute you to the utmost rigour of the law, &c. (Signed) "*E. Major*, (and dated) June 1st, 1796;" with a view and intent to extort and gain money from the said *A. R.* against the form of the statute, &c. The judges, on reference to them after conviction, in *Michaemas* term 1796, held the conviction wrong; for the letter was not sent to extort money, but to procure delivery up of the bill. *Major's case, O. B. June 1796, and before all the judges, in M. T. 1796, 2 East's P. C. 1118.*

A letter intimating that some persons have conspired to burn or otherwise destroy the property of *J. S.*, and offering to make a disclosure if a certain sum of money is placed in a certain place for the writer, is not within 7 & 8 G. 4.: though it may create apprehension in the owner's mind, it does not contain a menace. *E. T. 1830.*

Prisoner wrote a letter to *J. S.*, telling him that some persons had conspired to injure him and burn his buildings; and offering, if he would lay a purse of thirty sovereigns in a certain place for the writer, he in return would leave a letter to shew how he might detect and secure the offenders. On case, *Tindal C. J., Garrow B., and Park and Bosanquet Js.* thought this a letter demanding money with menaces: the other eight inclined to a contrary opinion. *E. T. 1830, R. v. Pickford, MS. Bayley B.*

The indictment charged the prisoner with sending to prosecutor

(a) By 4 G. 4. c. 54. the offence is the same, whether the letter or writing be "with or without any name or signature subscribed thereto, or with a fictitious name or signature."

a threatening letter, with intent to extort money from him; the terms of the letter, being somewhat ambiguous, as to the nature of the threat, evidence was admitted of parol declarations of the prisoner explaining the meaning of the expressions used in the letter and on case reserved after conviction, it was held that such evidence was properly received. *E. T. 1826, R. v. Tucker, 1 R. & M. 134.* The above case was on an enactment of 4 G. 4. c. 54., which part of the stat. is now repealed.

The indictment for sending a letter threatening to accuse of an infamous crime, need not specify such crime, as it may have been intentionally left in doubt. *S. C., ibid.*

The following enactments connected with the class of offences that consist of demands accompanied by threats are here introduced, though not strictly belonging to the present title. By 7 & 8 G. 4. c. 29. § 6., it is enacted (*int. al.*), that if any person shall, with *menaces or by force*, demand any chattel, money, or valuable security of any other person with intent to steal the same, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

§ 7. If any person shall accuse, or threaten to accuse, any other person of an infamous crime, as herein-after defined, with a view or intent to extort or gain from him, and shall by intimidating him by such accusation or threat extort or gain from him any chattel, money, or valuable security, every such offender shall be deemed guilty of robbery, and shall be indicted and punished accordingly.

In regard to what shall be deemed an infamous crime, see § 9. *ante*, p. 503.

It has been decided, upon reference to the judges, that the indictment must set forth the threatening letter, in order that the court may judge whether it falls within the purview of the respective statutes. *Lloyd's case, cor. Yates J., Hereford Sp. Ass. 1767, 2 East's P. C. 1123. 2 Russ. 586.*

There is no doubt but that the party may be tried in the county where the letter was delivered to the prosecutor, though written by the prisoner and by him sent in another county. *Girdwood's case, 2 East's P. C. 1120. 2 Russ. 586.*

An indictment on the stat. 30 G. 2. against two defendants for sending a letter to the prosecutor, threatening to accuse him of an unnatural crime, with intent to extort money from him, laid the offence in *Middlesex*, but the letter was dated from *Maidstone in Kent*. The sending it was proved by the defendant's confession. It was objected, that as the letter was dated and sent by the post from *Maidstone*, the fact of the sending, which constituted the offence, was committed in *Kent*, and the indictment would not lie in *Middlesex*. But *Ld. Mansfield C. J.*, held, that, as it was directed to the prosecutor in *Middlesex*, where it was delivered, that was a sending in *Middlesex*; for the whole was to be considered as the act of the defendant to the time of the delivery in that county. *Essex's case, Westminster Sitings after Trin. 7 G. 3.*

Declarations of prisoner admissible to shew the nature of the threats in the letter.

Specification of crime.

7 & 8 G. 4. c. 29. Demand of property with menaces, &c. with intent to steal.

Obtaining money, &c. by threatening to accuse party of an infamous crime, a robbery.

Threatening letter must be set out.

The offence of sending a threatening letter may be laid in the county where it is delivered by the post.

So, in the county in which it is put into the post.

2 *East's P. C.* 1118. See *R. v. Burdett*, *post*, tit. *Libel*; and see 7 & 8 *G. 4. c. 64.* § 12.

And it seems as if the prisoner may be tried in the county in which he sends the letter, though the prosecutor may receive it in another county. The offence described in the statutes of 4 *G. 4. c. 54.* and 7 & 8 *G. 4. c. 29.* § 8., is that of sending or delivering any letter or writing: it should seem therefore that the offence is complete, as far as depends on the prisoner, by his putting the letter into the post office to go into another county. By his act of putting the letter into the post office in the county of *A.*, he *sends* (in the language of the statutes) it to the prosecutor, though the latter may afterwards receive it in the county of *B.* 2 *Russ.* 586.

Indictment must shew from whom the money was demanded, and who was the person threatened.

In a prosecution on 4 *G. 4. c. 54.*, one count alleged that prisoner by menaces demanded the monies of *J. S.*; and another count stated that prisoner *threatened to accuse J. S. of a certain crime, with intent, &c.* On *ca. res.*, after conviction, the judges held each count bad; one of them not stating *from whom* the money was demanded, and the other omitting to shew *who the person was* that was threatened. *E. T.* 1825, *R. v. Dunkley*, 1 *R. & M.* 90.

Warrant to apprehend on stat. 4 *G. 4. c. 54.* for sending a Threatening Letter.

County of } To the constable of _____, and to all other peace
_____ } officers in the said county.

FORASMUCH as *A. I.* of _____ in the said county, gentleman, hath this day made information and complaint upon oath before me _____, esq., one of *H. M.'s* justices of the peace in and for the said county, that he this morning, from an unknown hand, did receive a certain letter in writing without any name or signature subscribed thereto, directed to him the said *A. I.* by the name and description of *Mr. A. I.* [or, as the case may be], threatening to murder the said *A. I.* [or, as the fact may be]; and that he the said *A. I.* hath just cause to suspect, and doth suspect that the said threatening letter was written and sent by one *A. O.* late of _____ in the said county, labourer. These are therefore to command you in *H. M.'s* name, forthwith to apprehend and bring before me, or some other of *H. M.'s* justices of the peace in and for the said county, the body of the said *A. O.* to answer unto the said complaint, and to be further dealt withal according to law. Herein fail you not. Given under my hand and seal, the _____ day of _____ in the year of our Lord one thousand eight hundred and _____.

G. C. (L. S.)

Seditious or defamatory letters. See *Libel*.

Lewdness.

Offence at common law.

IF any offend their brethren by adultery, whoredom, incest, or any other uncleanness, the churchwardens shall present them to the ordinary, and they shall not be admitted to the holy communion till they be reformed. *Canon* 109.

But although lewdness be properly punishable by the ecclesiastical law, yet the offence of keeping a bawdy-house cometh also under the cognizance of the law temporal, as a common nuisance.

not only in respect of its endangering the public peace, by drawing together dissolute and debauched persons, but also in respect of its apparent tendency to corrupt the manners of both sexes.

3 *Inst.* 205. 1 *Haw. c.* 74. *Obs.* 1.

In general, all open lewdness grossly scandalous is punishable upon indictment at the common law. 1 *Haw. c.* 5. § 4.

In a late case, it was held to be an indictable offence for a man to undress himself on the beach and to bathe in the sea near inhabited houses, from which he might be distinctly seen; although the houses had been recently erected, and, until their erection, it had been usual for men to bathe in great numbers at the place in question. *Macdonald C. B.* ruled, that whatever place becomes the habitation of civilised men, there the laws of decency must be enforced. And the court of K. B., when the defendant was brought up for judgment, expressed a clear opinion that the offence imputed to him was a misdemeanor, and that he had been properly convicted. *R. v. Crunden*, 2 *Campb.* 89. In *R. v. Sir Charles Sedley*, *Sid.* 168. 1 *Keb.* 620., the defendant, being indicted for shewing himself naked from a balcony in *Covent Garden* to a great multitude of people, confessed the indictment, and was sentenced to pay a fine of 2000 marks, to be imprisoned a week, and to give security for his good behaviour for three years.

Offenders of this kind are punishable not only with fine and imprisonment, but also with such infamous punishment as to the court in discretion shall seem proper. 1 *Haw. c.* 5. § 5.

And a wife may be indicted together with her husband, and punished with him, for keeping a bawdy-house (a); for this is an offence as to the government of the house, in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of her sex.

But if a person is indicted for frequenting a bawdy-house, it must appear that he knew it to be such a house; and it must be expressly alleged that it is a bawdy-house, and not that it is suspected to be so. *Wood's Inst.* b. 3. c. 3.

On an indictment for keeping a disorderly house, a female witness swore, that she was a sailor's wife, and during her husband's absence out of the realm she had often prostituted herself there. *Ld. Raymond C. J.* said, it was an odious piece of evidence, and ought not to be heard. *Barl. tit. Bawdy-house.*

But it is said a woman cannot be indicted for being a bawd generally, for that the bare solicitation of chastity is not indictable. 1 *Haw. c.* 74. 1 *Salk.* 382.

See the provisions of stats. 25 *G. 2. c.* 36. §§ 5, 6., and 58 *G. 3. c.* 70. § 7. for encouraging prosecutions against persons keeping bawdy-houses, or other disorderly houses, under tit. *Gaming.*

All open indecency.

Public bathing.

Exposure from a balcony.
See 5 *G. 4. c.* 83. § 4.
(Vagrant act).

Punishment.

Wife may be indicted with her husband for keeping a brothel.

Statute for putting down.

Indictment for keeping a Disorderly House.

County of } *THE* jurors of our lord the king upon their oath
— present, that A. O. late of — in the said
county, labourer, on the — day of — in the —

(a) Before the reign of Henry VII. there were eighteen of these infamous houses, and Henry VII. for a time forbade them: but afterwards, twelve only were permitted, and had signs painted on their walls; as a *Boar's Head*, *The Cross Keys*, *The Gun*, *The Castle*, *The Crane*, *The Cardinal's Hat*, *The Bell*, *The Swan*, &c., 3 *Inst.* 205.

year of the reign of ———, and at divers other times as well before as after, with force and arms at ——— aforesaid, in the county aforesaid, did keep and maintain, and yet doth keep and maintain, a certain common ill-governed and disorderly house, and in the said house, for his own lucre and gain, certain evil and ill-disposed persons, as well men as women, of evil name and fame, and of dishonest conversation, to frequent and come together then and the said divers other times, there unlawfully and wilfully did cause and procure; and the said men and women, in the said house, at unlawful times as well in the night as in the day then and the said other times there to be and remain drinking, tipling, whoring, and misbehaving themselves, unlawfully and wilfully did permit, and yet doth permit, to the great damage and common nuisance of all the subjects of our said lord the king, and against the peace of our said lord the king, his crown and dignity.

Libel.

- I. *What it is.*
- II. *Who are punishable for it.*
[38 G. 3. c. 78.]
- III. *Indictment, Trial, and Punishment.*
[32 G. 3. c. 60.]
- IV. *Power of Justices of the Peace.*
- V. *Prevention and Punishment of Blasphemous and Seditious Libels.*
[60 G. 3. c. 8. 1 W. 4. c. 73.]

I. *What it is.*

Blasphemy, &c. **PUBLICATIONS** blaspheming God, or turning the Christian religion to contempt and ridicule, may be made the subjects of indictment. 3 B. & A. 161. 1 Russ. 209.

Indecency. So, publications of an immoral and immodest nature, tending to corrupt the mind. *Ib.*

Publications against the government; So, such as wantonly defame, or indecorously calumniate, the laws and government of the country. *Ib.*

against the king; It is especially criminal to degrade or calumniate the person and character of the sovereign, his government by his minister, or the administration of justice by his judges. *Ib.*

against the parliament; The same law extends to similar reflections on the proceedings of the two houses of parliament. *Ib.*

against foreign sovereigns. And to such publications also as tend to create animosities between this country and foreign states, by the personal abuse of the sovereign of such states, his ambassadors, or other ministers. *Ib.*

Against an individual. A libel on an individual is taken for a malicious defamation of any person, expressed either in printing or writing, signs or pictures, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and to expose him to public hatred, contempt, or ridicule. 1 Haw. c. 73. § 1. Wood's Inst. b. 3. c. 3.

Ironical defamation. Scandal which is expressed in a scoffing and ironical manner, is as properly a malicious defamation, as that which is expressed in direct terms; as where a person proposes one to be imitated for his courage, who is known to be a great statesman, but no soldier;

and another to be imitated for his learning, who is known to be a great general, but no scholar; and the like: which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so.

1 *Haw. c. 73. § 4.*

And from the same foundation it hath also been resolved, that a defamatory writing, expressing only one or two letters of a name, in such a manner that, from what goes before and follows after, it must needs be understood to signify such a particular person, in the plain, obvious, and natural construction of the whole, and would be perfect nonsense if restrained to any other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law, to suffer its justice to be eluded by such trifling evasions: and it is a ridiculous absurdity to say, that a writing which is understood by every the meanest capacity cannot possibly be understood by a judge and jury. 1 *Haw. c. 73. § 4.*

It matters not whether the libel be true, or whether the party against whom it is made be of good or bad fame; for in a settled state of government the party grieved ought to complain for any injury done to him in the ordinary course of law, and not by any means to revenge himself, either by the odious course of libelling, or otherwise. But this is to be understood, when the prosecution is by information or indictment: but in an action on the case, which is to repair the party in damages, the defendant may justify the truth of the facts, and shew that the plaintiff hath received no injury. 5 *Rep. 125. 3 Blac. Com. 126.*

In some instances, however, even in a criminal proceeding, the truth of the libel is considered an extenuation of the offence. 1 *Russ. 212. n. (r).*

And the court of *King's Bench* have, in general cases, laid it down as a rule that they will not grant an information for a libel on an individual, unless the prosecutor applying makes an affidavit of the falsehood of the charge. 1*b.*

But, in the case of a libel on a particular public body, the court will grant an information on denial of the truth of the charge. See *R. v. Williams, infra*, p. 512.

Where a writing inveighs against mankind in general, or against a particular order of men, as, for instance, men of the gown, this is no libel; but it must descend to particulars and individuals to make it a libel. 3 *Salk. 224.*

Libels on persons employed in a public capacity receive an aggravation, as they tend to scandalise the government, by reflecting on those who are entrusted with the administration of public affairs: for they not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned to acts of revenge; but also have a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition. 1 *Haw. c. 73. § 7. 1 Russ. 224.*

Rez v. Cobbett, K. B., E. 1804, Holt on Libel, 114, 115. The defendant was charged with publishing a libel upon the administration of the *Irish* government, and upon the public conduct and character of the lord lieutenant and lord chancellor of *Ireland*. *Ld. Ellenborough C. J.*, in his address to the jury, observed, "It is no new doctrine, that if a publication be calculated to alienate

Expressing one or two letters only of a name.

Whether true or false is not material in criminal proceedings.

In some cases truth may be an alleviation.

King's Bench will not grant an information unless the truth be denied.

Aliter where the libel is on a public body.

General accusation is not a libel.

Libel on public men.

R. v. Cobbett. Ridicule or obloquy on the government.

the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime. It has ever been considered as a crime, whether wrapt in one form or another. The case of the *King v. Tutchin, Holt*, 424. 14 *Howell's St. Tri.* 1095. S. C., decided in the time of *Ld. C. J. Holt*, has removed all ambiguity from this question; and, although at the period when that case was decided great political contentions existed, the matter was not again brought before the judges of the court by any application for a new trial. — "It has been observed, that it is the right of the *British* subject to exhibit the folly or imbecility of the members of the government. But we must confine ourselves within limits. If in so doing individual feelings are violated, there the line of interdiction begins, and the offence becomes the subject of penal visitation." The defendant was found guilty, but not called up for judgment, having redeemed himself by giving up the author of the libel, who was immediately prosecuted and convicted. See *7 East, R. v. Johnson*.

Decorous imputation of error to the king not libellous.

False imputation to the king of mental derangement.

The court will grant a criminal information for a libel upon a public body of men upon an affidavit, stating the publication of the libel by the defendant, without any affidavit of the falsehood of the charge.

It has been held, that to impute to the king that he has taken an erroneous view of the interests of his dominions, if it be done with perfect decency and respect, and without any imputation of bad motives, will not amount to a libel. *R. v. Lambert and Perry*, 2 *Campb.* 398.; and see 1 *Russ.* 223.

Falsely publishing that the king is labouring under mental derangement is a libel, as tending to unsettle the public mind and lower the respect due to the king. *R. v. Harvey*, 2 *B. & C.* 257. cit. 1 *Russ.* 223.

Rex v. Williams, *E. 3 G. 4. 5 B. & A.* 595. A rule nisi had been obtained for filing a criminal information against the defendant for an alleged libel upon the clergy of the diocese of *Durham*. The publication stated, that upon the death of her late majesty, none of the bells in the several churches at *Durham* were tolled. It ascribed this omission to the clergy, and then proceeded to make some very severe observations on that body. The rule was obtained upon affidavits, stating the purchase of the newspaper containing the libel, and that the defendant was the proprietor or publisher of the paper. On shewing cause, it was urged that the court would not grant a criminal information for a public libel, upon the application of an unknown private prosecutor, and without any affidavit of the charge being untrue. *Contrâ.* The court have, in many instances, granted informations for libels on a number of individuals, without requiring any affidavit of the falsehood of the charge. In *Mich. T. 13 Geo. 2. 1739*, such an information was granted against *M. Jenour*, the printer of the *Daily Advertiser*, for publishing a libel against the directors of the *East India* company; and this application was supported by affidavits, stating the purchase of the newspaper, and an acknowledgment by the defendant that he had printed it. In *Hil. T. 28 Geo. 2. 1755*, a similar information was granted against *A. Alderton*, for writing and publishing a libel on the justices of the peace for the county of *Suffolk*, in an advertisement respecting the expenditure of money in the hands of the county treasurer. The only affidavit in support of the application was that of the printer of the newspaper, that he had received the advertisement from the defendant

for publication. So, in *Hil. T. 15 Geo. 3.*, such an information was granted against *R. Holloway* and *G. Allan*, for printing and publishing a libel upon the justices of the peace of the county of *Middlesex*, usually sitting by rotation in *Litchfield-street*, in a pamphlet entitled the *Rat-trap*, charging them with ignorance and corruption in the execution of their office. This rule was granted upon an affidavit, stating the purchase of the pamphlet from one of the defendants, and that the other acknowledged himself to be the author, and that several gentlemen named usually sat by rotation, as justices at a public office in *Litchfield-street*. It is clear, too, from *Rex v. Osborn*, 2 *Barnard*. 138. 166. 2 *Swanst.* 503., that the court will grant a criminal information for a libel reflecting on a public body. — R. A.

Rex v. Marsden, *E. 55 G. 3. 4 M. & S.* 164. The defendant was convicted at *Essex Lent Assizes*, 1815, upon an indictment for a libel. The indictment, which was for a libel against one *W. S.*, a mayor and magistrate of a borough town, omitted to allege that the defendant published it “*of and concerning W. S.*” The court of K. B., on motion in arrest of judgment, held that this was an omission, not to be supplied by its being alleged in the *introductory part*, “that the defendant intended to vilify *W. S.*, he having been mayor of, &c., and to cause it to be believed that as such mayor he had practised corruption, and been guilty of abuses in respect to granting a licence to one *J. L.* to retail beer,” &c., and concluding “*to the injury and disgrace of W. S.*,” although the *inuendos* pointed the different parts of the libel immediately to *W. S.* and to *J. L.*, and to the granting of the licences.

In an indictment for a libel, it must be alleged that the defendant published it *of and concerning the particular person*.

A libel is either in writing, or without writing: in writing, when an epigram, rhyme, or other writing, is published to the contumely of another, by which his fame or dignity may be prejudiced: without writing, may be by pictures, as to paint the party in any shameful and ignominious manner; or by signs, as to fix a gallows or other reproachful and ignominious signs at a man's door. 5 *Rep.* 125.

May be in writing or without.

In *Rex v. Cobbett*, *Ld. Ellenborough C. J.* said, “no man has a right to render the person or abilities of another ridiculous, not only in publications; but if the peace and welfare of individuals, or even of society, be interrupted, or even exposed by types and figures, the act, by the law of *England*, is a libel.” *Holt on Libel*, 114, 115.

Turning a person into ridicule by types or figures.

Mayor of *Northampton's* case, 1 *Str.* 422. He sent Lord *Halifax* a licence to keep a public house, which the court said was a libel, in the case of a person of his quality, and they granted an information for it.

The offence is the same, whether the person libelled be alive or dead. 5 *Rep.* 125.

Persons libelled being dead, and contempt brought thereby upon their family.

But this must be understood with some addition; otherwise it might reach historians, who in giving a history of the time are obliged to contrast the bad with the good. Therefore, in *Rex v. Topham*, 4 *T. R.* 126., where the defendant was convicted for publishing a libel reflecting on the memory of the late Earl *Cowper*, the court arrested the judgment; because it was not alleged in the indictment that it was done with a design to bring contempt on the family of the deceased, and to stir up the hatred

of the king's subjects against them, and to excite his relations to a breach of the peace.

Literary criticisms.

To this general doctrine of libel there are, however, several exceptions; as in the case of a literary criticism, exposing the follies of the work, and holding up the author to ridicule, it will not be indictable, provided it does not exceed the bounds of fair criticism by attacking the character of the writer apart from his publication. *Carr v. Hood*, 1 *Campb.* 355. 1 *Russ.* 230.

Confidential communications.

So, confidential communications made *bond fide*, and without malice, to those who are interested in being made acquainted with the real character of the individual, will not be deemed libels. 1 *Russ.* 231.

Bond fide investigation of facts.

Nor, statements, although they may be injurious to the character of another, if they are made *bond fide*, with a view of investigating certain facts, the truth of which it is important to the maker of such statements to ascertain. 1 *Russ.* 231, 232.

Libel on juries, &c.

Although it is an aggravated misdemeanor to publish an invective against judges and juries, with a view to bring into suspicion and contempt the administration of justice in the country, still it is lawful with candour and decency to discuss the merits of the verdict of a jury, or the decisions of a judge.

If not fair discussions but invectives.

Rez v. White and Hart, London sittings after *E. T.* 48 G. 3. cor. *Grose J.* — 1 *Campb.* 359. This was an information filed by the attorney-general against the proprietor and printer of a *Sunday* newspaper, called *The Independent Whig*, for a libel upon Mr. Justice *Le Blanc* and the jury before whom the captain of a merchant ship had been tried for murder at the *Old Bailey*. The libel affirmed the prisoner to have been guilty of murdering one of his crew, and in a gross and abusive style censured the judge and jury for acquitting him. It was contended on the part of the defendants, that every one has a right to canvass the proceedings of courts of justice, and that the article complained of was a fair exercise of that right. — *Grose J.* said, it certainly was lawful with decency and candour to discuss the propriety of the verdict of a jury, or the decisions of a judge; and if the defendants should be thought to have done no more in this instance, they would be entitled to an acquittal; but, on the contrary, they had transgressed the law, and ought to be convicted, if the extracts from the newspaper set out in the information contained no reasoning or discussion, but only declamation and invective, and were written, not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country. The defendants were found guilty on this and a similar information, and sentenced to three years' imprisonment.

Proceedings in court where the matter is blasphemous or indecent.

Rez v. Mary Carlile, M. 60 G. 3. 3 *B. & A.* 167. It is not lawful to publish even a correct account of the proceedings in a court of justice, if such an account contain matter of a scandalous, blasphemous, or indecent nature.

Publications of proceeding of a court with remarks may be libellous.

In an action for a libel, which professed to be a narrative of proceedings in the insolvent court, beginning "*Shameful conduct of an Attorney*," and proceeding with the detail of the speeches, examinations, and observations of the court; defendant pleaded that the alleged libel was a correct account, and a verdict was found for him: but the court of K. B. afterwards held, that the

pleas were bad, the narrator not having confined himself to what actually passed in court, but prefaced the statement with the words "*Shameful conduct,*" &c. which were a direct allegation against the plaintiff; and gave judgment for the plaintiff, notwithstanding the verdict. *Lewis v. Clement*, 3 B. & A. 702. See also 3 Brod. & Bing. 297. S. C.

II. Who are punishable for it.

It is certain, that not only he who composes a libel, or procures another to compose it, but also he who publishes or procures another to publish it, is in danger of being punished for it; and it is said not to be material, whether he who disperses a libel knows any thing of the contents or effect of it or not; for nothing would be more easy than to publish the most virulent papers with the greatest security, if concealing the purport of them from an illiterate publisher would make him safe in dispersing them. 1 Haw. c. 73. § 10.

In an information for a libel in a newspaper against the proprietor, where it appeared that he resided more than 100 miles off, and took no part in the conduct of the paper, and was in an ill state of health, still it was held that he was responsible, and he was convicted; *Ld. Tenterden C. J.*, saying, that he never meant to express that some possible case might not occur in which the proprietor might be exempt; but that, generally speaking, he is responsible. *R. v. Gutch and others*, 1 M. & Malk. 433.

Also it hath been said, that if he who hath either read a libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any part of it in the presence of others, or lend or shew it to another, he is guilty of an unlawful publication of it. 1 Haw. c. 73. § 10.

Also it hath been holden that the copying of a libel shall be a conclusive evidence of the publication of it, unless the party can prove that he delivered it to a magistrate to examine it. 1 Haw. c. 73. § 10.

It is no excuse to prove that the libel was copied from another work, shewing, at the same time, who the author of such other work was. *Lewis v. Waller*, 4 B. & A. 605. cit. 1 Russ. 212.

And it hath been ruled that the finding a libel on a bookseller's shelf is a publication of it by the bookseller; and that it is no excuse to say that the servant took it into the shop without the master's knowledge; for the law presumes the master to be acquainted with what the servant does. *Rex v. Dodd*, 1 Sess. Cas. 33.

It seems to be the better opinion, that he who first writes a libel dictated by another is thereby guilty of making it, and consequently punishable for the bare writing; for it was no libel till it was reduced to writing: for the essence of a libel consisteth in the writing of it; if a man speak such words, unless the words be put in writing, it is not a libel. 2 Salk. 419. 1 Haw. c. 73. § 10.

Also it hath been resolved, that the sending of a letter full of provoking language to another, without publishing it, is highly punishable, as manifestly tending to a disturbance of the peace. 1 Haw. c. 73. § 11.

Composer, procurer, and publisher.

Proprietor of a newspaper *prima facie* answerable for its contents, though there may be a possible case in which he is exempt.

Reader of it to another, see *infra*.

Copying a libel.

No excuse from being a copy.

Finding a libel on a bookseller's shelf.

Writing a libel dictated by another.

Sending a provoking letter.

Reader of a libel to another not knowing its contents.

But it hath been resolved, that he who barely reads a libel in the presence of another, without knowing it before to be a libel, or who is only proved to have had a libel in his custody, shall not in respect of any such act be adjudged the publisher of it. But the having in one's custody a written copy of a libel, publicly known, is an evidence of the publication of it. 1 *Haw. c. 73. § 13.*

Caricature.

A person who, having a copy of a libellous caricature, shews it to another on being requested so to do, is not thereby liable to an action for maliciously publishing it. *Smith v. Wood, Sitt. after H. T. 53 G. 3., 3 Campb. 323.*

III. Indictment, Trial, and Punishment.

What is the punishment.

There seemeth to be no doubt but that the offenders may be condemned to pay such fine, and also to suffer such corporal punishment as to the court in discretion shall seem proper, according to the heinousness of the crime, and the circumstances of the offender. 1 *Haw. c. 73. § 16.*

May be indicted before justices of peace.

And it hath been adjudged that libels, having a direct and immediate tendency to a breach of the peace, are indictable before justices of the peace. 2 *Haw. c. 8. § 38.*

And in the case of *R. v. Rispal*, 1 *Blac. Rep. 368*. *Ld. Mansfield C.J.* expressly said, that libels were within the jurisdiction of a court of quarter sessions.

Must be set out according to tenor.

On an indictment setting forth the offence, *according to the tenor and to the effect following*, it was agreed by the court, that *to the effect following* hath been naught, being vague and useless words; for the court must judge of the words themselves: but the words, *according to the tenor*, do correct the defect; for they import the very words themselves; for the *tenor* of a thing is the transcript and true copy of it, to which it may be compared: and therefore of words spoken there can be no tenor, because there is no written original. 2 *Salk. 417. 3 Salk. 225.*

Tenor is a transcript and true copy.

It must be proved to be written or published in the county laid in the indictment, all matters of crime being local. See the trial of the Seven Bishops, 12 *Howell's St. Tri. 183. 315.*

Need not be *vi et armis*.

An information for a libel need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is false. 7 *T. R. 4.*

Libel tends to breach of peace.

The chief cause for which the law so severely punishes all offences of this nature, is, the direct tendency of them to a breach of the public peace, by provoking the parties injured, and their friends and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from public justice for injuries of this kind, which of all others are most sensibly felt.

Of the power of a jury in cases of libel.

A great alteration took place a few years ago in the trials for libels. It had been held, in many cases, that the facts of writing, printing, or publishing, and the truth of the innuendoes inserted in the proceedings, were the only matters to be submitted to the consideration of the jury; but by stat. 32 *G. 3. c. 60. § 1.*, after reciting that doubts had arisen "whether on the trial of an indictment or information for the making or publishing any libel, where an issue or issues are joined between the king and the defendant or defendants on the plea of not guilty pleaded, it be competent to

32 *G. 3. c. 60.*

the jury impanelled to try the same to give their verdict upon the whole matter in issue; it is therefore declared and enacted, that on every such trial the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information; and shall not be required or directed by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information."

§ 2. "Provided always, that, on every such trial, the court or judge before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases."

§ 3. "Provided also, that nothing herein contained shall extend or be construed to extend to prevent the jury from finding a special verdict, in their discretion, as in other criminal cases."

§ 4. "Provided also, that in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the said defendant or defendants to move in arrest of judgment, on such ground, and in such manner as by law he or they might have done before the passing of this act."

By 38 G. 3. c. 78., for preventing the mischiefs arising from the printing and publishing newspapers, &c., it is required that an affidavit should be filed at the stamp office, stating the names, additions, &c. of the printer, publisher, and two of the proprietors, which is to be received as conclusive evidence of such matters; and also so particularising the newspaper as to admit of being easily identified. See the stat. at full, tit. *Printers*.

R. v. Sir F. Burdett, bart., M. 1 G. 4. 4 B. & A. 95. Information in the county of *Leicester* for writing and publishing a libel. Proof that defendant wrote it in the county of *Leicester*, and that *Bickersteth* delivered it to *Brooks* for publication in *Middlesex* unsealed. *Bickersteth* was not called at the trial, nor was there any evidence of his being in the county of *Leicester*, or how the libel came to him; the jury were told, as he had it open they might presume he received it open; and as defendant wrote it in *Leicestershire*, it might be presumed he received it in *Leicestershire*: the jury found accordingly for the crown. On R. N. for a new trial and cause shewn, three judges (*Bayley J. dissentiente*) held the direction justifiable; and they also held, that if delivery open could not be presumed, delivery sealed, with a view to, and for the purpose of publication, was a publication; and they thought there was sufficient ground for presuming some delivery, whether open or sealed, in *Leicestershire*. R. D.

If a libel imputes to a man a triable offence, proof of the truth is inadmissible; for it would be trying the question behind a man's back, and creating a prejudice against him. *Per totam curiam*. S. C.

A libel imputing murder to certain soldiers. Evidence offered of the truth, but rejected: and the court unanimously held that it was rightly rejected; for the persons charged might afterwards

32 G. 3. c. 60.
May give a verdict on the whole matter put in issue.

Court may state their opinion to the jury.

Special verdict may be found;

or motion made in arrest of judgment.

38 G. 3. c. 78.
Affidavits required from printers, publishers, and proprietors of newspapers.

Delivering a libel sealed, that it may be opened and published by a third person in a distant county, is a publication in the county where delivered.

Truth not admissible of the libel.

Intention to be presumed.

come to be tried, and the previous inquiry might prejudice them. S. C.

The intention may be collected from the libel, unless the mode of publication or other circumstances explain it. S. C.

The publisher must be presumed to intend what the publication is likely to produce. S. C.

So that, if it is likely to excite sedition, he must be presumed to intend that it should. S. C.

Judge's direction.

The judge may tell the jury that they are to take the law from him, unless they are satisfied he is wrong. S. C.

If a man writes a libel in the county of *L.*, with intent to publish it in the county of *M.*, and publishes it accordingly in *M.*, he may be indicted in *L.* or in *M.* S. C.

Libel written in one county published in another.

Defendant wrote a libel in *Leicestershire* with intent to publish it in *Middlesex*, and published it in *Middlesex* accordingly. Information in *Leicestershire*: and on question, whether the information in *Leicestershire* was right, three judges (*Bayley J. dubitante*) held it was. S. C.

If a libel is charged to be of and concerning the government of the kingdom, though it do not in express terms impute to the government any of the facts it mentions, the court is to judge from its whole tenor and import, understanding it as other men would understand it, whether it does not mean to cast that imputation.

S. C. *H. 1 & 2 G. 4., 4 B. & A. 314.* The information stated that the defendant, intending to excite hatred against the government of this realm, and to cause it to be believed that divers subjects had been inhumanly killed by certain troops of the king, published a libel of and concerning the government of this realm, and of and concerning the said troops. The libel stated, that he saw with astonishment in the newspapers the accounts of a transaction at *Manchester*, and alleged that unarmed and unresisting men had been inhumanly cut down by the dragoons (meaning the said troops), and then commented strongly upon this being the use of a standing army, and called upon the people to demand justice, &c.: it did not in terms say, that the dragoons acted under the authority or order of government; and, after conviction, motion in arrest of judgment, on the ground that it did not sufficiently appear that it was written of and concerning the government, nor of and concerning what troops it was written; but the court held it was obvious, from its whole tenor and import, that it meant to cast imputation upon the government; that it was a libel to impute crime to any of the king's troops, though it did not define what troops in particular were referred to; and that the innuendo of the "said troops" meant the undefined part of those troops; and sentence was passed.

Affidavits in mitigation.

The libel, purporting to be founded on certain newspaper reports, charged certain troops with acts of murder; after conviction, affidavits were allowed to be received, shewing that the newspapers did in fact contain those reports; but affidavits alleging the truth of such reports were rejected, as being calculated to prejudice any future trial for such murders. S. C. *4 B. & A. 314. cit. 1 Russ. 246.*

60 G. 3. c. 8.

By stat. 60 G. 3. c. 8. § 1., after reciting that whereas it is expedient to make more effectual provision for the punishment of blasphemous and seditious libels; it is enacted, "That from and after the passing of this act, [30th December, 1819.] in every case in which any verdict or judgment by default shall be had against any person for composing, printing, or publishing any blasphemous libel, or any seditious libel, tending to bring into hatred or contempt the person of H. M., his heirs and successors, or the regent, or the

Court to make order for the seizure of copies of the libel in possession of the persons against whom

government and constitution of the U. K. as by law established, or either house of parliament, or to excite H. M.'s subjects to attempt the alteration of any matter in church or state as by law established, otherwise than by lawful means, it shall be lawful for the judge, or he court before whom or in which such verdict shall have been given, or the court in which such judgment by default shall be had, to make an order for the seizure and carrying away and detaining in safe custody, in such manner as shall be directed in such order, all copies of the libel which shall be in the possession of the person against whom such verdict or judgment shall have been had, or in the possession of any other person named in the order for his use; evidence upon oath having been previously given, to the satisfaction of such court or judge, that a copy or copies of the said libel is or are in the possession of such other person, for the use of the person against whom such verdict or judgment shall have been had as aforesaid; and in every such case it shall be lawful for any justice of the peace, or for any constable or other peace officer acting under any such order, or for any person or persons acting with or in aid of any such justice of the peace, constable, or other peace officer, to search for any copies of such libel in any house, building, or other place whatsoever belonging to the person against whom any such verdict or judgment shall have been had, or to any other person so named, in whose possession any copies of any such libel, belonging to the person against whom any such verdict or judgment shall have been had, shall be; and in case admission shall be refused or not obtained within a reasonable time after it shall have been first demanded, to enter by force by day into any such house, building, or place whatsoever, and to carry away all copies of the libel there found, and to detain the same in safe custody until the same shall be restored under the provisions of this act, or disposed of according to any further order made in relation thereto."

60 G. 3. c. 8.

verdicts shall have been had, &c.

§ 2. enacts, "That if in any such case as aforesaid judgment shall be arrested, or if, after judgment shall have been entered, the same shall be reversed upon any writ of error, all copies so seized shall be forthwith returned to the person or persons from whom the same shall have been so taken as aforesaid, free of all charge and expense, and without the payment of any fees whatever; and in every case in which final judgment shall be entered upon the verdict so found against the person or persons charged with having composed, printed, or published such libel, then all copies so seized shall be disposed of as the court in which such judgment shall be given shall order and direct."

Copies of libels so seized to be restored if judgment for defendant; otherwise to be disposed of as court shall direct.

§ 3. provides, "That in Scotland, in every case in which any person or persons shall be found guilty before the court of justiciary, of composing, printing, or publishing any blasphemous or seditious libel, or where sentence of fugitation shall have been pronounced against any person or persons, in consequence of their failing to appear to answer to any indictment charging them with having composed, printed, or published any such libel, then and in either of such cases, it shall and may be lawful for the said court to make an order for the seizure, carrying away, and detaining in safe custody all copies of the libel in the possession of any such person or persons, or in the possession of any other person or persons named in such order, for his or their use, evidence upon

Court of justiciary in Scotland to make order for seizing copies of libels, &c.

60 G. S. c. 8.

oath having been previously given, to the satisfaction of such court or judge, that a copy or copies of the said libel is or are in the possession of such other person for the use of the person against whom such verdict or judgment shall have been had as aforesaid; and every such order so made shall and may be carried into effect, in such and the same manner as any order made by the court of judicatory, or any circuit court of judicatory, may be carried into effect according to the law and practice of *Scotland*: Provided always, that in the event of any person or persons being reponed against any such sentence of fugitation, and being thereafter acquitted, all copies so seized shall be forthwith returned to the person or persons from whom the same shall have been so taken as aforesaid; and in all other cases, the copies so seized shall be disposed of in such manner as the said court may direct."

Punishment of persons convicted of second offence.

§ 4. enacts, "That if any person shall, after the passing of this act, be legally convicted of having, after the passing of this act, composed, printed, or published any blasphemous libel, or any such seditious libel as aforesaid, and shall, after being so convicted, offend a second time, and be thereof legally convicted before any commission of oyer and terminer or gaol delivery, or in H. M.'s court of K. B., such person may, on such second conviction, be adjudged, at the discretion of the court, either to suffer such punishment as may now by law be inflicted in cases of high misdemeanors, or to be banished from the U. K. and all other parts of H. M.'s dominions, for such term of years as the court in which such conviction shall take place shall order."

Banishment. This enactment now repealed, see p. 522.

Persons not departing within thirty days after sentence of banishment may be conveyed out of H. M.'s dominions.

§ 5. enacts, "That in case any person so sentenced and ordered to be banished as aforesaid, shall not depart from this U. K. within thirty days after the pronouncing of such sentence and order as aforesaid, for the purpose of going into such banishment as aforesaid, it shall and may be lawful to and for H. M. to convey such person to such parts out of the dominions of his said majesty, as H. M., by and with the advice of his privy council, shall direct."

Persons banished found at large within H. M.'s dominions to suffer transportation.

§ 6. enacts, "That if any offender who shall be so ordered by any such court as aforesaid to be banished in manner aforesaid, shall, after the end of forty days from the time such sentence and order hath been pronounced, be at large within any part of the U. K. or any other part of H. M.'s dominions, without some lawful cause, before the expiration of the term for which such offender shall have been so ordered to be banished as aforesaid, every such offender being so at large as aforesaid, being thereof lawfully convicted, shall be transported to such place as shall be appointed by H. M., for any term not exceeding fourteen years; and such offender may be tried, either before any justices of assize, oyer and terminer, great sessions, or gaol delivery, for the county, city, liberty, borough, or place where such offender shall be apprehended and taken, or where he or she was sentenced to banishment; and the clerk of assize, clerk of the peace, or other clerk or officer of the court, having the custody of the records where such order of banishment shall have been made, shall, when thereunto required on H. M.'s behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, and of the order for his or her banish-

ment, to the justices of assize, oyer and terminer, great sessions, or gaol delivery, where such offender shall be indicted, for which certificate 6s. 8d. and no more shall be paid, and which certificate shall be sufficient proof of the conviction and order for banishment of any such offender."

§ 7. enacts, " That the clerk of assize, clerk of the peace, or other clerk or officer of the court having the custody of the records where any offender shall have been convicted of having composed, printed, or published any blasphemous or seditious libel, shall, upon request of the prosecutor on H. M.'s behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender to the justices of assize, oyer and terminer, great sessions, or gaol delivery, where such offender or offenders shall be indicted for any second offence of composing, printing, or publishing any blasphemous or seditious libel; for which certificate 6s. 8d. and no more shall be paid, and which certificate shall be sufficient proof of the conviction of such offender."

60 G. 3. c. 8.

Certificate to be given of conviction of former libel.

§ 8. enacts, " That any action and suit which shall be brought or commenced against any justice or justices of the peace, constable, peace officer, or other person or persons, within that part of *G. B.* called *England*, or in *Ireland*, for any thing done or acted in pursuance of this act, shall be commenced within six calendar months next after the fact committed, and not afterwards; and the venue in every such action or suit shall be laid in the proper county where the fact was committed, and not elsewhere; and the defendant or defendants in every such action or suit may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and if such action or suit shall be brought or commenced after the time limited for bringing the same, or the venue shall be laid in any other place than as aforesaid, then the jury shall find a verdict for the defendant or defendants; and in such case, or if the jury shall find a verdict for the defendant or defendants upon the merits, or if the plaintiff or plaintiffs shall become nonsuit, or discontinue his, her, or their actions after appearance, or if, upon demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall have double costs, which he or they shall and may recover in such and the same manner as any defendant can by law in other cases."

Limitation of actions.

General issue may be pleaded.

Double costs.

§ 9. enacts, " That every action and suit which shall be brought or commenced against any person or persons in *Scotland*, for any thing done or acted in pursuance of this act, shall in like manner be commenced within six calendar months after the fact committed, and not afterwards, and shall be brought in the court of session in *Scotland*; and the defender or defenders may plead that the matter complained of was done in pursuance of this act, and may give this act and the special matter in evidence; and if such action or suit shall be brought or commenced after the time limited for bringing the same, then the same shall be dismissed; and in such case, or if the defender or defenders shall be assoilzied, or the pursuer or pursuers shall suffer the action or suit to fall asleep, or a decision shall be pronounced against the pursuer or pursuers upon the relevancy, the defender or defenders shall

Limitation of actions, &c. in Scotland.

60 G. 3. c. 9.
Double costs.

Not to alter the law of Scotland in respect to punishment for libels.

No person to print or publish newspapers, &c. or pamphlets, without entering into recognizance, or giving bond for securing fines upon conviction for libels.

have double costs, which he or they shall and may receive in such and the same manner as any defender can by law recover costs or expences in other cases."

§ 10. provides, "That nothing in this act contained shall be held or considered as in any respect altering the law or practice of *Scotland* regarding the punishment of persons convicted of composing, printing, publishing, or circulating any blasphemous or seditious libel."

By 60 G. 3. c. 9. § 8., "No person shall print or publish for sale any newspaper, or any pamphlet or other paper containing any public news, intelligence, or occurrences, or any remarks or observations thereon, or upon any matter in church or state, which shall not exceed two sheets, or which shall be published for sale at a less price than 6d., until he or she shall have entered into a recognizance before a baron of the Exchequer in *England, Scotland, or Ireland* respectively, as the case may be, if such newspaper or pamphlet, or other paper aforesaid, shall be printed in *London or Westminster*, or in *Edinburgh or Dublin*, or shall have executed in the presence of, and delivered to, some justice of the peace for the county, city, or place where such newspaper, pamphlet, or other paper shall be printed, if printed elsewhere, a bond to his majesty, his heirs and successors, together with two or three sufficient sureties, to the satisfaction of the baron of the Exchequer taking such recognizance, or of the justice of the peace taking such bond, every person printing or publishing any such newspaper, or pamphlet, or paper aforesaid, in the sum of 300*l.*, if such newspaper, pamphlet, or paper shall be printed in *London*, or within twenty miles thereof, and in the sum of 200*l.*, if such newspaper, pamphlet, or paper shall be printed elsewhere in the united kingdom, and his or her sureties in a like sum in the whole, conditioned that such printer or publisher shall pay to his majesty, his heirs and successors, every such fine or penalty as may at any time be imposed upon or adjudged against him or her, by reason of any conviction for printing or publishing any blasphemous or seditious libel, at any time after the entering into such recognizance, or executing such bond; and that every person who shall print or first publish any such newspaper, pamphlet, or other paper, without having entered into such recognizance, or executed and delivered such bond with such sureties as aforesaid, shall, for every such offence, forfeit the sum of 20*l.*"

1 W. 4. c. 73.

Punishment of banishment repealed.

Amount of bonds to be given by persons publishing newspapers, &c. under 60 G. 3. c. 9. increased.

By 1 W. 4. c. 73. § 1., reciting certain enactments of 60 G. 3. c. 8., whereby persons convicted a second time of having published, &c. any blasphemous or seditious libel are rendered liable to the sentence of banishment, it is enacted, "That so much and such parts of the said act as relate to the sentence of banishment for the second offence be and the same are hereby wholly repealed."

By § 2., reciting certain provisions made by 60 G. 3. c. 9. "for preventing any person from publishing any newspaper or pamphlet, or other paper of the description therein mentioned, without first entering into a recognizance or giving a bond, with sureties, in manner and to the amount therein specified," it is enacted, "that the amount of such recognizances and bonds, in all cases whenever it shall be hereafter necessary, according to the provisions of the said act, to enter into any new recognizance or bond, shall be extended to the

sum of 400*l.* for the principal, and the like sum for the sureties, in any such new recognizances, and to the sum of 300*l.* for the principal, and the like sum for the sureties, in any such new bond; and that the conditions of such new recognizances and bonds respectively shall extend to secure the payment of damages and costs to be recovered in actions for libels published in such newspapers, pamphlets, or other papers, as well as to secure the payment of fines to his majesty upon such convictions as aforesaid; and that all the clauses and provisions in the said last-mentioned act contained, relating to the recognizances and bonds therein mentioned, shall be applicable and extend to such new recognizances and bonds as are herein directed to be taken and made."

§ 3. "And be it further enacted, that if any plaintiff, in any action for libel against any editor, conductor, or proprietor of such newspaper, pamphlet, or other paper as aforesaid, shall make it appear by affidavit to his majesty's court of Exchequer that he is entitled to have execution against the defendant upon any judgment in such action, but that he has not been able to procure satisfaction by writ of execution against the goods and chattels of such defendant, it shall be lawful for the said court, for the benefit of such plaintiff, to order and direct such proceedings to be had and taken upon such recognizances or bonds respectively as would be taken to obtain any fines or penalties due to his majesty secured by such recognizance and bond: Provided always, that the expence of such proceedings shall be exclusively borne by such plaintiff as aforesaid."

1 W. 4. c. 73.

Damages due to any plaintiff in any action for libel may be recovered upon such bond.

IV. Power of Justices of the Peace.

On a case officially referred to the attorney and solicitor general, by the secretary of state for the home department, in the year 1817, the following opinion was promulgated by authority:—

"We are of opinion that a warrant may be issued to apprehend a party charged on oath for publishing a libel, either by the secretary of state, a judge, or a justice of the peace.

"With respect to the secretary of state in the case of *Entick v. Carrington*, as reported by Mr. *Hargrave*, though the court were of opinion the warrants which were then the subject of discussion were illegal, yet *Ld. Camden* declared, and in which he stated the other judges agreed with him, that they were bound to adhere to the determination of *The Queen v. Derby*, and *The King v. Earbury*, in both of which cases it had been holden, that it was competent to the secretary of state to issue a warrant for the apprehension of a person charged with a scandalous and seditious libel, and that they, the judges, had no right to overturn those decisions.

"With respect to the power of a judge to issue such warrant, it appears to us that, at all events, under the statute of 48 G. 3. c. 38., a judge has such power, upon an affidavit being made in pursuance of that act. A judge would probably expect that it should appear to be the intention of the attorney-general to file an information against the person charged.

"With respect to a justice of the peace, the decision of the court of Common Pleas, in the case of Mr. *Wilkes's* libels, on amounts to this, — that libel is not such an actual breach of

Warrant to apprehend for libel.

See Hansard's Parliamentary Debates, vol. xxxvi. p. 449. (n.)

See also 19 Howell's St. Tri. 1039.

Fort. 140.

Fort. 37.
8 Mod. 177.

That defendant may be held to bail for libel.

peace, as to deprive a member of parliament of his privilege of parliament, or to warrant the demanding sureties of the peace from the defendant; but there is no decision or opinion that a justice of the peace might not apprehend any person not so privileged, and demand bail to be given to answer the charge. It has certainly been the opinion of one of our most learned predecessors, that such warrants may be issued and acted upon by justices of the peace, as appears by the cases of *Thomas Spence* and *Alexander Hogg*, in the year 1801. We agree in that opinion, and therefore think that a justice of the peace may issue a warrant to apprehend a person charged by information on oath with the publication of a scandalous and seditious libel, and to compel him to give bail to answer such charge.

"Lincoln's Inn,

"Feb. 24th, 1817.

"W. GARROW.

"S. SHEPHERD."

In dom. Proc.
Opinions.

This opinion was fully discussed in the House of Lords on the 12th May, 1817, when the Lord Chancellor (*Eldon*) and Lord *Ellenborough*, C. J. of the K. B., delivered their opinions that justices of the peace had power to hold to bail in cases of libel; and in *Butt v. Conant* (a) 1 *Brod. & Bing.* 548., it was expressly decided, after much consideration, and a view of all the adjudged cases and authorities, that a justice of the peace has authority to issue his warrant for the arrest of a party charged with having published a libel; and upon the neglect of the party so arrested to find sureties, may commit him to prison, there to remain till he be delivered by due course of law. See also 4 *Blac. Com.* 150.

Arrest for libel
held legal.

The publishers and distributors of impious and seditious libels may be instantly taken up and held to bail. It is not necessary to stand by and see the mischief spreading, without attempting to interrupt its progress: it would be a reproach to the laws of the country if it were so, and if the magistrates might not arrest the torch in the incendiary's hand, before it has actually set fire to the building. *Per Leycester J. in his charge to the grand jury at Carnarvon Sum. Ass.* 1819.

Acc.

Indictment for a Seditious Libel.

THE jurors for our lord the king upon their oath present, That
A. O. late of _____ in the county of _____ gentleman,
not having God before his eyes, but moved by the instigation of the
devil, and falsely and maliciously contriving and intending to bring
our said lord the king into hatred and infamy amongst his subjects,
and to move sedition amongst the subjects of our said lord the king,
did on the _____ day of _____, in the _____ year of the

(a) The warrant, in this case, dated 6th March 1817, at the public office *Bee-street*, was directed, "To all constables and others H. M.'s officers of the peace, whom it may concern," commanding them to take and bring before the defendant or some other of H. M.'s justices of the peace the body of the plaintiff, "to answer all such matters or things as, on H. M.'s behalf, shall on oath be objected against him, for that he on the 5th March instant did publish and cause to be published a certain wicked, scandalous, and malicious libel, imputing the crime of robbery to *Edward Lord Ellenborough* Lord C. J. of H. M.'s court of K. B.: and another wicked, scandalous, and malicious libel, imputing to *Robert Henry Lord Castlereagh*, that he had stated a gross falsehood to the House of Commons, to answer his own purposes; and to the said *Edward Lord Ellenborough* that he had unjustly convicted the plaintiff, to make money of him, against the peace," &c.

reign of ———, with force and arms, at ——— aforesaid in the county aforesaid, falsely, seditiously, and maliciously write and publish, and cause to be written and published, a certain false, seditious, and scandalous libel, intitled ———. In which said libel are contained, among other things, divers false, seditious, scandalous, and malicious matters, according to the tenor following, to wit, ———. And in another part of the same libel are contained divers other false, seditious, scandalous, and malicious matters, according to the tenor following ———, to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity.

Lunatics.

[39 & 40 G. 3. c. 94. — 9 G. 4. c. 40.]

THE general law respecting lunatics will be found in another part of this work; the subject will no further be treated of here than as it is connected with crime.

Non compos mentis is of four kinds: —

First, Idiots; who are of *non sane memory* from their nativity, by a perpetual infirmity. 1 *Inst.* 247.

Secondly, Those that lose their memory and understanding by the visitation of God, as by sickness or other accident.

Thirdly, Lunatics; who have sometimes their understanding, and sometimes not.

Fourthly, Drunkards; who by their own vicious act for a time deprive themselves of their memory and understanding.

He who incites a madman to do a murder, or other crime, is a principal offender, and as much punishable as if he had done it himself. 1 *Haw. c. 1. § 7.*

But idiots and lunatics, who are under a natural disability of distinguishing between good and evil, are not punishable by any criminal prosecution. 1 *Haw. c. 1. § 1.*

It is not every frantic and idle humour of a man that will exempt him from justice and the punishment of the law. When a man is guilty of a great offence, it must be very plain and clear before a man is allowed such an exemption; therefore it is not every kind of frantic humour, or something unaccountable in a man's actions, that points him out to be such a madman as is to be exempted from punishment. It must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast; such a one is never the object of punishment. *Per Tracy J. R. v. Arnold, 16 Howell's St. Tri. 764.*

If there be a total permanent want of reason, it will acquit the prisoner. If there be a total temporary want of it, when the offence was committed, it will acquit the prisoner. But if there be only a partial degree of insanity, mixed with a partial degree of reason; not a full and complete use of reason, but (as Lord Hale carefully and emphatically expresses himself) a competent use of it, sufficient to have restrained those passions, which produced the crime; if there be thought and design; a faculty to distinguish the nature of actions, to discern the difference be-

Non compos of four kinds.

Inciting a madman to commit a crime.

Idiots, &c. not punishable for crimes.

What degree of insanity will exempt from punishment.

tween moral good and evil; then, upon the fact of the offence proved, the judgment of the law must take place. *Per Yorke, Solicitor General in Ld. Ferrers's case*, 19 *Howell's St. Tri.* 947, 948. *et per Lawrence J. R. v. Allen, tried at Stafford Lent Ass. 1807, for murdering three of his children.* MS.

Drunkards.

Drunkards shall have no privilege by their want of sound mind; but shall have the same judgment as if they were in their right senses. 1 *Inst.* 247. 1 *Haw. c. 1. § 6.* 1 *Hale*, 32.

Frenzy caused by medicine or diet.

If a person by the unskillfulness of his physician, or the contrivance of his enemies, eats or drinks such a thing as causes frenzy, this puts him in the same condition with any other frenzy, and equally excuses him: also, if by such practices an habitual frenzy is caused, though this madness was contracted by the vice and will of the party, yet the habitual and fixed frenzy puts the man in the same condition as if it were contracted at first involuntarily. 1 *Hale*, 32. 1 *Russ.* 8.

Permanent frenzy.

But if a person, who wants discretion, commit a trespass against the person or possession of another, he shall be compelled in a civil action to give satisfaction for the damage. 1 *Haw. c. 1. § 5.*

Punishable for civil offences.

Becoming *non compos* before trial.

If one who hath committed a capital offence become *non compos* before conviction, he shall not be arraigned; and if after conviction, he shall not be executed. *Hale's Sum.* 10. 1 *Haw. c. 1. § 3.*

How tried whether he is *non compos*.

By the common law, if it be doubtful whether a criminal, who at his trial in appearance is a lunatic, be such in truth or not, it shall be tried by an inquest of office, to be returned by the sheriff; and if it be found by them that the party only feigns himself mad, and he still refuse to answer, he shall be dealt with as if he had confessed the indictment. 1 *Haw. c. 1. § 4.*

39 & 40 G. 3. c. 94.

Persons acquitted as insane on trial for murder, treason, or felony.

By stat. 39 & 40 G. 3. c. 94. § 1., in all cases, where it shall be given in evidence upon the trial of any person for treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of committing such offence, and to declare whether they acquitted him on account of such insanity; and if they do so find, the court shall order such person to be kept in strict custody in such place and in such manner as to them shall seem fit, until H. M.'s pleasure shall be known; whereupon H. M. may give such order for the safe custody of such person during his pleasure in such place and manner as to H. M. shall seem fit.

So, if insane, when indicted, for any offence.

§ 2. When any person who shall be indicted for any offence, shall be insane, and upon arraignment shall be found by a jury impanelled for that purpose to be insane, so that he cannot be tried, or when upon the trial he shall be found to be insane, the court may record such finding, and order the party to be kept in strict custody until H. M.'s pleasure shall be known; and if any person, charged with any offence, shall be brought before any court to be discharged for want of prosecution, and such person shall appear to be insane, the court may order a jury to be impanelled to try the sanity of such person; and if the jury find him to be insane, the court may order such person to be kept in strict custody, &c.; and in all cases of insanity his majesty may give such order, &c. (as in the former section).

§ 3. And for the better prevention of crimes being committed by persons insane, if any person shall be discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing some crime, for which, if committed, he would be liable to be indicted, and any justice before whom such person may be brought shall think fit to issue a warrant for committing such person as a dangerous person suspected to be insane, such cause of commitment being plainly expressed in the warrant, the person so committed shall not be bailed, except by two justices, one whereof shall be the justice who issued such warrant, or by the quarter sessions, or by one of the judges or lord chancellor, lord keeper, or commissioners of the great seal.

In the case of an assault and battery, where the jury found that the defendant was insane, both at the time of the commission of the offence and of the trial, and acquitted him on that account, on reference to the judges, they held that 39 & 40 G. 3. c. 94. § 2. extended to all offences; and that the order of the court for keeping him in custody under that section was, therefore, good. *R. v. Little, C. C. R.* 430.

The judges have held, that in a trial where the insanity of the prisoner is in question, it was competent to receive the evidence of a medical person in regard to the symptoms of insanity, and the causes likely to produce a paroxysm; but they doubted whether he should be allowed to give his opinion as to the insanity of the prisoner upon the other evidence, which was the very point the jury were to decide. *R. v. Wright, C. C. R.* 456.

The prisoner having been committed under 39 & 40 G. 3. c. 9. § 3. as a dangerous lunatic, was brought into court by *habeas corpus*; and objections were made, that the commitment did not shew that any evidence had been taken on oath, nor did it mention the name of the party whom the prisoner shewed a purpose of assaulting. The court, however, held that it was not to be considered as a commitment in execution, nor to receive the same strict construction; but that it was a commitment to prevent mischief, and, upon the whole, might be considered as sufficiently certain, and the prisoner was remanded. *R. v. Gourlay, 7 B. & C.* 669. *S. C. antè, tit. Commitment.* For the form, see *post*.

By 9 G. 4. c. 40. § 54., "In all cases where any person shall be kept in custody as an insane person by order of any court, or by his majesty's order subsequent thereunto, it shall and may be lawful for any two justices of the peace of the county where such person shall be so kept in custody, to inquire into and ascertain, by the best legal evidence that can be procured under the circumstances of personal legal disability of such insane person, the place of the last legal settlement, and the circumstances of such person; and if it shall not appear that he or she is possessed of sufficient property which can be applied to his or her maintenance, it shall and may be lawful for such two justices to make order, under their hands and seals, upon such parish where they adjudge him or her to be legally settled, to pay such weekly sum for his or her maintenance in such place of custody as one of his majesty's principal secretaries of state shall, by writing under his hand from time to time direct; and where such place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county where such person shall have been appre-

39 & 40 G. 3.
c. 94.

Deranged persons likely to commit crime.

39 & 40 G. 3.
c. 9. s. 2.
extends to misdemeanors.

Opinion of medical person, how far evidence as to fact of insanity.

Form of commitment under 39 & 40 G. 3.
c. 9. s. 3.

9 G. 4. c. 40.
Where persons charged with offences are insane, justices to inquire into their settlement, and make order for their maintenance.

9 G. 4. c. 40.

Appeal.

hended; but if it shall appear that such person is possessed of such sufficient property as aforesaid, then such justices shall order and direct the same to be applied to pay and satisfy the expence of the maintenance of such person, in the manner herein-before directed: Provided always, that the churchwardens and overseers of the parish in which the justices, or the major part of them, shall adjudge any insane person to be settled, may appeal against such order to the general quarter sessions of the peace to be holden for the county where such order shall be made, in like manner and under like restrictions and regulations as against any order of removal, giving reasonable notice thereof to the clerk of the peace of such county, who shall be respondent in such appeal; which appeal the justices of the peace assembled at the said general quarter sessions are hereby authorised and empowered to hear and determine, in the same manner as appeals against orders of removal are now heard and determined."

Persons convicted of offences, becoming insane during imprisonment, may be removed to a county asylum, by order of the secretary of state.

§ 55. "If any person, while imprisoned in any prison or other place of confinement in *England*, under any sentence of imprisonment or transportation, shall become insane, and it shall be duly certified by two physicians or surgeons that such person is insane, it shall be lawful for one of his majesty's principal secretaries of state to direct, by warrant under his hand, that such person shall be removed to such county lunatic asylum, or other proper receptacle for insane persons, as his majesty's said principal secretary of state may judge proper and appoint; and every such person so removed shall remain under confinement in such county lunatic asylum, or other proper receptacle as aforesaid, or in any other county lunatic asylum, or other proper receptacle, to which such person may be removed by any like order, until it shall be duly certified to one of his majesty's principal secretaries of state, by two physicians or surgeons, that such person has become of sound mind; whereupon his majesty's said secretary of state is hereby authorised, if such person shall still remain subject to be continued in custody, to issue his warrant to the keeper or other person having the care of any such county lunatic asylum, or other proper receptacle as aforesaid, directing that such person shall be removed back from thence to the prison or other place of confinement from whence he shall have been taken; or if the period of imprisonment or custody of such person shall have expired, that he shall be discharged."

Form of Warrant of Commitment under 39 & 40 G. 3. c. 94.

§ 3. See 7 B. & C. 669.

WHEREAS [Robert Gourlay] hath been discovered and apprehended under circumstances that denote a derangement of mind, and a purpose of committing a crime (that is to say, an assault and breach of the peace), for which, if committed, he would be liable to be indicted; and the said [Robert Gourlay] being brought before me, one of his majesty's justices of the peace in and for the said county, and it appearing to me that I ought to issue a warrant for committing him as a dangerous person suspected to be insane, these are, therefore, to command you, and each of you, to receive into your custody the body of the said [Robert Gourlay], herewith sent, as a dangerous person suspected to be insane, and him safely to keep

in your custody until he shall be bailed, as directed by the statute in that case made and provided, or until he shall be discharged by due course of law; and, for so doing, this shall be your sufficient warrant. Given under my hand and seal this 25th day of June, 824.

T. H. (L. S.)

Madmen. See **Lunatics.**

Maim.

MAIM is such a hurt of any part of a man's body, whereby he is rendered less able in fighting either to defend himself, or annoy his adversary; for the members of every subject are under the safeguard and protection of the law, to the end a man may serve his king and country when occasion shall be offered. 1 *Haw. c. 44. § 1.* 1 *East's P. C.* 393.

Definition.

A person who even maims himself, or procures another to maim him, that he may have more colour to beg; or disables himself to revert being pressed for a soldier; is subject to fine and imprisonment at common law; and so is the party by whom it was effected at the other's desire. *Wright's case, Leicester Ass.* 1 *Jac. I. Jo. Lit.* 127. a. 1 *Hale*, 412. 1 *East's P. C.* 396.

Person maiming himself.

The cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or castrating him, are said to be maims; but the cutting off his ear, or nose, were not esteemed maims at the common law, because they do not weaken but only disfigure him. 1 *Haw. c. 44. § 2.*

Maims at common law, what.

It is said, anciently castration was punished with death, and other maims with the loss of member for member; but afterwards to maim was punished in any case with the loss of life or member, not only with fine and imprisonment. 1 *Haw. c. 44. § 2.*

If the maim come not within the provisions of any stat., yet it is indictable at the common law, and may be punished by fine and imprisonment; or the party injured may bring an action of trespass; in which he shall recover damages. 2 *Haw. c. 23. § 16. 22. Blac. Com.* 206.

Maim indictable at common law.

It is not every trifling assault that will justify a grievous and immediate mayhem, such as cutting off a leg or hand, or biting off a joint of a man's finger, unless it happened accidentally, without any cruel and malignant intention, or after the blood was heated in the scuffle; but it must appear that the assault was in some degree proportionable to the mayhem. 1 *East's P. C.* 402.

Trifling assault will not justify a maim.

It doth not seem that in maiming there can be accessaries after the fact. 2 *Haw. c. 29. § 4. 5.*

See tit. **Malicious Injuries.**

Maimprise. See tit. **Bail.**

Maintenance.

BUYING of titles belongeth not to this place, but is treated of under a title of its own.

I. Of Maintenance in general.

[1 Ed. 3. st. 2. c. 14. — 20 Ed. 3. c. 4. — 1 R. 2. c. 4. — 32 H. 8. c. 9.]

II. Of Champerty in particular.

[3 Ed. 1. c. 25. — 28 Ed. 1. c. 11. — 33 Ed. 1. st. 3. — 1 R. 2. c. 9. — 31 El. c. 5.]

III. Of Embracery in particular.

[32 H. 8. c. 9. — 6 G. 4. c. 50.]

I. Of Maintenance in general.

Maintenance,
what.

Maintenance (*manu tenere*) is an unlawful taking in hand or upholding of quarrels or suits to the disturbance or hindrance of common right. 1 Haw. c. 83. § 1. 4 Blac. Com. 134. 1 Russ. 266.

And it is twofold; technically termed *ruralis et curialis*.

In the country.

One in the country; as where one assists another in his pretensions to certain lands, by taking or holding the possession of them for him by force or subtlety; or where one stirs up quarrels and suits in the country, in relation to matters wherein he is no way concerned. And this kind of maintenance is punishable at the king's suit by fine and imprisonment, whether the matter in dispute any way depended in plea or not; but it is said not to be actionable. *Id.* §§ 1. 2.

In courts of
justice.

Another in the courts of justice: where one officiously intermeddles in a suit depending in any such court, which no way belongs to him, by assisting either party with money or otherwise in the prosecution or defence of any such suit. 1 Haw. c. 83. §§ 1. 2.

Of this second kind of maintenance, there are three species:—

Maintenance.

First, where one maintains another, without any contract to have part of the thing in suit; which generally goes under the common name of *maintenance*.

Champerty.

Secondly, where one maintains one side to have part of the thing in suit; which is called *champerty*.

Embracery.

Thirdly, where one laboureth a jury; which is called *embracery*. *Id.* § 3.

Exceptions;
common interest.

But it seemeth to be agreed, that wherever any persons claim a common interest in the same thing, as in a way, churchyard, or common, by the same title, they may maintain one another in a suit relating to the same. *Id.* § 18.

Affinity.

Also, that whoever is any way of kin or affinity to the party may counsel and assist him, but that he cannot justify the laying out any of his own money in the cause unless he be either father, son, or heir apparent. (a) *Id.* § 20.

(a) It is curious and not altogether useless to see how the doctrine of maintenance has from time to time been received in *Westminster Hall*. At one time not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expence which he would otherwise be put to, was held guilty of maintenance. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a subpoena, or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside, must be expected. *Per Buller J.* in *Master v. Miller*, 4 T. R. 940.

Also, that any one in charity may lawfully give money to a poor man, to enable him to carry on his suit. 1 *Haw. c. 83. § 26.*

Russ. 179. 4 Blac. Com. 135.

It seemeth that all maintenance is not only *malum prohibitum* by statute, but is also *malum in se*, and strictly prohibited by the common law, as having a manifest tendency to oppression; and therefore it is said that all offenders of this kind are not only liable to an action of maintenance at the suit of the party grieved, herein they shall render such damages as shall be answerable to the injury done to the plaintiff, but also that they may be indicted; offenders against public justice, and adjudged thereupon to such fine and imprisonment as shall be agreeable to the circumstances of the offence. Also it seemeth that a court of record may commit a man for an act of maintenance done in the face of the court.

Inst. 212. 1 Haw. c. 83. § 36.

By stat. 1 *Ed. 3. st. 2. c. 14.*, no person shall take upon him to maintain quarrels, nor parties in the country, to the disturbance of the common law.

By stat. 20 *Ed. 3. c. 4.*, none shall take in hand quarrels other than their own, nor the same maintain, by them nor by other, for gift, promise, amity, favour, doubt, fear, nor other cause, in disturbance of law and hindrance of right.

By stat. 1 *R. 2. c. 4.*, none shall take or sustain any quarrel by maintenance in the country, nor elsewhere, on pain, if he is a great officer, as the king by advice of the lords shall ordain: if he is a lesser officer, he shall forfeit his office, and be imprisoned and ransomed at the king's will: and all other persons, on pain of imprisonment, and ransom at the king's will.

And by stat. 32 *H. 8. c. 9. § 3.*, no person shall unlawfully maintain or procure any unlawful maintenance in any action, demand, or complaint, in any court having power to hold plea of lands; nor shall unlawfully retain any person for maintenance of any plea to the disturbance or hindrance of justice; on pain of 10*l.*, half to the king, and half to him that shall sue within one year.

It seemeth, that in an information on this statute, it is not sufficient to say that the defendant maintained the party, without adding that he did it unlawfully. 1 *Haw. c. 83. § 45.*

It is said to have been adjudged, that maintenance of a suit in a spiritual court is neither within this nor any other statute concerning maintenance. *Id. c. 83. § 46.*

It hath been holden that in an information on this statute, it is necessary to shew that a plea was depending; and therefore that it is not sufficient to say that a bill was exhibited. *Id. c. 83. § 47.*

A counsellor, having received his fee, may lawfully set forth his client's cause to the best advantage; but can no more justify giving him money to maintain his suit, or threatening a juror, than any other person. An attorney also, when specially retained, may lawfully prosecute or defend an action, and lay out his own money in the suit; but an attorney who maintains another is not justified by a general retainer to prosecute for him in all causes. Nor can an attorney lawfully carry on a cause for another at his own expence, with a promise never to expect repayment; and it is said to be questionable whether solicitors, who are no attorneys,

Charity.

How punishable by the common law, as tending to oppression.

1 *Ed. 3. st. 2. c. 14.*

How punishable by statute.
20 *Ed. 3. c. 4.*

1 *R. 2. c. 4.*

32 *H. 8. c. 9.*

Maintenance must be averred to be unlawful.

None in spiritual court.

Plea must be pending.

Counsel.

Attorney.

can, in any case, lawfully lay out their own money in another's case. 1 Russ. 179.

II. Of Champerty in particular.

What it is.

Champerty (from *campi parte*) is the *unlawful maintenance of a suit in consideration of some bargain to have part of the lands or thing in dispute, or part of the gains.* 1 Haw. c. 84. § 1. 1 Russ. 179.

Every champerty is maintenance, but every maintenance is not champerty; for champerty is but a *species* of maintenance, which is the *genus*. 2 Inst. 208.

How punishable by the common law.

Champerty was an offence at the common law, and as such is punishable in like manner as hath been expressed in treating of maintenance in general. 2 Inst. 208.

3 Ed. 1. c. 25.
How punishable by statute.

By stat. 3 Ed. 1. c. 25., *no officer of the king, by himself, nor by other, shall maintain pleas, suits, or other matters hanging in the king's courts, for lands, tenements, or other things, for to have part or profit thereof, by covenant made between them; and he that doth shall be punished at the king's pleasure.*

Covenant, any agreement.

That is, by agreement either by word or writing; for albeit in the common sense, a covenant is taken for an agreement by writing, yet in a larger sense it is taken (as it is here) for an agreement by writing or by word. 2 Inst. 209.

28 Ed. 1. c. 11.

By stat. 28 Ed. 1. c. 11., *no person whatsoever, for to have part of the thing in plea, shall take upon him the business that is in suit, nor shall any upon such covenant give up his right to another; on pain that the taker shall forfeit to the king the value of the part he has purchased for such maintenance. But no person shall be prohibited hereby to have counsel of pleaders, or of men learned in the law, for their fee; or of his parents and next friends.*

33 Ed. 1. st. 3.

By stat. 33 Ed. 1. st. 3., *any person who shall take for maintenance or the like bargain, any suit or plea against another, he and also they who consent thereto shall be imprisoned three years, and make fine at the king's pleasure. Vide Tomlin's Statutes, vol. 2. p. 225.*

Imprisonment.

1 R. 2. c. 9.
Feoffment or gift for maintenance, void.

And by stat. 1 R. 2. c. 9., *a feoffment of lands, or gift of goods, for maintenance, shall be void, and the person disseised shall recover the lands against the first disseisors with double damages, without having any regard to such alienations.*

But it is said that it shall only be void with regard to him that hath right, and not between the feoffor and feoffee. 1 Inst. 369.

31 El. c. 5.
Venue.

And by stat. 31 El. c. 5. § 4., *the offence of champerty may be laid in any county, at the pleasure of the informer.*

III. Of Embracery in particular.

What it is.

Interference, &c. with a juror.

It seems clear, that any attempt whatsoever to corrupt or influence or instruct a jury, or any way to incline them to be more favourable to the one side than to the other, by money, promises, letters, threats, or persuasions, is a proper act of embracery, whether the juror on whom such attempt is made give any verdict or not, or whether the verdict given be true or false. 1 Haw. c. 85. § 1.

And the law so far abhors all corruption of this kind, that it prohibits every thing which has the least tendency to it, what precious pretence soever it may be covered with; and therefore it will not suffer a mere stranger so much as to labour a juror to appear and act according to his conscience. 1 *Haw. c. 85. § 2.*

But any person who may justify any other act of maintenance may safely labour a juror to appear and give a verdict according to his conscience: but no one whatsoever can justify the labouring a juror not to appear. *Id. c. 85. § 6.*

There is no doubt but that offences of this kind do subject the offender either to an indictment or action, in the same manner as all other kinds of unlawful maintenance do by the common law. *Id. c. 85. § 7.*

By stat. 32 *H. 8. c. 9. §§ 3. 6., no person shall embrace any jurors on pain of 10l., half to the king, and half to him that shall sue within a year.*

Stat. 6 *G. 4. c. 50. § 61.* provides, enacts, and declares, "That notwithstanding any thing herein contained, every person who shall be guilty of the offence of embracery, and every juror who shall wilfully or corruptly consent thereto, shall and may be respectively proceeded against, by indictment or information, and be punished by fine or imprisonment, in like manner as every such person and juror might have been before the passing of this act."

Indictment for Maintenance.

THE jurors for our lord the king upon their oath present, that A. O., late of ——— in the county aforesaid, yeoman, on the ——— day of ———, in the ——— year of the reign of ———, with force and arms at ——— aforesaid, in the county aforesaid, did unjustly and unlawfully maintain and uphold a certain suit which was then depending in the court of our said lord the king before the king himself, between A. P. plaintiff, and A. D. defendant, in a plea of debt on the behalf of the said A. P. against the said A. D., contrary to the form of the statute in such case made and provided, and to the manifest hindrance and disturbance of justice, and in contempt of our said lord the king, and to the great damage of the said A. D., and against the peace of our said lord the king, his crown and dignity.

Malicious Trespases. See tit. **Malicious Injuries**; and see tit. **Trespases**.

Malicious Injuries.

UNDER this title are comprised all such offences against the persons or the property of individuals, as are not distinctly classed within some other description of crime in this work; and they will be found to result chiefly from the enactments of 9 *G. 4. c. 31.* and of 7 & 8 *G. 4. c. 30.*, the former entitled "An act for consolidating and amending the statutes for offences against the person," the latter, "for consolidating and amending the laws relative to malicious injury to property."

- I. *To the Person.*
[9 G. 4. c. 31.]
- II. *To Property.*
[7 & 8 G. 4. c. 30.]

I. Malicious Injuries to the Person.

9 G. 4. c. 31.
Attempts to
murder, when
evidenced by
certain acts,
shall be capital.

By 9 G. 4. c. 31. § 11., "If any person unlawfully and maliciously shall administer (a), or attempt to administer to any person, or shall cause to be taken by any person, any poison or other destructive thing, or shall unlawfully and maliciously attempt to drown, suffocate, or strangle any person, or shall unlawfully and maliciously shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to murder such person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

Shooting at, or
stabbing, cut-
ting, or wound-
ing any person
with intent to
maim, &c. shall
be capital, pro-
vided the case
would have
been murder
if death had
ensued.

§ 12. "If any person unlawfully and maliciously shall shoot at any person, or shall, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable such person, or to do some other grievous bodily harm to such person, or with intent to resist or prevent the lawful apprehension or detainer of the party so offending, or any of his accomplices, for any offence for which he or they may respectively be liable by law to be apprehended or detained, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon: Provided always, that in case it shall appear on the trial of any person indicted for any of the offences above specified, that such acts of shooting, or of attempting to discharge loaded arms, or of stabbing, cutting, or wounding as aforesaid, were committed under such circumstances, that, if death had ensued therefrom, the same would not in law have amounted to the crime of murder, in every such case the person so indicted shall be acquitted of felony."

Administering
poison, or using
any means to
procure the
miscarriage of
a woman quick
with child.
The like as to
a woman not
quick with
child.

§ 13. "If any person, with intent to procure the miscarriage of any woman then being quick with child, unlawfully and maliciously shall administer (a) to her, or cause to be taken by her, any poison or other noxious thing, or shall use any instrument or other means whatever with the like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon; and if any person, with intent to procure the miscarriage of any woman not being, or not being proved to be, then quick with child, unlawfully and maliciously shall administer (a) to her, or cause to be taken by her, any medicine or other thing, or shall use any instrument or other means whatever with the like intent, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years

(a) See *R. v. Cadman*, *post*, p. 546.

nor less than seven years, or to be imprisoned, with or without 9 G. 4. c. 31.
hard labour, in the common gaol or house of correction, for any
term not exceeding three years, and, if a male, to be once, twice,
or thrice publicly or privately whipped (if the court shall so think
fit), in addition to such imprisonment.

§ 15, "Every person convicted of the abominable crime of Sodomy.
buggery, committed either with mankind or with any animal,
shall suffer death as a felon."

By 43 G. 3. c. 58. (called *Ld. Ellenborough's act*, and which is 43 G. 3. c. 58.
now repealed), "if any person or persons shall, either in *England* (Lord Ellen-
or *Ireland*, wilfully, maliciously, and unlawfully shoot at any of his borough's Act),
majesty's subjects, or shall wilfully, maliciously, and unlawfully now repealed.
present, point, or level any kind of loaded fire-arms at any of his
majesty's subjects, and attempt by drawing a trigger, or in any
other manner, to discharge the same at or against his or their
person or persons, or shall wilfully, maliciously, and unlawfully
stab or cut any of his majesty's subjects, with intent in so doing,
or by means thereof, to murder, or rob, or to maim, disfigure, or
disable such his majesty's subject or subjects, or with intent to do
some other grievous bodily harm to such his majesty's subject or
subjects, or with intent to obstruct, resist, or prevent the lawful
apprehension and detainer of the person or persons so stabbing or
cutting, or the lawful apprehension and detainer of any of his,
her, or their accomplices for any offences for which he, she, or
they may respectively be liable by law to be apprehended, im-
prisoned, or detained, provided," &c.

Among the following decisions, many upon this last-mentioned
stat. will be found for the most part applicable to the correspond-
ing enactments in 9 G. 4. c. 31.

Rex v. Kitchen, Bridgewater Sum. Ass. 1805, C. C. R. 95. The
prisoner was tried and convicted on an indictment for maliciously
shooting at *Elizabeth Monslow, with a loaded pistol*, with intent to
kill and murder her, against the statute. There were other counts
in the indictment, some stating the intent to be to do her some
grievous bodily harm, and others to disfigure her, and some
stating the pistol to be loaded with gunpowder only, and others
stating it to be loaded with gunpowder and other destructive
materials.—There was not any direct and positive evidence of the
pistol, which was fired close to the prosecutrix's ear, being loaded
with any thing besides gunpowder and wadding or paper, but
there were circumstances from whence to infer, that it was loaded
with some other destructive materials, and the evidence of the
surgeon, as to his opinion from the nature of the wound, was
positive that it must have been so loaded: it is, however, very pos-
sible, that it might not have been loaded with any thing except
powder and paper. The learned judge directed the jury, that
whether the pistol was loaded with gunpowder and ball or other
destructive materials, or whether it was loaded with gunpowder
and paper only, if the prisoner fired so near to the person of the
prosecutrix, and in such a direction, as that it probably would kill
her, or do her some grievous bodily harm, and with intent that it
should do so, the case was within the statute: but his lordship
desired them, if they found him guilty, to tell him whether they
were satisfied that the pistol was loaded with any destructive
materials besides gunpowder and paper, or not. The jury found

To shoot at
another with a
pistol loaded
with gunpow-
der and wad-
ding only, is an
offence within
stat. 43 G. 3.
c. 58.

Kitchen's case. the prisoner guilty, and said, they were satisfied that the pistol was loaded with some destructive material besides powder and wadding.

Application was afterwards made to the crown for mercy, on the ground that the pistol was not loaded with any thing but powder and paper, and supposing that to be the fact, the question submitted to the judges was, whether the direction to the jury was right. — On 16th November, 1805, all the judges (except Heath J. who was absent from illness) were of opinion, that the prisoner was properly convicted and the direction right.

What shall be considered loaded fire-arms.

To constitute the offence of attempting to discharge loaded fire-arms, they must be so loaded as to be capable of doing the mischief intended. If part of the loading has fallen out, though without the knowledge of the party, and what remains is inadequate to effect the mischief, the case is not within the act. The case is not within the act, if there be not such a loading at the time as is likely to produce a discharge, though it is possible it may produce it.

Blunderbuss loaded, but no priming.

Rex v. William Carr, O. B. Jan. Sess. 1819, cor. Holroyd J. C. C. R. 377. The prisoner was tried for wilfully, maliciously, and unlawfully pointing and levelling a blunderbuss loaded with gunpowder and leaden shot, and attempting by drawing the trigger to discharge the same against *William Billingsly*, with intent to murder him. There were two other counts, one charging the intent to be to disable *W. B.*, and the other to do him some grievous bodily harm. It appeared in evidence that *W. B.* had loaded the blunderbuss with gunpowder and leaden shot, and primed it a fortnight before the offence was committed, but had not examined it afterwards; and that at the time when the prisoner, having levelled the blunderbuss, pulled the trigger, the flint struck fire, but the flash was of the flint only and not of any priming. The loading was afterwards discharged and fired from the blunderbuss at the police office by accident, without any fresh priming. The jury found the prisoner guilty, but they at the same time added, that the blunderbuss was not primed at the time when the prisoner drew the trigger. On case, a great majority of the judges considered this equivalent to a finding that the blunderbuss was not so loaded as to be capable of doing mischief by having the trigger drawn, and if not, that it was not loaded within the meaning of the act. — The prisoner was accordingly pardoned.

Variance as to the contents of the fire-arms.

In an indictment against two prisoners on 9 G. 4. c. 31., one was charged with shooting at the other, the other being present, aiding and abetting; the intent was laid variously in different counts, but they all stated that the pistol was loaded with a leaden bullet: the prisoner *Hughes* had fired at the prisoner *Ann Worsley* by her desire, and also had shot himself, and they were both badly wounded. The surgeon gave evidence, that, from the nearness of the position in which they stood to each other, the wadding might have produced the same effect as a ball; and no ball could be found. *Bolland B.*, after consulting with *Park J.* and *James Parke J.*, directed the jury that the indictment was not sufficiently proved. Verdict, not guilty. *O. B. Jan. Sess. 1832, R. v. Hughes and Ann Worsley, 5 C. & P. 126.*

Touch-hole plugged so that no mischief could be done.

Prisoner was charged under 9 G. 4. c. 31. §§ 11, 12, with attempting to discharge a loaded pistol at *W. W.* by drawing the trigger, and in different counts the intent was laid in several ways: the pistol was proved to have been loaded with powder and ball, and it was snapped at the prosecutor's head; but there was evidence

that twisted paper was inserted in the touch-hole, so that it could not have been fired. *Patteson J.* told the jury, that if they believed the touch-hole to have been plugged so that it could not do mischief, they should acquit the prisoner. Verdict, not guilty. *Gloster Sum. Ass. 1831, R. v. Harris, 5 C. & P. 159.*

On an indictment for shooting with intent to murder, it appeared that the prisoner was out poaching, and that, being pursued, he had fallen, and the gamekeeper had taken from him the stock and lock of a double-barrelled gun; upon which the prisoner took the barrel, and struck the percussion-cap which was on it with a knife, whereby he discharged it, and wounded the gamekeeper. An objection was taken that the case was not within the stat., the gun-barrel not constituting "loaded arms." *Patteson J.* held it to be within the stat., and that the material words were "shall shoot at." Several other judges concurring, no case was reserved. *Gloster Spr. Ass. 1834, R. v. Coates, 6 C. & P. 394.*

Rex v. Hayward, otherwise *Harwood, O. B. January, 1805, cor. Macdonald C. B., C. C. R. 78.* The prisoner was indicted on statute 43 G. 3. c. 58. § 1. The indictment charged a larceny to have been committed by the prisoner, by stealing certain goods of *Richard Crabtree*, of the value of 5s.: that having committed the felony, he made an assault upon *Benjamin Chantry*, and with a certain sharp instrument then and there feloniously, &c. did strike, stab, and cut the said *Benjamin Chantry* in and upon the head, with intent in so doing, by means thereof, to obstruct, resist, and to prevent the lawful apprehension and detainer of him *Richard Hayward* (the prisoner).—All the counts, which were four in number, charged the striking, stabbing, and cutting only, with intent to prevent the lawful apprehension and detainer, &c. A larceny was proved to have been committed in the house of *Crabtree*, into which the prisoner and another had entered. They were seen coming out of the house by persons who had watched them. The prisoner was pursued and seized by one gentleman, from whom he disengaged himself; but was still pursued, and afterwards seized by *Benjamin Chantry*, whose evidence was as follows:—That on the evening of the 20th of *October* last, about seven o'clock, he heard very much a cry of Stop thief: that he went out of his shop, and saw a gentleman pursuing a man, and crying, Stop thief: That he stepped over the way to meet him, following him across the street. The prisoner fell down, and he (the witness) caught hold of him, in order to apprehend him: That he led the prisoner along quietly forty or fifty yards: That *Mr. Halford*, the gentleman who had been pursuing him, said to the witness, that the prisoner had something in his hand he would strike him with; and before he looked to see, the prisoner did strike him with an iron on the head. Several bones have been taken out, and more were expected. He then proved that the iron, which was produced at the trial, was taken out of the prisoner's hand.—*Stephen Parrot*, surgeon of the *Middlesex* hospital, said, that the skull was fractured, and that nothing was so likely as that it should have been done with an instrument such as that which was produced, and had been proved to be the instrument made use of by the prisoner.—That a part of the bone was cut away from the skull like a goose-quill, three inches and a half long. The court put several questions to him, to ascertain

Discharge of a gun-barrel separated from the rest of the gun.

An instrument capable of cutting, and proved to have actually cut, although not ordinarily used for that purpose, is within stat. 43 G. 3. c. 58.

Hayward's
case.

whether the piece of the skull was taken off by breaking, splintering, tearing, &c. or clearly by cutting; to which he answered, that a complete piece was taken out as if sawed out, not broken out, but cut out. The witness having assimilated the bone taken out to a quill, he was asked if it appeared to be cut off in the same manner as part of a quill is cut off, in beginning to make a pen; to which he answered, "Exactly so." Upon this evidence the prisoner was convicted. Lord C. B. *Macdonald* was inclined at the trial to think, that as the instrument was proved by the surgeon to be capable of cutting, and actually to have cut, and as the act has mentioned cutting generally, without reference to any description of instrument, that the conviction was proper. But some doubts arising on the case, as the instrument which was used was not of a sort originally intended for cutting, nor ordinarily used for that purpose, being adapted for the purpose of prising open doors, drawers, chests, &c., and that the intent of the prisoner was not to cut with such an instrument, but to break or lacerate the head; the case was referred to the consideration of the judges, who held the conviction right, and the prisoner was accordingly executed.

Cutting instru-
ment.

A striking over
the face with
the sharp or
claw part of a
hammer, is a
cutting within
this act.

Rex v. Atkinson, York Lent. Ass. 1806, cor. *Chambre J.*, C. C. R. 104. *Peter Atkinson* was indicted on stat. 43 G. 3. c. 58. with feloniously, wilfully, &c. striking, stabbing, and cutting *Elizabeth Stockden*, with intent, as laid in some of the counts, to kill and murder her, and in others to do her grievous bodily harm. Some of the counts charged the acts to be done with a hammer, the others generally, without mention of the instrument. The effect of *Elizabeth Stockden's* evidence was, that she and the prisoner were both servants to *Michael Scholefield*; there was no other servant in the family, and their master and mistress being from home, no one slept in the house but themselves on the night of the 22nd of September. In the morning of the 23rd, she got up about six, and having unlocked her bed-chamber door, she found the prisoner standing close to it, with his face to the door; he said he was going to kill her; he had a smallish claw hammer in his right hand, with which he struck her first over the nose. Before he struck she saw the claw distinctly, and that the blow was with the claw end of the hammer; it was sharp, and cut her nose near an inch in length, and down to the bone; the blow knocked her down; she lay upon her face; then he beat her on the right side of her head with the hammer; he kept her down with his hands without speaking to her at all; he struck her seven times on the right side of her head, and six times on her left; but whether with the claw or the other end of the hammer, she knew no otherwise than from what the surgeon told her, as she continued lying on her face; he left her lying on the landing place, where she continued a quarter of an hour, or better, from inability to rise.—The surgeon, who arrived about eight in the morning, found *Elizabeth Stockden* with a great deal of blood upon her clothes, and many wounds on her head, one near an inch long on the right side of the nose, quite to the bone; those on the head were not quite so long, but the greatest part of them went quite down to the bone. He said he could speak with certainty to twelve in number on her head; but he was not certain that they were all inflicted by the same instrument; some were simple incisions, others con-

tused and lacerated; that on the nose was a simple incision, appearing as if made by a sharp instrument. The greatest part of the wounds on the head seemed contused, but all might have been done with the same instrument by which the nose was cut. The difference might arise from the different situation of the wounds; according to the situation of the parts.—The claw of a hammer might give a wound accompanied by some contusion. A blow with the bony part of the fist, he thought, might cut in such a way as not easily to be distinguished from a simple incised wound. He observed the wounds on the head with a view to form a judgment whether they were given with a hammer, and some of them seemed as if given by the two sides of the claw of the hammer, there being a wound or cut on each side, and a space between unhurt. There were several in that state; and on comparing the extent of the parts unhurt, lying between the wounds, they seemed to correspond in size, so that the wounds had the appearance of being given by the same instrument. No hammer was found that could be ascertained to be what the prisoner had used, so that there was no opportunity of judging by inspection in what degree it was calculated to be used as a cutting instrument. It was left to the consideration of the jury, whether the wounds were given with the claw part of the hammer, and they found the prisoner guilty. Sentence was passed upon him, but execution respited, to take the opinion of the judges, whether the evidence of the nature of the wounds and of the instrument used was sufficient to bring the case within stat. 43 G. 3. c. 58. The judges held the conviction to be right, and the prisoner was executed. Vide *Hayward's case*, ante, p. 537.

N.B. Had he attempted to kill her with the blunt end of the hammer, he would have been guilty of a misdemeanor only. 4 Bl. Com. 208. (n.) edit. 1809.

The indictment charged that prisoner feloniously, &c. assaulted J. S., and, with an instrument called a bayonet, did feloniously strike and cut the said J. S., with intent, &c. It appeared in evidence, that the wound was inflicted by stabbing and not by cutting; and, on ca. res., the judges held the conviction wrong, for that as the stat. 48 G. 3. (a) uses the words, "stab or cut," in the alternative, the distinction must be attended to in the indictment. *R. v. M'Dermot*, C. C. R. 356.

Cutting is properly a wounding with an instrument having a sharp edge; stabbing is a wounding with a pointed instrument. 1 Russ. 597. See also *Johnson's Dictionary*.

In the following case, it was held that a blow with a square iron bar, which inflicted a contused or lacerated wound, was not a cutting within the act.

John Adams was tried at the O. B. Jan. Sess. 1808, before Lawrence J., on an indictment, the first count of which charged him with feloniously, wilfully, and maliciously making an assault on William Barret, and with a certain sharp instrument striking and cutting him in and upon his head, with intent to murder him, against the form of the statute. A second count charged the same facts, with intent to disable Barret; and a third, with intent to do him great bodily harm. On the evidence it appeared, that on

Atkinson's case.
Cutting instrument.

Averment of cutting, evidence of wound by stabbing; variance material.

A blow with a square iron bar, which inflicted a contused or lacerated wound, held not a cutting within the act.

Adams's case.

the 9th of June 1807, *William Barret*, the prosecutor, being the constable of *Poplar* and *Blackwall*, and *John Lee*, being the headborough, having heard that there was a riot in a street called *Noble-street*, went into that street about twelve o'clock at night, with a view of keeping the peace; that when they got there the rioters had dispersed; but observing a woman, who turned out to be the prisoner's wife, standing at an alley in that street, *Barret* told her to go home, or he should find her one; and immediately upon his saying this, the prisoner (who probably mistook him and *Lee* for some men, who, as he alleged in his defence, had been in his house that night, and treated his wife with great indecency), rushed by the woman, and with some weapon struck *Lee* two blows, the last of which knocked him down, and directly afterwards struck the prosecutor with the same weapon several blows on the head and body, pursuing him near two hundred yards, when he fell, and was there left by the prisoner senseless, with a cut, as the prosecutor expressed himself, on one side of his head, of two inches long. The weapon, as described by *Lee*, was about two feet and a half long, heavy, and sharp withal, and, as he supposed, iron, but he did not observe its shape. *Barret* described it as being about three feet long, of the same thickness throughout, and square, and from the blows he received, and its appearance, he judged it to be a square iron bar. One of the blows divided the prosecutor's hat in a straight line for about the length of an inch or more; another blow, which occasioned the wound in his head, made a dent in the hat of some length, and in some degree broke the texture of the hat, but it did not divide it; and the wound, as described by the surgeon who attended the prosecutor, was about two inches long, penetrating the integuments to the skull, and appeared to him to have been given by a blunt, and not by a sharp instrument; there being a great deal of contusion down the sides of the wound, being what the surgeons call a contused and lacerated wound, and not what is called an incised wound. There was no direct proof of any intention in the prisoner to cut the prosecutor. Under these circumstances, the learned judge directed the jury, if they believed the evidence, to find the prisoner guilty, reserving it for the opinion of the judges, whether the facts, as given in evidence, were sufficient to establish a wilful cutting within the meaning of the 43 G. 3. c. 58.; and the jury found the prisoner guilty. The judges held the conviction wrong, the wound having been inflicted, not with a sharp, but with a blunt instrument. *Rex v. Adams, O. B. Jan. Sess. 1808, MS. C. C. R.*

So also, in a case before *Dallas C. J.* and *Burton J.* at *Chester Assizes*, it was ruled, that a blow with the handle of a windlass was not a cutting within the act, though it made an incision. *Anon. 5 Ev. Col. Stat., part v. c. 4. p. 334. note (2.)*

9 G. 4. c. 31.
"stab, cut, or
wound."

It is to be remarked, with reference to the foregoing decisions, that the importance of them is now in a great measure superseded, as the stat. 9 G. 4. c. 31. uses the terms "stab, cut, or wound;" whereas the two first of these only are to be found in 43 G. 3. c. 58. See, however, *R. v. Wood and another, p. 542.*, and the following cases.

Cutting with
intent to do
grievous bodily
harm.

What shall be considered a cutting with intent to do some grievous bodily harm.] An extraordinary and shocking case was tried before *Graham B.* at *Chelmsford Lent Ass. 1818.* The

prisoner was indicted on Lord *Ellenborough's* act. The only count to which the evidence applied was, that with a sharp instrument he feloniously and maliciously did cut *Mary Evans* upon her private parts, with intent in so doing to do her a grievous bodily harm. The fact of cutting, as charged, was proved by the evidence of *Mary Evans*, an intelligent girl of ten years of age; in which she was corroborated by the testimony of her mother and the surgeon who had examined her. — The learned judge told the jury, that they were to consider whether this was not a grievous bodily injury to the child, though eventually not dangerous; that such it seemed to him; and as to the intent (though meant a rape), he did that which the law made a distinct crime, viz. intentionally to do the child a grievous bodily harm. He was not the less guilty of that crime, because his principal object was another. That the intention might be inferred from the act itself. The jury found the prisoner guilty, but sentence was respited, to take the opinion of the judges, all of whom held the conviction right. *R. v. Cox*, C. C. R. 362.

Cox's case.

N. B. At the following assizes the prisoner received sentence of death, and was left for execution. On 30th *July* following, he was respited till the 14th of *August*; and ultimately he was ordered to be imprisoned two years in the house of correction.

R. v. Akenhead, Northumberland Summer Ass. 1816, cor. Bayley J., Holt's Rep. 469. The prisoner was indicted on stat. 43 G. 3. c. 58. The circumstances were these: — The prosecutor and some other men had got hold of a woman, who, as they conceived, had been using another person ill. They said that she deserved to be ducked in a trough which was near; but it did not appear that such was their intention. The prisoner, who was at some distance at the time, on being informed that they were using the woman ill, exclaimed, "I have got a good knife," and immediately rushed to the place where she was. He entered among the crowd, and instantly struck the prosecutor on the shoulder with a knife. The prosecutor turned round upon him; a struggle ensued between them, and in that struggle the prosecutor received other wounds. After they had fought for some time, the prisoner dropped the knife and ran away. The wound upon the prosecutor's shoulder was about seven inches long, and two deep; and the lap of one of his ears was cut. There was likewise a slight wound on the gland of his neck, and a cut on his left arm. The indictment contained counts — first, for an intent to murder, &c.; and, second, to maim, disfigure, and disable; third, and do some other grievous bodily harm. *Williams*, for the prisoner, objected; — First, that the first and second counts in the indictment were not supported by the evidence. The only question was upon the third count; did the prisoner mean to do some "other grievous bodily harm" to the prosecutor? He submitted that the wounds were not of that nature from which grievous bodily harm could ensue. It was a scuffle, in which a knife was used accidentally, without any settled design to "maim, disfigure, or disable," or to do "other grievous bodily harm" to the prosecutor. Secondly, the wounds were not inflicted in a part of the body which could produce such a consequence. *Bayley J.* entertained some doubts on the circumstances; the wounds were not in a vital part; and *quære*, whether the injury done was a grievous bodily harm contemplated by the act? Had

In an indictment on stat. 43 G. 3. c. 58, semble, that the words, "some other grievous bodily harm," must be construed to extend to such wounds only as are inflicted upon a vital part of the body.

death ensued, would it have been more than manslaughter? And was not this limit clearly understood throughout the act? His lordship directed an acquittal, under all the circumstances of the case.

The wound must be such as to break the skin.

In a case where the prosecutor suffered grievous bodily injury from the prisoners, by being beaten with an iron bar and hammer, it was held not to be a wound within the meaning of 9 G. 4., on account of the continuity of the skin not being broken. *R. v. Wood and another*, 1 M. 278.

Such wound inflicted by a hammer will be within the stat.

But where the prosecutor was severely wounded by a hammer, which was thrown at him, and divided the skin, and caused an effusion of blood, it was held to be within the statute, and that the prisoner was properly convicted. *R. v. Withers*, 1 M. 294.

Wound from a kick with a shoe is within the stat.

A wound from a kick with a shoe will be within the act, *Tr. T. 1831, MS. Bayley B.* A wound from a shoe in the hand would be within the act, and a blow from a shoe on the foot would be likely to inflict a more deadly wound than a blow from a shoe in the hand. *Per* *Ld. Tenterden, ib.*

Means or instrument of the wound need not be stated.

On an indictment for wounding with intent to kill, &c., the instrument or means by which the wound was inflicted need not be stated, and though stated, do not confine the prosecutor to prove a wound by such means.

Averment of a wound by striking and kicking; proof of either sufficient.

On an indictment which charges the wound to have been inflicted by striking with a stick and kicking with the feet, proof that the wound was caused either by a blow from a stick or from a kick will be sufficient, though it be uncertain by which of the two it was. *Ibid.*

Person wounded had been both struck and kicked.

Indictment on 9 G. 4. charged that the prisoners, with a certain stick and with their feet, did strike, kick, and wound *W. L.*, with intent, &c. It appeared in evidence that the prisoners struck him with a hedge-stake, or half a rail, and kicked him, and that the wound was occasioned either by a blow from a stick or by a kick from a heavy shoe, but the witnesses could not say which. On case, the judges (*Patteson J.* alone absent) held, that the means by which the wound was inflicted need not have been stated; that it was surplusage to state them; that the evidence did not confine the crown to the means stated, but might be rejected as surplusage; and that, whether the wound was from a blow with a stick or a kick from a shoe, the indictment was equally supported. Conviction right. *Tr. T. 1831, R. v. Briggs, MS. Bayley B. S. C. 1 M. 318.*

Averment of means of wounding surplusage.

N. B. The wounds were such that prosecutor was covered with blood, his mouth was cut, and the membrane of his skull laid bare.

Biting off a finger not a wounding within the stat.

The prisoner having been convicted at the *Old Bailey* in April 1834, on an indictment for feloniously and maliciously assaulting *G. A.*, and feloniously and maliciously wounding him, by biting off the end of the second finger of the left hand, with intent (1st count) to maim; (2d) to disfigure; (3d) to do some grievous bodily harm. A doubt having arisen whether this was a wounding within the meaning of the statute, on case reserved it was the opinion of seven judges against six that the conviction was wrong. *E. T. 1834, R. v. John Stevens, MS.*

Intent must be laid.

It is necessary that the indictment should allege the intent with which the defendant inflicted the personal injury with which he is charged. 1 *Russ.* 598.

But though the intent laid is that of doing grievous bodily harm, and it appears that the prisoner's main intent was to prevent his lawful apprehension, yet he may be convicted, if, in order to effect such latter intent, he also intended to do grievous bodily harm. 1 *Russ.* 599.

Where a poacher fired at one of three keepers, who were advancing to seize him, and the jury thought his motive was to prevent his being apprehended, but that, in order to effect that purpose, he had also the intention of doing some grievous bodily harm, it was held, that he was properly convicted on an indictment, laying the intent to be that of doing grievous bodily harm. *R. v. Gillow*, 1 *R. & M.* 85.

Where the intent charged is that of obstructing a lawful apprehension, it must appear that resistance was made to a person having lawful authority to apprehend the prisoner. *R. v. Dyson*, *cit.* 1 *Russ.* 600.

Where the prisoner was detected in the night attempting to commit a felony, it was held, he might lawfully be detained without a warrant, till he could be carried before a magistrate. *R. v. Hunt*, 1 *R. & M.* 93. 1 *Russ.* 601.

So, if the injury is inflicted with the intent to do grievous bodily harm, it is immaterial whether grievous bodily harm be or be not done. *S. C. ibid.*

It was also held, that to constitute this offence, general malice is sufficient, and that it is not necessary to shew particular malice against the individual. *S. C. ibid.*

Killing an officer who attempts to arrest a man will be murder, though the officer has no warrant, and though the man has done nothing for which he is liable to be arrested, if the officer has a charge against him for felony, and he knows the individual to be an officer, though the officer do not notify to him that he has such a charge. *E. T.* 1832, *Bayley B. MS.*

Prisoners attempted to push *J. S.* into a ditch: shortly afterwards, *J. S.* saw *A.*, a watchman, and told him they had attempted to rob him. *J. S.* and *A.* followed them, and *J. S.* said to *A.* "That's them:" prisoners were near enough to have heard. They had not, in fact, attempted to rob *J. S.* *A.* addressed the prisoners, "You must come back and go along with me:" he did not say why, or say he had any charge: he was at the time beyond the limits in which he was watchman. One prisoner, *W.*, drew a sharp instrument, and said, "Keep off." *A.* repeated, "It's of no use; you must go back." The prisoner *W.* made a spring at *A.*, and caught one of the skirts of his coat: *A.* pulled out his staff, and turned at the prisoners, and they came at him. He struck at *W.* with his staff, and hit him: *W.* immediately stabbed *A.*, and the other prisoner struck at him with another knife. On indictment *inde* for stabbing, with intent to do grievous bodily harm, it appeared that the prisoners knew *A.* was a watchman; and upon conviction and case, the question was, whether, as prisoners had done nothing to warrant their arrest, *A.* could legally attempt to arrest them without saying they had a charge of robbery against them; and nine judges, against *Bayley*, *Park*, *Littledale*, and *Bosanquet*, held he might, and that had death ensued it would have been murder. *E. T.* 1832, *R. v. Woolmer*, *MS.* *Bayley B. S. C.* 1 *M.* 334.

Main intent to prevent being apprehended, but by means of doing bodily harm, such latter intent may be laid.

There must be lawful authority to apprehend.

Person attempting a felony by night may be detained.

Sufficient if there be intent to do bodily harm.

General malice sufficient.

Charge of felony made, though none had been committed.

Officer wounded in arresting out of his limits, without declaring the charge, by a person who knew him to be an officer.

Case within the statute.

Charge for maliciously cutting to prevent lawful apprehension.

Question of warrant continuing in force.

Indictment pursuing the words of the statute sufficient.

Malicious cutting to prevent lawful apprehension.

Prisoner using unlawful games at a fair, apprehended some hours afterwards without warrant: Held not fresh pursuit.

It is not an offence within 43 G. 3. c. 58. against maliciously cutting, with intent to resist lawful apprehension, if the cutting took place in an attempt to apprehend the prisoner previous to notification to him of the purpose for which he was laid hold of.

Prisoner was indicted for maliciously cutting and wounding, with intent to resist his being lawfully apprehended for a certain offence, for which "he was then and there liable to be apprehended, by, &c., viz. for that on, &c. he violently assaulted and beat one A.B." It appeared that prisoner, being apprehended on a warrant for an assault, and carried before two magistrates, refused to find bail, and while his commitment was making out, made his escape: upon which the prosecutor (being the person who had taken the prisoner into custody) was ordered verbally by the magistrates, through their clerk, to go after the prisoner, which he did; and on attempting to retake him, the prisoner cut him with a knife in the hand and arm. It was objected, that the warrant for the assault was *functus officio*, and that the second apprehension was for the escape. It was also objected that the count was bad, as it did not follow that the prisoner was liable to be apprehended for assaulting and beating A.B. The judges held unanimously that the prosecutor had power to arrest upon the original warrant; and, secondly, that the count was good, the words of the stat. being sufficiently pursued (a), and that all after the viz. might be considered surplusage. Conviction right. *M. T. 1833, R. v. Robt. Williams, cor. Gaselee J., Denb. Sum. Ass. 1833. MS.*

Charge for maliciously cutting, with intent to resist lawful apprehension. Prisoner, with several others in his company, was playing at thimble-rig in a fair, between two and four p.m., and a constable, who had orders to take up persons so employed, endeavoured to apprehend him, and took one of them, but the prisoner and the others rescued him. The constable saw nothing more of the prisoner till nine at night, when he found him at a public-house, and trying to apprehend him, the prisoner cut him, &c. By Vagrant Act, 5 G. 4. c. 83. § 4., prisoner was a rogue and vagabond, and § 6. authorises any person whatever to apprehend any person who shall be found offending, &c. The question reserved was, whether the constable had power to apprehend without warrant, and whether it was fresh pursuit: the judges held unanimously that it was not fresh pursuit, and a pardon was recommended. *M. T. 1833, R. v. W. Gardener, cor. Bosanquet J. Glamorgan Sum. Ass. 1833. MS. R. v. Howarth, 1 R. & M. 207. Hanway v. Bolton, 2 Mann. 15.*

R. v. Ricketts, Worcester Sum. Ass. 1811, cor. Lawrence J. 3 Campb. 68. Indictment on stat. 43 G. 3. c. 58., for maliciously cutting one Webb, with intent to obstruct, resist, and prevent the lawful apprehension and detainer of the prisoner. The prisoner stole some wheat, which was soon after found concealed in a field. Webb watched near the place, and on the prisoner's coming and taking up the bag containing the wheat, pursued and seized him, without desiring him to surrender, or stating for what reason he was apprehended. A scuffle ensued, during which, before Webb had spoken, the prisoner drew a knife, and cut him across the throat. — *Lawrence J.* As Webb did not communicate to the prisoner the purpose for which he seized him, this case does not come within the statute. If death had ensued, it would only have been manslaughter. Had a proper notification been made before the cutting, the case would have assumed a different com-

plexion. The prisoner must be acquitted upon this indictment. (a)

Where a constable took prisoner into custody on a person's complaining to him verbally that prisoner had misused him, and charged J. S. to assist in taking him before a justice, and afterwards, in proceeding along towards the justice's, the prisoner tried to escape, and J. S. pursued, and in attempting to take hold of him was cut by him in the face with a knife, prisoner was indicted, on 43 G. 3., for maliciously cutting with intent to prevent lawful apprehension. On ca. res., the judges were of opinion, that as the original arrest was unlawful, the recaption would have been so too; wherefore it would not have been murder if death had ensued; and consequently, that on this indictment prisoner was entitled to an acquittal. *E. T. 1826, R. v. Curvan, 1 R. & M. 132.*

Illegal apprehension and retaking upon escape by constable's assistant.

Prisoner being discovered in a shop which he had broken into, the watchman endeavoured to apprehend him, on which prisoner struck him some severe blows with a crow-bar, which cut and maimed him; the jury convicted him, and found that he wounded the watchman with intent to disable him till he could escape. On ca. res., the judges held the conviction wrong, as it appeared the prisoner intended only to produce a temporary disability, not a permanent one. The indictment was on 43 G. 3., laying the intent to murder, maim, and disable. *Tr. T. 1824, R. v. Boyce, 1 R. & M. 29.*

Intent to disable for a time, not permanently.

Prosecutor, a gamekeeper, was out with his brother, an assistant, to look after poachers, and they heard some guns fired in a neighbouring wood. Shortly afterwards, they saw the four prisoners walking in a road, one of whom had a gun, and prosecutor spoke to them for being out killing game, but used no threats, and prosecutor's brother took hold of the gun which was in the hands of one of the men, but no violence ensued between them. The place where they were was not within the manor of prosecutor's master. Shortly afterwards, the prosecutor was violently beaten, and his leg cut; and the prisoners being indicted on 9 G. 4. c. 31., a case was reserved, after conviction, and the judges were of opinion that the circumstances were not such as would have made it manslaughter if death had ensued, and consequently that the conviction was right. *E. T. 1833, R. v. Warner and others, 1 M. 380.*

Provocation given by gamekeepers to poachers.

Where the prisoner was indicted under 43 G. 3. c. 58. (now repealed), which made it capital "to administer to, or cause to be administered to, or to be taken by any one, any deadly poison," &c. and it appeared that he gave A., a woman by whom he had had a child, a poisoned cake, and urged her to eat it, and she put a

Administering poison: a mere delivery does not constitute.

(a) Mr. Campbell adds, in a note, — But if a constable, acting within his district where he is generally known, produces his staff of office, the law will presume that the party to be apprehended had due notice of his intent, without a verbal justification. *Gordon's case, 1 East's P. C. 815.* And it is sufficient for a constable to say he arrests in the king's name. *1 Hale, 583.* Where it appears that the party knows the officer and his business, the law requires no express notice to be given. Thus, where Pew drew his sword on a bailiff who came to arrest him, and said, "Stand off, I know you well enough: come at your peril," and upon the bailiff's immediately taking hold of him, without using words of arrest, or showing any warrant, Pew killed him, this was holden to be murder. *Pew's case, Cro. Car. 183.*

piece of it in her mouth, but did not swallow it: after conviction, on ca. res., the judges were of opinion that the delivery to the woman did not constitute an administering within the statute, and a pardon was recommended. *R. v. Cadman*, 1 R. & M. 114.

Aider and abetter; indictment need not state that he was feloniously present, &c.

In a prosecution under 43 G. 3. prisoner was convicted on a count charging that an unknown person feloniously, &c. shot at prosecutor, and that prisoner and two others were then and there present, aiding and abetting. An objection was taken that the indictment was defective, on account of its omitting to state that the prisoner was feloniously, &c. present, &c., and the point was reserved for the consideration of the judges: the judges were all of opinion that the conviction was right. *M. T. 1816, R. v. Towle*, C. C. R. 314. 1 Russ. 603.

9 G. 4. c. 31. Arresting a clergyman during divine service.

By 9 G. 4. c. 31. § 23. "If any person shall arrest any clergyman upon civil process, while he shall be performing divine service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall suffer such punishment, by fine or imprisonment, or by both, as the court shall award."

Punishment for assaults on officers, &c. for their endeavours to save shipwrecked property.

§ 24. "If any person shall assault and strike or wound any magistrate, officer, or other person whatsoever lawfully authorised, on account of the exercise of his duty, in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, every such offender, being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the court shall award."

Assaults with intent to commit felony; assaults on peace officers; or to prevent the arrest of offenders; or in pursuance of a conspiracy to raise wages; punishable with hard labour.

§ 25. "Where any person shall be charged with, and convicted of, any of the following offences as misdemeanors; that is to say, of any assault with intent to commit felony; of any assault upon any peace officer or revenue officer in the due execution of his duty, or upon any person acting in aid of such officer; of any assault upon any person, with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person, for any offence for which he or they may be liable by law to be apprehended or detained; or of any assault committed in pursuance of any conspiracy to raise the rate of wages; in any such case the court may sentence the offender to be imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years, and may also (if it shall so think fit) fine the offender, and require him to find sureties for keeping the peace."

Assault on any seaman, &c. to prevent him from working; assault with intent to obstruct the buying or selling of grain, or its free passage, punishable before two magis-

§ 26. "If any person shall unlawfully and with force hinder any seaman, keelman, or caster from working at or exercising his lawful trade, business, or occupation, or shall beat, wound, or use any other violence to him, with intent to deter or hinder him from working at or exercising the same; or if any person shall beat, wound, or use any other violence to any person, with intent to deter or hinder him from selling or buying any wheat or other grain, flour, meal, or malt, in any market or other place, or shall beat, wound, or use any other violence to any person having the care or charge of any wheat or other grain, flour, meal, or malt,

whilst on its way to or from any city, market town, or other place, with intent to stop the conveyance of the same, every such offender may be convicted thereof before two justices of the peace, and imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding three calendar months: Provided always, that no person, who shall be punished for any such offence by virtue of this provision, shall be punished for the same offence by virtue of any other law whatsoever."

§ 27. "Whereas it is expedient that a summary power of punishing persons for common assaults and batteries should be provided under the limitations herein-after mentioned; be it therefore enacted, that where any person shall unlawfully assault or beat any other person, it shall be lawful for two justices of the peace, upon complaint of the party aggrieved, to hear and determine such offence, and the offender, upon conviction thereof before them, shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of 5*l.*, which fine shall be paid to some one of the overseers of the poor, or to some other officer of the parish, township, or place in which the offence shall have been committed, to be by such overseer or officer paid over to the use of the general rate of the county, riding, or division in which such parish, township, or place shall be situate, whether the same shall or shall not contribute to such general rate; and the evidence of any inhabitant of the county, riding, or division shall be admitted in proof of the offence, notwithstanding such application of the fine incurred thereby: and if such fine as shall be awarded by the said justices, together with the costs (if ordered), shall not be paid, either immediately after the conviction, or within such period as the said justices shall at the time of the conviction appoint, it shall be lawful for them to commit the offender to the common gaol or house of correction, where to be imprisoned for any term not exceeding two calendar months, unless such fine and costs be sooner paid; but if the justices, upon the hearing of any such case of assault or battery, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands, stating the act of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred."

§ 28. "If any person against whom any such complaint shall have been preferred for any common assault or battery, shall have obtained such certificate as aforesaid, or having been convicted shall have paid the whole amount adjudged to be paid under such conviction, or shall have suffered the imprisonment awarded for nonpayment thereof, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

§ 29. "In case the justices shall find the assault or battery committed of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as they would have done before the passing of this act: Provided also, that nothing

9 G. 4. c. 31.

trates, with imprisonment, not exceeding three months.

Persons committing any common assault or battery may be compelled by two magistrates to pay fine and costs, not exceeding 5*l.*

Application of the fine.

Commitment on nonpayment.

If the magistrates dismiss the complaint, they shall make out a certificate to that effect.

Such certificate on conviction shall be a bar to any other proceedings.

These provisions not to apply where there has been an attempt to commit a felony, nor to cases fit for indictment.

9 G. 4. c. 31.

Justices not to interfere in title to land, or in bankruptcy or insolvency, or judicial process.

Provision for offences against this act punishable on summary conviction.

Limitation of time for summary proceedings.

Form of conviction.

herein contained shall authorise any justices of the peace to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice."

§ 33. "Where any person shall be charged on the oath of a credible witness before any justice of the peace with any such offence, the justice may summon the person charged to appear before any two justices of the peace at a time and place to be named in such summons, and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person by delivering the same to him) the justices may either proceed to hear and determine the case *ex parte*, or may issue their warrant for apprehending such person and bringing him before them; or the justice before whom the charge shall be made may (if he shall so think fit) issue such warrant in the first instance, without any previous summons."

§ 34. provides and enacts, "That the prosecution for every offence punishable on summary conviction by virtue of this act shall be commenced within three calendar months after the commission of the offence, and not otherwise."

§ 35. "The justices before whom any person shall be summarily convicted of any offence against this act may cause the conviction to be drawn up in the following form of words, or in any other form of words to the same effect as the case shall require, that is to say:—

"**BE** it remembered, that on the — day of —, in the year of our Lord —, at —, in the county of —, [or, riding, division, liberty, city, &c., as the case may be,] *A. O.* is convicted before us [naming the justices], two of his majesty's justices of the peace for the said county, [or, riding, &c.] for that he the said *A. O.* did [specify the offence, and the time and place when and where the same was committed, as the case may be]; and we, the said justices, adjudge the said *A. O.* for his said offence to be imprisoned in the —, and there kept to hard labour, for the space of —, [or, we adjudge the said *A. O.* for his said offence to forfeit and pay the sum of] [here state the amount of the fine imposed,] and also to pay the sum of — for costs; and, in default of immediate payment of the said sums, to be imprisoned in the — for the space of —, unless the said sums shall be sooner paid [or, and we order that the said sums shall be paid by the said *A. O.* on or before the — day of —]; and we direct that the said sum of — [i.e. the amount of the fine] shall be paid to —, of — aforesaid, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; and we order that the said sum of — for costs shall be paid to *C. D.* [the party aggrieved.] Given under our hands the day and year first above mentioned."

No certiorari.

§ 36. "No such conviction shall be quashed for want of form, or be removed by *certiorari*, or otherwise, into any of his majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein

alleged that the party has been convicted, and there be a good and valid conviction to sustain the same."

§ 37. Nothing in this act contained shall affect or alter any act so far as it relates to the crime of high treason, or to any branch of the public revenue, or shall affect or alter any act for the prevention of smuggling, or any part of the act passed in the sixth year of the present reign, intituled "An Act to repeal the laws relating to the combination of workmen," &c. (6 G. 4. c. 129.)

The 38th section provides that the act shall not extend to Scotland or Ireland.

See further, tit. Arrest, tit. Game, and tit. Homicide.

Not to affect any act as to treason, smuggling, or the combination of workmen.

Act not to extend to Scotland or Ireland.

II. Malicious Injuries to Property.

For many offences comprised in this definition, the reader is referred to the following titles, among others, **Burning, Cattle, Fish, Riot, Ships, Trespasses, Wreck.**

By 7 & 8 G. 4. c. 30. § 3., "If any person shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy or to render useless, any goods or article of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any frame-work-knitted piece, stocking, hose, or lace, respectively, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process, or progress of manufacture; or shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, or cotton, or of any one or more of those materials mixed with each other, or mixed with any other material, or any loom, frame, machine, engine, rack, tackle, or implement, whether fixed or moveable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles; or shall, by force, enter into any house, shop, building, or place, with intent to commit any of the offences aforesaid, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

By indictment on 28 G. 3. c. 55. § 4., prisoner was charged with feloniously entering, by force, into a shop, and feloniously damaging a frame used for the working and making of stockings. It was proved that prisoner with others entered the shop and there unscrewed and took away part of a frame, which made the frame useless for the time, but which could easily have been replaced as before. On ca. res., the judges were unanimous, that by so taking away a part of the frame, the frame was damaged within the meaning of the act, and the conviction right. *R. v. Tacey*, C. C. R. 452.

7 & 8 G. 4. c. 30. Destroying goods of silk, cotton, &c. in process of manufacture.

Destroying machinery used in manufacturing.

Forcibly entering buildings with such intent.

Felony. Punishment.

Frame damaged by taking away part, though it might have been replaced without injury.

7 & 8 G. 4. c. 30.

Destroying machines, &c. not included in the foregoing.

Felony.

Punishment.

Destroying any sea bank, &c. or works on any river or canal.

Removing the piles of any sea bank, &c. or doing any damage to obstruct the navigation of a river or canal.

Injury to a public bridge.

Destroying a turnpike gate, toll house, &c.

§ 4. "If any person shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy or to render useless, any threshing machine, or any machine or engine, whether fixed or moveable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, or cotton goods, or goods of any one or more of those materials, mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace), every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

§ 12. "If any person shall unlawfully and maliciously break down or cut down any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or shall unlawfully and maliciously throw down, level, or otherwise destroy any lock, sluice, floodgate, or other work on any navigable river or canal, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment; and if any person shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground and used for securing any sea bank or sea wall, or the bank or wall of any river, canal, or marsh, or shall unlawfully and maliciously open or draw up any floodgate, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

§ 13. "If any person shall unlawfully and maliciously pull down or in anywise destroy any public bridge, or do any injury with intent and so as thereby to render such bridge or any part thereof dangerous or impassable, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

§ 14. "If any person shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike gate, or any wall, chain, rail, post, bar, or other fence belonging to any turnpike gate, or set up or erected to prevent passengers

passing by without paying any toll directed to be paid by any act or acts of parliament relating thereto, or any house, building, or weighing engine erected for the better collection, ascertainment, or security of any such toll, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be punished accordingly."

7 & 8 G. 4. c. 90.

§ 15. "If any person shall unlawfully and maliciously break down or otherwise destroy the dam of any fishpond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish therein, or shall unlawfully and maliciously break down or otherwise destroy the dam of any millpond, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

Breaking down the dam of a fishery, &c. or mill dam.

§ 18. "If any person shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

Destroying hopbinds.
Felony.

Punishment.

§ 19. "If any person shall unlawfully and maliciously cut (a), break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood respectively growing in any park, pleasure-ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the amount of the injury done shall exceed the sum of 1*l*.) shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment; and if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations herein-before mentioned, every such offender (in case the amount of the injury done shall exceed the sum of 5*l*.) shall be guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the court may award for the felony herein-before last mentioned."

Destroying or damaging trees, shrubs, &c. growing in certain situations, shall be felony, if the value exceed 1*l*.

Punishment.

The like to trees, shrubs, &c. growing elsewhere, shall be felony, if the value exceeds 5*l*.

Punishment.

(a) See *Mills v. Collett*, post, p. 559.

7 & 8 G. 4. c. 30.

Destroying or damaging trees, shrubs, &c. wheresoever growing, and of any value above 1s. punishable on summary conviction for first and second offence; third offence, felony.

Destroying, &c. any fruit or vegetable production in a garden, &c. punishable on summary conviction for first offence; second offence, felony.

Destroying vegetables, &c. not in gardens.

First offence.

Second offence.

§ 20. "If any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of 1s. at the least, every such offender, being convicted before a justice of the peace, shall, for the first offence, forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding 5*l.*, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall, for such second offence, be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the court may award for the felony herein-before last mentioned."

§ 21. "If any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hot-house, green-house, or conservatory, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding six calendar months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding 20*l.*, as to the justice shall seem meet; and if any person so convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the court may award for the felony herein-before last mentioned."

§ 22. "If any person shall unlawfully and maliciously destroy, or damage with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, or nursery ground, every such offender, being convicted thereof before a justice of the peace, shall, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, for any term not exceeding one calendar month, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding 20*s.*, as to the justice shall seem meet; and, in default of payment thereof, together with the costs, if ordered, shall be committed as aforesaid for any term not exceeding one calendar month, unless payment be sooner made; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender

shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding six calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction." 7 & 8 G. 4. c. 30.

§ 23. "If any person shall unlawfully and maliciously cut, break, throw down, or in anywise destroy, any fence of any description whatsoever, or any wall, stile, or gate, or any part thereof respectively, every such offender, being convicted before a justice of the peace, shall, for the first offence, forfeit and pay, over and above the amount of the injury done, such sum of money, not exceeding 5*l.*, as to the justice shall seem meet; and if any person so convicted shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall be committed to the common gaol or house of correction, there to be kept to hard labour for such term, not exceeding twelve calendar months, as the convicting justice shall think fit; and if such subsequent conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped, after the expiration of four days from the time of such conviction."

Destroying fences, &c.

First offence.

Second offence.

§ 24. "If any person shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment is herein-before provided, every such person, being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of 5*l.*; which sum of money shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence; and in such case, or in the case of property of a public nature, or wherein any public right is concerned, the money shall be applied in such manner as every penalty imposed by a justice of the peace under this act, is herein-after directed to be applied; and if such sum of money, together with costs (if ordered), shall not be paid either immediately after the conviction, or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, as the justice shall think fit, for any term not exceeding two calendar months, unless such sum and costs be sooner paid: Provided always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, nor to any trespass, not being wilful and malicious, committed in hunting, fishing, or in the pursuit of game; but that every such trespass shall be punishable in the same manner as before the passing of this act."

Malicious trespasses in general, not before provided against.

Conviction.

Penalty.

Commitment.

Hard labour.

Proviso.

Claims of right.

Trespasses in hunting, fishing, or sporting.

§ 25. "Every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall Malice against the owner not necessary.

7 & 8 G. 4. c. 90.

Punishment of
accessaries be-
fore the fact, and
aiders and abet-
tors in felony.

Accessaries
after the fact.

Misdemeanor.

Solitary con-
finement.

Persons in the
act of commit-
ting any offence
may be appre-
hended without
a warrant.

Limitation of
summary pro-
ceedings.

Competency of
witnesses.

Process by
summons and
warrant.

equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise."

§ 26. "In the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable with death or otherwise, in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act, shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act, shall be liable to be indicted and punished as a principal offender."

§ 27. "Where any person shall be convicted of any indictable offence punishable under this act, for which imprisonment may be awarded, it shall be lawful for the court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labour, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labour, as to the court in its discretion shall seem meet."

§ 28. "For the more effectual apprehension of all offenders against this act, any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace to be dealt with according to law."

§ 29. "The prosecution for every offence punishable on summary conviction under this act shall be commenced within three calendar months after the commission of the offence, and not otherwise; and the evidence of the party aggrieved shall be admitted in proof of the offence, and also the evidence of any inhabitant of the county, riding, or division in which the offence shall have been committed, notwithstanding any forfeiture or penalty incurred by the offence may be payable to the general rate of such county, riding, or division."

§ 30. "For the more effectual prosecution of all offences punishable on summary conviction under this act, where any person shall be charged on the oath of a credible witness before any justice of the peace with any such offence, the justice may summon the person charged to appear at a time and place to be named in such summons; and if he shall not appear accordingly, then (upon proof of the due service of the summons upon such person, by delivering the same to him personally, or by leaving the same at his usual place of abode), the justice may either proceed to hear and determine the case *ex parte*, or issue his warrant for apprehending such person and bringing him before himself or some other justice of the peace; or the justice before whom the charge shall be made may (if he shall so think fit), without any previous summons (unless where otherwise specially directed), issue such warrant; and the justice before whom the person charged shall appear or be brought, shall proceed to hear and determine the case."

§ 31. "Where any offence is by this act punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, any person who shall aid, abet, counsel, or procure the commission of such offence, shall, on conviction before a justice of the peace, be liable, on every first, second, or subsequent offence of aiding, abetting, counselling, or procuring, to the same forfeiture and punishment which a person guilty of a first, second, or subsequent offence as a principal offender is by this act made liable." See tit. Accessory.

7 & 8 G. 4. c. 30.

Aiders and abettors in offences punishable on summary conviction.

§ 32. "With regard to the application of all forfeitures and penalties upon summary convictions under this act, every sum of money which shall be forfeited for the amount of any injury done (such amount to be assessed in each case by the convicting justice), shall be paid to the party aggrieved, if known, except where such party shall have been examined in proof of the offence; and in that case, or where the party aggrieved is unknown, such sum shall be applied in the same manner as a penalty; and every sum which shall be imposed as a penalty by any justice of the peace, whether in addition to such amount or otherwise, shall be paid to some one of the overseers of the poor, or to some other officer (as the justice may direct) of the parish, township, or place in which the offence shall have been committed, to be by each overseer or officer paid over to the use of the general rate of the county, riding, or division in which such parish, township, or place shall be situate, whether the same shall or shall not contribute to such general rate: Provided always, that where several persons shall join in the commission of the same offence, and shall, upon conviction thereof, each be adjudged to forfeit a sum equivalent to the amount of the injury done, in every such case, no further sum shall be paid to the party aggrieved than that which shall be forfeited by one of such offenders only; and the corresponding sum or sums forfeited by the other offender or offenders shall be applied in the same manner as any penalty imposed by a justice of the peace is herein-before directed to be applied."

Application of penalties.

Proviso.

§ 33. "In every case of a summary conviction under this act, where the sum which shall be forfeited for the amount of the injury done, or which shall be imposed as a penalty by the justice, shall not be paid, either immediately after the conviction, or within such period as the justice shall, at the time of the conviction, appoint, it shall be lawful for the convicting justice (unless where otherwise specially directed) to commit the offender to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion of the justice, for any term not exceeding two calendar months, where the amount of the sum forfeited, or of the penalty imposed, or of both (as the case may be), together with the costs, shall not exceed 5*l.*; and for any term not exceeding four calendar months, where the amount, with costs, shall not exceed 10*l.*; and for any term not exceeding six calendar months in any other case; the commitment to be determinable in each of the cases aforesaid upon payment of the amount and costs."

Persons convicted not paying sums forfeited.

Scale of imprisonment.

§ 34. Provided "that where any person shall be summarily convicted before a justice of the peace of any offence against this act, and it shall be a first conviction, it shall be lawful for the

Where the justice may discharge the party.

7 & 8 G. 4. c. 30.

justice, if he shall so think fit, to discharge the offender from his conviction, upon his making such satisfaction to the party aggrieved, for damages and costs, or either of them, as shall be ascertained by the justice."

The king may
pardon.

§ 35. "It shall be lawful for the king's majesty to extend his royal mercy to any person imprisoned by virtue of this act, although he shall be imprisoned for nonpayment of money to some party other than the crown."

Summary con-
viction, a bar to
other proceed-
ings.

§ 36. "In case any person convicted of any offence punishable upon summary conviction, by virtue of this act, shall have paid the sum adjudged to be paid, together with costs, under such conviction, or shall have received a remission thereof from the crown, or shall have suffered the imprisonment awarded for non-payment thereof, or the imprisonment adjudged in the first instance, or shall have been discharged from his conviction in the manner aforesaid, in every such case he shall be released from all further or other proceedings for the same cause."

Form of convic-
tion.

§ 37. "The justice before whom any person shall be convicted of any offence against this act, may cause the conviction to be drawn up in the following form of words, or in any other form of words to the same effect, as the case shall require; viz.

"BE it remembered, That on the — day of —, in the year of our Lord —, at —, in the county of —, [or riding, division, liberty, city, &c., as the case may be], A. O. is convicted before me, J. P., one of his majesty's justices of the peace for the said county, [or, riding, &c.], for that he, the said A. O., did [specify the offence, and the time and place when and where the same was committed, as the case may be; and, on a second conviction, state the first conviction]; and I, the said J. P., adjudge the said A. O. for his said offence to be imprisoned in the —, [or, to be imprisoned in the —, and there kept to hard labour], for the space of —; [or, I adjudge the said A. O. for his said offence to forfeit and pay —, [here state the penalty actually imposed, or state the penalty and also the amount of the injury done, as the case may be], and also to pay the sum of — for costs; and, in default of immediate payment of the said sums, to be imprisoned in the —, [or, to be imprisoned in the —, and there kept to hard labour] for the space of —, unless the said sum shall be sooner paid [or, and I order that the said sums shall be paid by the said A. O. on or before the — day of —]; and I direct that the said sum of — [i. e. the penalty only] shall be paid to —, of — aforesaid, in which the said offence was committed, to be by him applied according to the directions of the statute in that case made and provided; [or, that the said sum of —, [i. e. the penalty] shall be paid to, &c. as before], and that the said sum of —, [i. e. the sum for the amount of the injury done] shall be paid to C. D. [the party aggrieved, unless he is unknown, or has been examined in proof of the offence, in which case state that fact, and dispose of the whole like the penalty, as before]; and I order that the said sum of — for costs shall be paid to —, [the complainant]. Given under my hand and seal, the day and year first above mentioned."

§ 38. "In all cases where the sum adjudged to be paid on any summary conviction shall exceed 5*l.*, or the imprisonment adjudged shall exceed one calendar month, or the conviction shall take place before one justice only, any person who shall think himself aggrieved by any such conviction may appeal to the next court of general or quarter sessions, which shall be holden not less than twelve days after the day of such conviction, for the county, riding, or division wherein the cause of complaint shall have arisen; provided that such person shall give to the complainant a notice in writing of such appeal, and of the cause and matter thereof, within three days after such conviction, and seven clear days at the least before such sessions, and shall also either remain in custody until the sessions, or enter into a recognizance with two sufficient sureties before a justice of the peace, conditioned personally to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into shall liberate such person, if in custody; and the court at such sessions shall hear and determine the matter of the appeal, and shall make such order therein, with or without costs to either party, as to the court shall seem meet; and in case of the dismissal of the appeal, the affirmance of the conviction, shall order and adjudge the offender to be punished according to the conviction, and to pay such costs as shall be awarded, and shall, if necessary, issue process for enforcing such judgment."

§ 39. "No such conviction, or adjudication made on appeal herefrom shall be quashed for want of form, or be removed by certiorari or otherwise into any of his majesty's superior courts of record; and no warrant of commitment shall be held void by reason of any defect therein, provided it be therein alleged that the party has been convicted, and there be a good and valid conviction to sustain the same."

§ 40. "Every justice of the peace, before whom any person shall be convicted of any offence against this act, shall transmit the conviction to the next court of general or quarter sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be resumed to have been unappealed against until the contrary be shown."

§ 41. "All actions and prosecutions to be commenced against any person for any thing done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise: and notice (a) in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the

7 & 8 G. 4. c. 30.

Appeal,

in what cases;

within what time;

what notice.

No certiorari.

No commitment void for any defect therein, if a conviction be alleged, and there be a valid one.

Justice to return conviction.

Proof of it by copy.

As to actions.

Venue, local.

Limitation of.

Notice of.

7 & 8 G. 4. c. 30.

General issue.

Tender of
amends.Defendant to
have full costs.Plaintiff not to
have costs un-
less the judge
certify his ap-
probation.Not to extend
to Scotland or
Ireland.To extend to
offences com-
mitted at sea.Cutting down
fruit trees held
to be within
9 G. 1. c. 22.,
though they be
not thereby
wholly de-
stroyed.Lopping of
trees, where to
be presumed
against consent
of owner.Person bond
fide supposing
that he is act-
ing pursuant
to statute is
within its pro-
tection, and
must have a
month's notice
of action.

action; and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and no plaintiff shall recover in any such action, if tender of sufficient amends shall have been made before such action brought, or if a sufficient sum of money shall have been paid into court after such action brought, by or on behalf of the defendant; and if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or discontinue any such action after issue joined, or if, upon demurrer or otherwise, judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases; and though a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be shall certify his approbation of the action, and of the verdict obtained thereupon.

§ 42. "Provided always, that nothing in this act contained shall extend to *Scotland or Ireland*."

§ 43. "Where any felony or misdemeanor, punishable under this act, shall be committed within the jurisdiction of the Admiralty of *England*, the same shall be dealt with, inquired of, tried, and determined in the same manner as any other felony or misdemeanor committed within that jurisdiction."

Prisoner was indicted on 9 G. 1. c. 22. § 1. (now repealed), for cutting down prosecutor's trees; and it appeared that they were pear and apple trees, from four to six feet high in the stem, which had been planted and grafted by the prosecutor for the purpose of making profit of their fruit. It was in evidence that the trees, though cut down, were not totally destroyed, but might shoot again. On *cas. res.*, the judges held that these trees were within the statute, and that the cutting them down, without wholly destroying them, brought the case within the enactment. *Reg. v. Taylor*, C. C. R. 373.

An indictment on 6 G. 3. c. 36. (now repealed), charged prisoners with lopping and topping an ash-tree, without consent of the owner (following the words of the statute). The owner had died about ten days after the offence committed, having given directions for their apprehension; and the steward proved that he had never himself given permission, and he believed his master never did. *Bayley J.* left it to the jury whether, from all the circumstances, they were perfectly satisfied that the prisoners had not obtained the owner's consent. The jury found the prisoners guilty. *Bucks Sum. Ass. 1826, R. v. Hazy and another*, 2 C. & P. 458.

An action for assault and false imprisonment was brought under the following circumstances:—Defendant's tenant had sold the loppings of some trees which grew on part of the demised premises; and the plaintiff was employed to cut them, which he proceeded to do, in spite of a notice from defendant, the landlord, forbidding him; and on his persevering in the cutting, the defendant came with a peace-officer and apprehended him, under § 28. of 7 & 8 G. 4. c. 30., and took him to the justice's clerk's office, where he was liberated on his undertaking to appear; and the next day the justice dismissed the charge. It was objected that there

ought to have been a month's notice of the action, by § 41. of the same act; and the court of King's Bench were of this opinion; holding that where a party *bond fide*, though erroneously, believes or supposes that he is acting in pursuance of an act of parliament, he is within the protection of such a clause, and they made absolute a rule for entering a nonsuit. *Beechey v. Sides*, 9 B. & C. 106.

In an action for assault and imprisonment, it appeared that defendant, a magistrate, had committed plaintiff to prison under § 8 G. 4. c. 30. § 19., for maliciously cutting down a tree; the depositions shewed that the tree was growing on premises occupied by plaintiff, and it was contended, on motion for setting aside a nonsuit, that this evidence proved the defendant to have acted without jurisdiction and without colourable cause. But, per Tindal C. J.: "I cannot accede to the proposition, that the circumstance of a party's being occupier of the premises on which the tree is cut necessarily takes a case out of the statute. Suppose the trees excepted in a lease; the tenant would be a trespasser; and if liable in trespass, I am not prepared to say he might not be liable criminally." The court, however, discharged the rule, on the ground that the magistrate had exercised his judgment in a case in which he had jurisdiction. *Mills v. Collett*, 6 B. 85.

Person cutting down a tree on premises which are in his occupation.

Form of Commitment on 9 G. 4. c. 31. § 11. for an Attempt to murder by shooting.

Sent [the county wherein the commitment is made]. — J. P. Esquire, one of his majesty's justices of the peace for the said county, to the constable of ———, in the said county, and to the keeper of the common gaol at ———, in the said county.

[THESE are to command you the said constable, in his majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said common gaol, the body of C. D., charged this day before me the said justice, on the oath of A. B. of ———, and others, for that he the said C. D., on, &c., at, &c., with a certain loaded arm, to wit, a [pistol] loaded with powder and a certain leaden shot, unlawfully, maliciously, and feloniously did shoot at one A. B., with intent, in so doing, then and there unlawfully, maliciously, and feloniously to shoot, kill, and murder the said A. B.; against the form of the statute in that case made and provided. And you the said keeper are hereby required to receive the said C. D. into your custody in the same common gaol, and him there safely to keep until he shall be thence delivered by due course of law. Herein fail you not. Given under my hand and seal the ——— day of ———, in the year of our Lord ———.

J. P.

If the commitment be on § 12. of the same stat., state the offence to be with the intention in so doing then and there unlawfully, maliciously, and feloniously to maim, disfigure, and disable or, to do some grievous bodily harm to) the said A. B.

Forms of Information, Warrant, and Commitment on
7 & 8 G. 4. c. 30.

Information for maliciously cutting, &c. the Whole or any Part of any Tree, &c. where Amount of Injury done is 12 or more — first Offence.

County of } *THE information and complaint of A. B., of K., in*
_____ } *the county of S., made on oath before me, J. P., one*
to wit. } *of his majesty's justices of the peace in and for the*
_____ } *said county, the _____ day of _____, in the year of our Lord*
_____ } *_____, who saith, that on the _____ day of _____ last, at*
_____ } *L., in the parish of M., in the said county, C. D., of L. aforesaid,*
_____ } *did unlawfully and maliciously cut [or, break, &c. as the case may*
_____ } *be] and damage the whole, &c. [as the case may be], the property*
_____ } *of G. H., whereby the same was then and there injured to the amount*
_____ } *of _____, contrary to the form of the statute in such case made*
_____ } *and provided. And thereupon the said A. B. prayeth the judgment*
_____ } *of me, the justice aforesaid, in the premises.*
_____ } *Taken and sworn before me,*
_____ } *J. P.*

Warrant to apprehend thereon.

To the constable of S., in the county of B.

County of } *WHEREAS information and complaint upon oath*
_____ } *have been made before me, J. P., one of his ma-*
to wit. } *jesty's justices of the peace in and for the said*
_____ } *county, by A. B., of K., in the county aforesaid, labourer, that as*
_____ } *the _____ day of _____, in the year of our Lord _____, at L.,*
_____ } *in the parish of S., in the said county, C. D., of L. aforesaid, in*
_____ } *the county aforesaid, did unlawfully and maliciously cut [or, break,*
_____ } *&c. as in the information] and damage the whole, &c. [as in the*
_____ } *information], the property of G. H., whereby the same was then and*
_____ } *there injured, to the amount of _____, contrary to the form of*
_____ } *the statute in such case made and provided: These are, therefore,*
_____ } *to require you forthwith to apprehend the said C. D., and bring*
_____ } *him before me, at _____, &c. in the said county, to answer unto*
_____ } *the said information and complaint, and to be further dealt with*
_____ } *according to law. Herein fail not.*
_____ } *Given under my hand and seal, the _____ day of _____, in the*
_____ } *year of our Lord _____.*

J. P.

Commitment after Conviction thereon.

To the constable of S., in the county of B., and to the keeper of the _____, at _____, in the said county.

County of } *WHEREAS C. D., of L., in the said county, la-*
_____ } *bourer, is convicted by and before me, J. P., one*
to wit. } *of his majesty's justices of the peace in and for the*
_____ } *said county, upon the oath of A. B., for that he the said C. D.*
_____ } *did, on, &c., in the parish of S., in the said county, unlawfully and*
_____ } *maliciously cut [or, break, &c. as in the information,] and damage*
_____ } *the whole, &c. [as in the information], the property of G. H.,*

whereby the same was then and there injured, to the amount of ———, contrary to the form of the statute in such case made and provided. And thereupon I, the said justice, adjudged the said C. D. to forfeit and pay, over and above the amount of the injury so done as aforesaid, for his said offence, the sum of ———, and for the said injury so done, the further sum of ———; and I did direct the said sum of ——— to be immediately paid to J. K., one of the overseers of the poor of the said parish of S., in the said county, to be by him paid over to the use of the general rate of the said county, and the said sum of ——— to be immediately paid to J. H., the party aggrieved by the said offence, who was not examined in proof of the same: And whereas the said C. D. has made default in payment of the said sums: These are, therefore, to require you, the said constable, to convey the said C. D. to the said ———, at ——— aforesaid, and deliver him to the said keeper thereof, together with this precept; and you, the said keeper, are hereby commanded to receive the said C. D. into your custody, in the said ———, there to be imprisoned [or, imprisoned and kept to hard labour] for the space of ———, unless such sums as aforesaid shall be sooner paid and satisfied, and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, the ——— day of ———, one thousand eight hundred and ———,

Information for maliciously destroying, or damaging with Intent to destroy, any Plant, &c. growing in any Garden, &c.

County of } THE information and complaint of A. B., of S., in
to wit. } the county of B., made upon oath before me, J. P.,
one of his majesty's justices of the peace in and for
the said county, the ——— day of ———, in the year of our Lord
one thousand eight hundred and ———, who saith, that on the
—— day of ——— last, at L., in the parish of S., in the said
county, C. D., of L., labourer, did unlawfully and maliciously de-
stroy [or, damage with intent to destroy] a certain plant, &c. [as
the case may be], the property of G. H., then growing in a ———
there situate, whereby the same was then and there injured, to the
amount of ———, contrary to the form of the statute in such
case made and provided: And thereupon the said A. B. prayeth
the judgment of me, the justice aforesaid, in the premises.

Taken and sworn before me,
J. P. }

Warrant to apprehend thereon.

To the constable of S., in the county of B.

County of } WHEREAS information and complaint upon oath
to wit. } have been made before me, J. P., one of his ma-
jesty's justices of the peace in and for the said
County, by A. B., of S., in the county aforesaid, labourer, that on the
—— day of ——— last, in the parish of S., in the said county,
C. D., of S., in the county aforesaid, labourer, did unlawfully and
maliciously destroy [or, damage with intent to destroy] a certain
plant, &c. [as in the information] the property of G. H., then grow-
ing in a ——— there situate, whereby the same was then and
there injured, to the amount of ———, contrary to the form of

the statute in such made and provided: These are, therefore, to require you forthwith to apprehend the said C. D., and bring him before me, at _____, in the said county, to answer unto the said information and complaint, and to be further dealt with according to law. Herein fail not.

Given under my hand and seal the _____ day of _____, in the year of our Lord _____.

Commitment after Conviction thereon.

To the constable of S., in the county of B., and to the keeper of the _____, at _____, in the said county.

County of } **WHEREAS** C. D., of S., in the said county, labourer, is convicted by and before me, J. P., one to wit. } of his majesty's justices of the peace in and for the said county, upon the oath of A. B., for that he the said C. D. did, on the _____ day of _____ last, at L., in the parish of S., in the said county, unlawfully and maliciously destroy [or, damage, &c. as in the information] the property of G. H., then growing in a _____ there situate, whereby the same was then and there injured, to the amount of _____, contrary to the form of the statute in such case made and provided. And thereupon I, the said justice, adjudged the said C. D. for his said offence, to forfeit and pay, over and above the amount of the injury so done as aforesaid, the sum of _____, and for the said injury so done, the further sum of _____; and I did direct the said sum of _____ to be immediately paid to J. K., one of the overseers of the poor of the said parish of S., in the said county, to be by him paid over to the use of the general rate of the said county, and the said sum of _____ to the said G. H., the party aggrieved by the said offence, who was not examined by and before me in proof of the same: And whereas the said C. D. has made default of payment of the said sums: These are, therefore, to require you, the said constable, to convey the said C. D. to the said _____, at _____ aforesaid, and deliver him to the said keeper thereof, together with this precept; and you the said keeper are hereby commanded to receive the said C. D. into your custody, in the said _____, there to be imprisoned [or, imprisoned and kept to hard labour] for the space of [not exceeding six calendar months], unless such sums as aforesaid shall be sooner paid and satisfied, and for your so doing this shall be your sufficient warrant.

Given under my hand and seal, the _____ day of _____, in the year of our Lord _____.

Information on § 24. for maliciously damaging, &c. any real or personal Property.

County of } **THE** information and complaint of A. B. of S. in to wit. } the county of B. made on oath before me J. P. one of his majesty's justices of the peace in and for the said county of B., the _____ day of _____, in the year of our Lord one thousand eight hundred and _____, who saith, that on the _____ day of _____ last, at L. in the parish of S. in the said county, C. D. of M., in the said county, labourer, did wilfully and maliciously damage, injure, and spoil [as the case

may be] of the value of —, the [real or personal] property of G. H. of a private nature, contrary to the form of the statute in such case made and provided. And thereupon the said A. B. prayeth the judgment of me, the justice aforesaid, in the remises. Taken and sworn before me,

J. P.

Warrant to apprehend thereon.

To the constable of S. in the county of B.

County of } **WHEREAS** information and complaint upon oath
to wit. } have been made before me, J. P., one of his ma-
y A. B. of S. in the county aforesaid, that on the — day of
— last, at L. in the parish of S. in the said county, C. D. of
L. in the county aforesaid, labourer, did wilfully and maliciously
damage, injure, and spoil, &c. [as in the information] of the value
of —, the [real or personal] property of G. H. of a private
nature, contrary to the form of the statute in such case made and
provided: These are, therefore, to require you forthwith to apprehend
the said C. D. and bring him before me, at R. in the said
county, to answer unto the said information and complaint, and to
be further dealt with according to law. Herein fail not.

Given under my hand and seal, the — day of —, in the
year of our Lord —.

J. P.

Commitment after Conviction thereon.

To the constable of S. in the county of B., and to the keeper of
the —, at —, in the said county.

County of } **WHEREAS** C. D. of M., in the said county,
to wit. } labourer, is convicted by and before me, J. P.,
in the said county, upon the oath of A. B., for that he the said C. D. did
on the — day of — last, at L. in the parish of S., in
the said county, wilfully and maliciously damage, injure, and
spoil, &c. [as in the information] of the value of —, the
real or personal property of G. H. of a private nature, contrary to
the form of the statute in such case made and provided, and for which
no other remedy or punishment hath been by the same statute pro-
vided. And thereupon I, the said justice, did adjudge the said
C. D. to forfeit and pay the sum of — for the said offence,
such sum appearing to me to be a reasonable compensation for the
damage, injury, and spoil so committed, together with the further
sum of — for costs, unto G. H., the said G. H. not having
been examined in proof of the offence. And whereas the said C. D.
has made default of payment, within the time appointed by me the
said justice, of the said sums. These are, therefore, to require you
the said constable to convey the said C. D. to the said —, at
— aforesaid, and deliver him to the said keeper thereof, to-
gether with this precept: and you the said keeper are hereby com-
manded to receive the said C. D. into your custody, in the said —,
here to be imprisoned [or imprisoned and kept to hard labour] for
the space of [not exceeding two calendar months] unless such sums

as aforesaid shall be sooner paid and satisfied, and for your so doing this shall be your sufficient warrant. Given under my hand and seal the ——— day of ———, in the year of our Lord one thousand eight hundred and ———.

J. P.

Misadventure. See Homicide.

Misdemeanor.

Its meaning.

THIS word, in its usual acceptation, is applied to all those crimes and offences, for which the law has not provided a particular name; and they may be punished according to the degrees of the offence, by fine or imprisonment, or both. *Barl.* 370.

Crime less than felony.

This is the case with respect to acts of omission or commission which were punishable at common law; but many offences are by the statute law punishable as misdemeanors specifically.

No accessories before or after in misdemeanors.

A misdemeanor is, in truth, any crime less than felony; and the word is generally used in contradistinction to felony: and misdemeanors comprehend all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, public nuisances, &c. 4 *Blac. Com.* 5. (*Christian's Note*,) (2)

Soliciting another to steal.

In cases that are criminal, but not capital, as in trespasses, *mayhem*, or *præmunire*, there are no accessories, for all the accessories *before* are in the same degree as principals; and accessories *after* by receiving the offenders, cannot be in law under any penalties as accessories, unless the acts of parliament that induce those penalties do expressly extend to receivers or comforters, as some do. 1 *Hale*, 613.

Receiving stolen goods.

To solicit a servant to steal his master's goods, is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except *the soliciting* and inciting. And such offence is indictable at the sessions, having a tendency to a breach of the peace. *Reg. v. Higgins*, 2 *East*, 5.

Compromise of a misdemeanor illegal.

For the punishment of persons convicted of misdemeanor for having received stolen goods knowing them to be stolen, see stat. 7 & 8 *G. 4. c.* 29. § 55. tit. *Accessory*.

Aliter, after conviction.

An agreement to put an end to a misdemeanor has been considered to be illegal, as impeding the course of public justice: but it is sometimes done after conviction, with the sanction of the court, in cases where the offence principally and more immediately affects an individual; the defendant being permitted to speak with the prosecutor before any judgment is pronounced, and a trivial punishment being inflicted, if the prosecutor declares himself satisfied. 1 *Russ.* 136. and the authorities there cited.

Arrest of party flying from apprehension.

Where a party is accused of a misdemeanor, and flies from the arrest, the officer must not kill him, though there be a warrant to apprehend him, and though he cannot otherwise be overtaken: and if he do kill him it will in general be murder. *Fost.* 271. 1 *Hale*, 481. cit. 1 *Russ.* 457.

As to the time of proceeding to trial in indictments, &c. for Misdemeanors, see stat. 60 G. 3. and 1 G. 4. c. 4. tit. *Crabtree*.
see tit. *Indictment*.

Misnomer. See *Indictment*.

Misprision of Felony. See *Felony*.

Misprision of Treason. See *Treason*.

Mittimus. See *Commitment*.

Murder. See *Homicide*.

Mute.

[12 G. 3. c. 20. 7 & 8 G. 4. c. 28.]

HERETOFORE a person standing mute upon an arraignment of felony (that is, without speaking any thing at all, or without putting himself upon God and the country), was liable to a range and cruel punishment: the judgment in such case was, that the man or woman should be remanded to the prison, and laid there in some low and dark room, where they should lie naked on the bare earth, without any litter, rushes, or other clothing, and without any garment about them, but something to cover their privy parts, and that they should lie upon their backs, their heads uncovered and their feet, and one arm to be drawn to one quarter of the room with a cord, and the other arm to another quarter, and in the same manner to be done with their legs; and there should be laid upon their bodies iron and stone, so much as they might bear and more; and the next day following, to have three morsels of barley bread without any drink, and the second day to drink thrice of the water next to the house of the prison (except running water) without any bread; and this to be their diet until they were dead. So as, upon the matter, they should die three manner of ways, by weight, by famine, and by cold. And the reason of this terrible judgment was, because they refused to stand to the common law of the land. 2 *Inst.* 178, 179.

Ancient punishment of *peine forte & dure*.

And this (which was called *peine forte & dure*) some persons endured for the sake of their children or other kindred; because in such case they forfeited their goods only, and not their lands; for lands could not be forfeited but by attainder.

But now, by stat. 12 G. 3. c. 20. § 1., *If any person being arraigned on any indictment or appeal for felony, or on any indictment for piracy, shall upon such arraignment stand mute, or will not answer directly to the felony or piracy, he shall be convicted of the offence, and the court shall thereupon award judgment and execution in the same manner as if he had been convicted by verdict or confession; and such judgment shall have all the same consequences as a conviction by verdict or confession.*

By § 2., this act extends to H. M.'s colonies and plantations in America.

And the same law is, with respect to an arraignment for *treason* or *petit larceny*; for before this act, persons standing mute in either of these cases, were to have the like judgment as if they had confessed the indictment. 2 *Inst.* 177. 2 *Haw. c.* 30. § 9, 10.

12 G. 3. c. 20. Person standing mute, to be convicted and have judgment, in felony and piracy.

So in treason.

Person born deaf and dumb.

One who is *surdus et mutus a navitate* is in presumption of law an idiot, and the rather because he has no possibility to understand what is forbidden by law to be done: but if it appear that he has use of understanding, which many of that condition discover by signs, to a very great measure, then he may be tried, and suffer judgment and execution; though great caution should be used in such a proceeding. 1 *Hale*, 34. cit. 1 *Russ.* 7.

Cause of standing mute to be tried *instantly*.

Whether a prisoner stand mute, obstinately, or by the visitation of God, is a fact triable *instantly* by a jury to be returned for that purpose, and if found obstinate, the trial in chief may proceed. *Mercier's case*, O. B. Dec. 1777, 1 *Leach*, 183.

Deaf prisoner may be tried.

So if the jury return that the prisoner is deaf by the visitation of God, the trial may proceed, and on conviction the prisoner be sentenced to transportation. *Steel's case*, O. B. 1787, 1 *Leach*, 451. See also *Jones's case*, acc. 1 *Leach*, 102. cit. 1 *Russ.* 7. n. (f.)

Prisoner standing mute by act of God.

In *R. v. G. Halton*, Apr. 20. 1824, *Bristol Gaol Delivery*, cor. Lord Gifford, Recorder, 1 R. & M. 88. Indictment or stat. 43 G. 3. c. 58. for maliciously cutting. The prisoner when called on to plead on his arraignment said, that he was quite deaf, but could read print or large writing. An officer then read over the indictment close to him with a loud voice, but the

Being deaf.

prisoner did not appear to hear: and on his not answering, a jury was sworn to try whether he stood mute by the act of God or out of malice: the gaoler was then examined and said, that the prisoner had always appeared quite deaf during the several months he had been in his custody, and that his fellow-prisoners conversed with him by signs.—Lord Gifford, Recorder, in charging the jury, said, that he had adopted this proceeding after great deliberation, on the authority of *R. v. Jones*, 1 *Leach*, C. C. 451. and *R. v. Steele* (*supra*), which, in his opinion, governed the present case in principle, though it differed from it in several respects.—The jury found that the prisoner was mute by the act of God, and were then sworn to try the indictment. The evidence of each witness was taken down in a large hand, and shewn to the prisoner before the witness retired. The prisoner read it, and asked some questions about words in the writing which he could not make out; but did not cross-examine the witnesses.—Acquitted.

7 & 8 G. 4. c. 28. Where prisoner stands mute of malice, the Courts may enter plea of not guilty.

By 7 & 8 G. 4. c. 28. § 2., If any person being arraigned upon any indictment or information for treason, felony, piracy, or misdemeanor, shall stand mute of malice, or will not answer directly to the indictment or information, it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of not guilty on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.

Nuisance.

I. What it is.

[25 G. 2. c. 36.—58 G. 3. c. 70.—5 W. & M. c. 11.]

II. Nuisances from Non-repair of Highways and Bridges.

III. How a Nuisance may be removed.

IV. How punished.

I. *What it is.*

A COMMON nuisance seems to be an offence against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires. 1 *Haw. c. 75. § 1.*

Common nuisance.

Annoyances to the prejudice of particular persons are not punishable by a public prosecution as common nuisances, but are to be redressed by the private actions of the parties aggrieved by them. 1 *Haw. c. 75. § 2.* 4 *Blac. Com.* 167.

Where, note a diversity between a *private* and a *public* nuisance: if it be a *private* nuisance, he shall have his action upon his case, and recover damages; but if it be a *public* nuisance, he shall not have an action upon his case, and this the law hath provided for voiding of multiplicity of suits; for if any one might have an action, all men might have the like; but the law for this common nuisance hath provided an apt remedy, by presentment or indictment at the suit of the king, in the behalf of all his subjects; unless any man hath a particular damage; as if he and his horse fall into a ditch made across a highway, whereby he received hurt and loss, there for his special damage, which is not common to others, he shall have an action upon his case. 1 *Inst.* 56.

Difference between a private and public nuisance.

Or if one man obstruct another passing by a ditch and gate across a public road, by which the latter is obliged to go a longer and a more difficult way, and oppose the other in attempting to remove the nuisance, in that case also the latter may bring his action. *Chichester v. Lethbridge, Willes*, 71.

Where an action lies for a public nuisance.

Although a nuisance may be public, yet there may be a special grievance arising out of the common cause of injury, which presses more upon particular individuals than upon others not so immediately within the influence of it. In case of stopping a common highway, which may affect all the subjects, yet if a particular person sustains a special injury from it, he has an action. *Per* *Ld. Ellenborough C. J. R. v. Dewsnap*, 16 *East*, 196.

There being a special grievance.

And from hence it clearly follows, that no indictment for a nuisance can be good, which lays it to the damage of private persons only; as where it accuses a man of surcharging such a common, or of inclosing such a piece of ground, wherein the inhabitants of such a town have a right of common, to the nuisance of all the inhabitants of such a town; or of disturbing a water-course running to such a mill, to the damage of such a person and his tenants, without saying of *all the liege subjects of the king*. 1 *Haw. c. 75. § 3.*

Indictment will not lie, unless the nuisance affect the public.

Where a tinman was indicted for a nuisance, on account of the noise which he made in carrying on his business, and it appeared that the noise only disturbed the inhabitants of three numbers of *Clifford's Inn*, it was held by *Ld. Ellenborough C. J.* that the prosecution could not be sustained, as it was, if any thing, a private nuisance only, and not indictable. *R. v. Lloyd*, 4 *Esp.* 200. cit. 1 *Russ.* 296.

Noise affecting a few chambers only.

Yet it hath been said, that an indictment of a *common scold* is good, although it conclude to the common nuisance of *divers*, instead of *all*, the king's subjects; perhaps, for this reason (says *Mr. Hawkins*), because a common scold cannot but be a common nuisance. 1 *Haw. c. 75. § 5.*

Common scold.

Public nuisance laid to affect divers of the king's subjects.

And if the law be so in this case, why should not an indictment, setting forth a nuisance to a way, and expressly and unexceptionably shewing it to be a highway, be good, notwithstanding it conclude to the nuisance of *divers*, without saying *all*, the king's subjects? And perhaps the authorities which seem to contradict this opinion might go upon this reason, that in the body of the indictment, it did not appear with sufficient certainty, whether the way, wherein the nuisance was alleged, were a highway or only a private way; and therefore that it shall be intended, from the conclusion of the indictment, that it was a private way. 1 *Haw. c. 75. § 5.*

Bawdy-houses, gaming houses, and stages for rope dancers.

There is no doubt but that common *bawdy-houses* are indictable as common nuisances: and it hath been said, that all common *stages for rope-dancers* (a), and also all common *gaming-houses*, are nuisances in the eye of the law, not only because they are great temptations to idleness, but also because they are apt to draw a great number of disorderly persons. 1 *Haw. 75. § 6.* 4 *Blac. Com.* 167.

Feme covert indictable,—bawdy-house.

It has been adjudged that a *feme covert* may be guilty of keeping a bawdy-house as well as if she were sole, and that she, together with her husband, may be convicted of it. *R. v. Williams, 1 Salk. 383.*

So gaming-house.

And so for keeping a gaming-house: for in each of these cases the female may be presumed to bear a principal part. *R. v. Dine, 10 Mod. 335.* See 1 *Russ. 16.*, and n. (r) *ib.*, and 299.

Single room.

And if a person is a lodger, and has only a single room, yet if she use it as a bawdy-house, she may be indicted for keeping one. *R. v. Pierson, 2 Ld. Raymond, 1197.* 1 *Russ. 299.*

Disorderly inn.

The keeper of a disorderly inn or alehouse may be prosecuted for a public nuisance if he usually harbour thieves or other scandalous characters, or suffer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where it is not wanted, to the hindrance of other old-established inns, or keep it in a place which for its situation is wholly unfit for it. 1 *Haw. P. C. c. 78. § 1.* See 3 *Bac. Abr. Inns, &c. (A). ib. (C) 2.* 1 *Russ. 298.* See tit. *Alehouses.*

In improper situation.

Also it hath been holden, that a common *playhouse* may be a nuisance, if it draw together such a number of coaches or people, as prove generally inconvenient to the places adjacent. 1 *Haw. c. 75. § 7.*

Playhouses.

25 G. 2. c. 36. Constable's duty upon notice of persons keeping a bawdy-house, gaming-house, &c.

By 25 G. 2. c. 36. § 5., "If any two inhabitants of any parish or place, paying scot and bearing lot therein, do give notice in writing to any constable (or other peace officer of the like nature, where there is no constable) of such parish or place, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, in such parish or place, the constable or such officer as aforesaid, so receiving such notice, shall forthwith go with such inhabitants to one of his majesty's justices of the peace of the county, city, riding, division, or liberty in which such parish or place does lie; and shall, upon such inhabitants making oath before such justice that they do believe the contents of such notice to be true, and entering into a recognizance in the penal sum of 20*l.* each, to give or produce material evidence against such person

(a) See the case of *Jacob Hall, 1 Mod. 76.*

for such offence, enter into a recognizance in the penal sum of 10*l.* to prosecute with effect such person for such offence at the next general or quarter sessions of the peace, or at the next assizes to be holden for the county in which such parish or place does lie, as to the said justice shall seem meet; and such constable or other officer shall be allowed all the reasonable expenses of such prosecution, to be ascertained by any two justices of the peace of the county, city, riding, division, or liberty where the offence shall have been committed, and shall be paid the same by the overseers of the poor of such parish or place; and in case such person shall be convicted of such offence, the overseers of the poor of such parish or place shall forthwith pay the sum of 10*l.* to each of such inhabitants; and in case such overseers shall neglect or refuse to pay to such constable or other officer such expenses of the prosecution as aforesaid, or shall neglect or refuse to pay, upon demand, the said sums of 10*l.* and 10*l.* such overseers, and each of them, shall forfeit to the person entitled to the same double the sum so refused or neglected to be paid."

§ 6. "Upon such constable or other officer entering into such recognizance to prosecute as aforesaid, the said justice of the peace shall forthwith make out his warrant to bring the person so accused of keeping a bawdy-house, gaming-house, or other disorderly house before him, and shall bind him or her over to appear at such general or quarter session or assizes, there to answer to such bill of indictment as shall be found against him or her for such offence; and such justice shall and may, if in his discretion he thinks fit, likewise demand and take security for such person's good behaviour in the mean time, and until such indictment shall be found, heard, and determined, or be returned by the grand jury not to be a true bill."

§ 7. "If any such constable shall neglect or refuse, upon such notice, to go before any justice of the peace, or to enter into such recognizance, or shall be wilfully negligent in carrying on the said prosecution, he shall for every such offence forfeit the sum of 20*l.* to each of such inhabitants so giving notice as aforesaid."

§ 8. "Any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof."

§ 9. provides, "That upon any such prosecution against any person for keeping a bawdy-house, gaming-house, or other disorderly house, any person may give evidence against the defendant, or on behalf of the defendant, in such prosecution, notwithstanding his or her being an inhabitant or parishioner of the said parish or place, or having entered into such recognizance as aforesaid."

§ 10. enacts, "That no indictment which shall at any time after the said 1st day of June be preferred against any person for keeping a bawdy-house, gaming-house, or other disorderly house, shall be removed by any writ of *certiorari* into any other court; but such

25 G. 2. c. 36.

The charges of prosecution,

and 10*l.* on conviction to each of the two inhabitants, to be paid by the overseers, on penalty of forfeiting double.

Persons keeping bawdy-houses, &c. to be bound over,

Penalty.

Who shall be deemed the keeper of such bawdy-house, &c.

Evidence may be given by an inhabitant, &c.

Indictment not removable by *certiorari*.

25 G. 2. c. 36. indictment shall be heard, tried, and finally determined at the same general or quarter session or assizes where such indictment shall have been preferred, (unless the court shall think proper, upon cause shewn, to adjourn the same,) any such writ or allowance thereof notwithstanding."

58 G. 3. c. 70. By 58 G. 3. c. 70. § 7., "A copy of the notice which shall be given to such constable shall also be served on or left at the places of abode of the overseers of the poor of such parish or place, or one of them, and such overseers or overseer of the poor shall be summoned or have reasonable notice to attend before such justice of the peace before whom such constable shall have notice to attend; and if such overseers or overseer of the poor shall then and there enter into such recognizance to prosecute such offender as the constable is in and by the said act required to enter into, then it shall not be necessary for, nor shall such constable be required to enter into such recognizance; but if such overseers or overseer of the poor shall neglect to attend such justice on having such notice, or shall attend and shall decline or refuse to enter into such recognizance to prosecute, then such constable shall enter into the same, and shall prosecute, and shall be entitled to his expenses, to be allowed as in and by the said act is directed."

Crown not bound as to the *certiorari*.

But § 10. of 25 G. 2. c. 36. does not restrain the crown from removing an indictment by *certiorari*, as nothing appears to shew that the statute intended to bind the crown. *R. v. Davies and others*, 5 T. R. 626.

Different defendants in same indictment for several offences.

More than one defendant may be included in the same indictment for keeping a disorderly house, stating, that they "severally" kept such houses, 2 Hale 174.; and it has been held, that several different defendants being charged in different counts of an indictment for offences of the same nature, it is not an objection on demurrer, though it may be a ground for applying to the discretion of the court to quash the indictment. *R. v. Kingston and others*, 8 E. R. 41. 1 Russ. 301.

Averments in indictment.

It seems necessary to state where the house is situate, and the time of the disorder; but it is not necessary to prove who frequents the house; for if it is proved that unknown persons are behaving disorderly there, it is sufficient. *Per Buller J. Janson v. Stuart*, 1 T. R. 754. 1 Russ. 302.

Acc.

The indictment need not allege particular facts; but the charge being general, particular facts may be given in evidence. *Per Lord Hardwick. Clarke v. Periam*, 2 Atk. 339.

Stopping a prospect;

Stopping a *prospect* is not a common nuisance. 2 Salk. 247.

Building a house in a larger manner than it was before, so that the street became dark, is not any public nuisance by reason of the darkening. *R. v. Webb*, 1 Ld. Ray. 737.

or lights.

So, erecting a shed so near a man's house that it stops up his *lights*, is not a nuisance for which an action will lie; unless the house is an ancient house, and the lights ancient lights. 2 Salk. 459.

An action for a nuisance does not lie for stopping another's lights, though they have con-

So, if two men be owners of two parcels of land adjoining, and one of them doth build an house upon his land, and makes windows and lights looking into the other's land, and this house and the lights have continued by the space of thirty or forty years; yet the other may, upon his own land and soil, lawfully

erect a house or other thing against the said lights and windows, and the other can have no action; for it was his folly to build his house so near to the other's land. But if the former had continued from time immemorial, it is otherwise. *Bury v. Pope*, *Cro. Eliz.* 118.

tinued for forty years.

All injuries whatsoever to a public highway, as digging a ditch, or making a hedge across it, or laying logs of timber in it, or doing any other act which will make it less commodious, are public nuisances at common law. 1 *Haw. P. C. c. 76. § 144.* 1 *Russ.* 317.

Injuries to highways.

Where, by a local road act (3 *G. 4. c. cxii.*), no building was to be erected or continued within ten feet of the road, and any such building was to be deemed a common nuisance, and by another section power was given to two justices to convict, and also to remove the buildings, the case was, that a wall having stood adjoining the road, it was pulled down, and a shop erected, not higher than the wall, which was connected with a house that stood farther back. On indictment and special case, it was held by K. B. that this was a *building* within the meaning of the act, and that there was a distinction between a *building* and a *wall*: they also held that, though the act gave a summary remedy, yet, as it declared such building to be a public nuisance, an indictment would lie. *R. v. Gregory*, 5 *B. & Ad.* 555.

Building near a road, a nuisance under a local road act.

Distinction between *building* and *wall*.

Indictment lies for a nuisance, though there be another remedy.

It is also a nuisance to suffer the highway to be incommoded by reason of the foulness of the adjoining ditches, or by boughs of trees hanging over it, &c.

Ditches, trees, overhanging.

And an occupier of a house standing on the highway, though tenant at will only, is indictable for suffering it to be so ruinous as to be dangerous to passengers. 3 *Bac. Ab. Highways* (E). 1 *Haw. P. C. c. 76. § 5. 8. 147.* 1 *Russ.* 317.

Ruinous house.

It is said the owner of land next adjoining the highway is bound of right to scour his ditches; but that the owner of land next adjoining such land is not so bound, except by prescription; so that the owner of trees overhanging the highway is bound at common law to lop them; and that any other person may do it, so as to remove the nuisance. 1 *Haw. ib.* 1 *Russ. ib.*

Scouring ditches.

Lopping trees.

Laying logs in a highway will be still a nuisance, though so laid that by winding and turning people may still pass. 1 *Haw. P. C. c. 76. § 145.* 1 *Russ.* 319.

Logs in highway.

It is a nuisance if a carrier carries an unusual weight with an unusual number of horses. 3 *Com. Dig. Chemin* (A. 3.) 1 *Russ.* 318.

Unusual weight with horses by carrier.

And it was held not necessary to state the number of horses. *R. v. Egenby*, 3 *Salk.* 183.

A gate erected in a highway where none had been before, is a common nuisance. 1 *Haw. c. 75. § 9.*

Erecting a gate;

So, erecting a wall across a highway. 8 *T. R.* 142.

It appears to have been holden, that an indictment will not lie for setting a person on the footway in a street to distribute handbills, whereby the footway was impeded and obstructed; nor for throwing down skins into a public way, by which a personal injury is accidentally occasioned, *R. v. Gill*, 1 *Str.* 190.; but acts of this kind, if improperly performed, might possibly be deemed nuisances; as it seems now to be well established that every unauthorised obstruction of a highway, to the annoyance of the king's subjects, is an indictable offence. *R. v. Cross*, 3 *Camp.* 227. Thus where a *waggoner* occupied one side of a public street in the city

Every unauthorised obstruction of a highway, to the annoyance of the king's subjects, is an indictable offence.

Waggons
loading and
unloading.

Coaches
plying for
passengers.

Carriages at a
rout.

Obstruction
for purposes of
business.

of *Exeter*, before his warehouses, in loading and unloading his waggons, for several hours at a time, both day and night, and had one waggon, at least, usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying on the ground on the same side, ready for loading, he was held to be indictable for a public nuisance; although it appeared that sufficient space was left for two carriages to have passed on the opposite side of the street. *R. v. Russell*, 6 East, 427. Upon the same principle it has been held to be an indictable offence for stage coaches to stand plying for passengers in the public streets; and Lord *Ellenborough* C.J. said, "a stage coach may set down or take up passengers in the street, this being necessary for public convenience, but it must be done in a reasonable time; and private premises must be procured for the coach to stop in during the interval between the end of one journey and the commencement of another." *R. v. Cross*, 3 Campb. 224. In the same case his lordship intimated, that there would be no doubt but that if coaches, on the occasion of a rout, should wait an unreasonable length of time in a public street, and obstruct the transit of his majesty's subjects wishing to pass through it in carriages or on foot, the persons who might cause and permit such coaches so to wait would be guilty of a nuisance. See 1 Russ. 463.

From *R. v. Jones*, 3 Camp. 230., it appears also that an obstruction to a public highway will not be excused, on the plea of its being necessary for the carrying on of the party's business, though such obstruction be only occasional. It was proved that the defendant, who was a *timber merchant*, occupied a small timber yard close to a street, and that from the narrowness of the street, and the construction of his own premises, he had, in several instances, necessarily deposited long sticks of timber in the street, and had them sawed into shorter pieces there before they could be carried into his yard: and it was contended on his behalf, that he had a right to do so, as it was necessary to the carrying on of his business; and that it could not occasion more inconvenience to the public than draymen taking hogsheads of beer from their drays and letting them down into the cellar of a publican. But Lord *Ellenborough* C. J. said, "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or waggon may be unloaded at a gateway; but this must be done with promptness. So as to the repairing of a house; the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict and steady application of it. I cannot bring myself to doubt of the guilt of the present defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway into his timber yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business."

Want of care
in person in-

In an action on the case for obstructing a highway, by means of which the plaintiff was thrown from his horse and injured, &c.,

it appeared that the plaintiff was riding through the streets as fast as his horse could go, and that if he had used ordinary care he must have seen the obstruction. The verdict was for the defendant; and upon application for a rule to shew cause why there should not be a new trial, it was refused, and *Ld. Ellenborough C.J.* said, that two things must concur to support this action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. *Butterfield v. Forrester*, 11 *East*, 60.

A river common to all men is considered a highway, and any obstruction which impedes the free use of it is an indictable nuisance. 1 *Hawk. P. C. c.* 76. § 1. 1 *Russ.* 339.

Upon the trial of an indictment for a nuisance in a navigable river, by erecting staiths there for loading ships with coals, the jury were directed by the learned judge to acquit the defendants, if they thought that the abridgement of the right of passage occasioned by these erections was for a public purpose, and produced a public benefit, and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river; and he pointed out to the jury that, by means of the staiths, coals were supplied at a cheaper rate, and in better condition, than they otherwise could be, which was a public benefit. It was held, by *Bayley* and *Holroyd Js.*, that this direction to the jury was proper, *Lord Tenterden C.J. diss.* *R. v. Russell*, 6 *B. & C.* 566. See also *R. v. Pease*, 4 *B. & Adol.* 30.

The public are not entitled, at common law, to tow on the banks of ancient navigable rivers. *Ball v. Herbert*, 3 *T. R.* 253.

If a river changes its course, the highway continues in the new channel. 1 *Hawk. P. C. c.* 76. § 4. 1 *Russ.* 340.

It has been held, that the soil of a public navigable river, *prima facie*, though not necessarily, belongs to the king, and is not, by presumption of law, in the owners of the adjoining lands. *R. v. Smith, Dougl.* 441. 1 *Russ.* 340.

It is a nuisance to divert part of a river, so as to make the current less navigable. 1 *Hawk. P. C. c.* 75. § 11. 1 *Russ. ib.*

So, laying timber in a river, if it obstruct the passage of vessels, though it be the party's own soil. 3 *Bac. Abr. Nuis. (A.)* 1 *Russ. ib.*

So, placing a floating dock in a river, though useful for repairing vessels. 1 *Hawk. ib. (n.)* 1 *Russ. ib.*

So, bringing a large ship into a common dock, used for small vessels only coming to London market. 5 *Bac. Abr. Nuis. (A.)* 1 *Russ. ib.*

Weirs erected across rivers are treated as a nuisance by *Magna Charta* and subsequent statutes. *Per Lord Ellenborough, Wild v. Hornby*, 7 *East*, 198. 1 *Russ. ib.*

Held, that the conversion of a brushwood weir into a stone weir could not be supported by shewing that two thirds of it had so been converted above forty years. *Wild v. Hornby*, 7 *East*, 195.

And so, that an obstruction to the navigation, by keeping the water to a certain level for twenty years, did not give a right to do so. *Vooght v. Winch*, 2 *B. & A.* 662.

Where an embankment had been made across a bay of the sea for forty years, it was considered, that if there had been a public right of fishing there prior to the forty years, such public right would not have been lost. *Chad v. Tilsed*, 5 *Moore*, 185. 1 *Russ.* 341.

jured by the obstruction.

Navigable river.

Passage of a river narrowed by a staith, but the public convenience increased.

Towing.

Change of course.

Soil of navigable river.

Diverting water.

Laying logs.

A dock.

Acc.

Weirs.

Obstruction after time has elapsed.

Acc.

Acc.

Obstruction by vessel being sunk.

Where a vessel has been sunk, by misfortune, in a navigable river, the owner is not indictable for not removing the nuisance to the navigation. *R. v. Watts*, 2 *Exp. R.* 675. 1 *Russ. ib.*

River clogged, and none bound by prescription to clear it.

If a navigable river be stopped, and none bound by prescription to clear it, it is said those who have the piscary, and neighbouring towns enjoying the easement of passage, may be compelled to do so. 1 *Hawk. P. C. c.* 75. § 13. 1 *Russ.* 342.

Public bridges, nuisances in.

All public bridges in a highway are considered as the highway itself, and all obstructions to such bridges are indictable nuisances, as is before stated in regard to nuisances in highways. 1 *Russ.* 343. cit. 12 *East*, 202, 203.

Ruinous house adjoining to bridge.

Defendant was indicted for not repairing a ruinous house, adjoining to a bridge, charging that he was bound to repair it *ratione tenuræ*. It was found, by a special verdict, that he was only tenant at will; but the court held, that he ought to repair, lest the public should suffer; and though not properly chargeable *ratione tenuræ*, yet the averment should be intended of the possession, and not of the service. *Reg. v. Watson*, 2 *Ld. R.* 856.

An useless bridge.

A bridge built in a public way without public utility is indictable as a nuisance; and so if it be built colourably, in an imperfect or inconvenient manner, with a view to throw the burthen of rebuilding or repairing it immediately on the county. 2 *East*, 342. *Vide per Grose J.* 351.; and see 43 *G. 3. c.* 59.

Offensive business in a place where other offensive ones are carried on.

It seems that an indictment will not lie for setting up a noxious manufactory in a neighbourhood where other offensive trades have been long borne with, unless the inconvenience to the public be greatly increased. *R. v. B. Neville, Peake*, 91. 1 *Russ.* 297. *acc. R. v. Watts, Mood. & M.* 281.

Noxious trade long carried on.

Nor for continuing a noxious trade which has been carried on at the same place for nearly fifty years. *R. v. S. Neville, Peake*, 93. 1 *Russ. ib.*

Generally, no time will legalise a nuisance.

The general principle, however, is, that no length of time will legalise a public nuisance. *Wild v. Hornby, clk.*, 7 *East*, 195., *per Ld. Ellenborough*, 69. *R. v. Cross*, 3 *Campb.* 227. *Coupland v. Hardingham, ib.* 398.

Noxious trade, originally in a remote situation.

But where a noxious trade is set up in a remote situation, and afterwards houses and roads are made near it, it will not be the subject of indictment, for it is the voluntary act of such as come to settle in the neighbourhood. *R. v. Cross*, 2 *C. & P.* 483.

Powder-mills, &c.

Erecting gunpowder mills or keeping gunpowder magazines near a town, is a nuisance at common law. 1 *Russ.* 297. and n. (a).

Dangerous articles put on board ship.

So, putting on board a ship articles of a combustible and dangerous nature, without giving due notice of the contents, will be a misdemeanor. 1 *Russ.* 298., and see *Williams v. East India Company*, 3 *East*, 192. 201.

See further as to nuisance, tit. *Letdowns*.

Brewhouse, glasshouse, hog-chandler's shop.

It hath been holden, that it is no common nuisance to *make yard candles* in a town, because the needfulness of them shall dispense with the noisomeness of the smell; but the reasonableness of this opinion seems justly to be questionable, because, whatever necessity there may be that candles be made, it cannot be pretended to be necessary to make them in a town; and surely the trade of a *brewer* is as necessary as that of a *chandler*; and yet it seems to be agreed, that a *brewhouse* erected in such an inconvenient place wherein the business cannot be carried on without

greatly incommoding the neighbourhood, may be indicted as a common nuisance: and so in like case may a *glass-house* or a *mine-yard*. 1 *Haw. c. 75. § 10.*

Two persons were indicted for making great quantities of *noisome, offensive, and stinking liquors*, called acid spirit of sulphur, oil of vitriol, and oil of aqua-fortis, whereby the air was impregnated with noisome and offensive smells: and it was held by the court to be a nuisance. The word *noisome* comes in the place of the Latin *nocivus*, and means not only disagreeable, but hurtful. And Lord Mansfield C. J. said, It is not necessary to constitute the offence that the smell should be *unwholesome*; it is enough if it render the enjoyment of life and property *uncomfortable*. *R. v. White and Ward, 1 Burr. 393.*

Making offensive liquors.

A person was indicted for making great noises in the night with a *speaking trumpet*, to the disturbance of the neighbourhood; and it was held by the court to be a nuisance. *R. v. Smith, 2 Str. 704.*

Making great noises in the night.

But it hath been resolved, that neither an old nor a new *dove-cote* is a common nuisance; but perhaps if a tenant hath erected one without a licence of the lord of the manor, the lord may have in action on the case against him. 1 *Haw. c. 75. § 8.*

A dove-cote.

A *monster* shewn for money is a misdemeanor. *Harring v. Walrond, 2 Cha. Ca. 110.* It was a monstrous child, that died, and was embalmed to be kept for shew; but was ordered by the Lord Chancellor to be buried.

A monster.

If a man have a *dog* that kills sheep, that is not a public nuisance; but the owner of the dog (knowing thereof) is liable to an action; but if he be ignorant of such quality, he shall not be punished for this killing; and in an action upon the case for such killing, the plaintiff shall be required to prove in evidence that the dog had used to kill sheep. *Dyer, 25. Het. 171.* (See tit. *Dogs*, vol. i.)

A dog that kills sheep.

If a man has an unruly *horse* in his stable, and leaves open the stable door, whereby the horse gets forth and doth mischief, an action lies against the master. 1 *Vent. 295.*

An unruly horse.

In the case of *Buxendin v. Sharp, 2 Salk. 662.*, the plaintiff declared that the defendant kept a *bull* that used to run at men, but did not say that the defendant knew of this quality; it was adjudged that an action did not lie, unless it did appear that the master knew of this quality.

A bull.

There is a difference between beasts that are *feræ naturæ*, as lions and tigers, which a man must always keep up at his peril, and beasts that are *mansuetæ naturæ*, and break through the tameness of their nature, such as oxen and horses. In the latter case an action lies, if the owner have had notice of the quality of the beast; but in the former case an action lies without such notice. 2 *Ld. Raym. 1582.*

Beasts *feræ naturæ*.

But after such wild beasts have escaped from their keeper, so as to regain their natural liberty, he that kept them before shall not answer for the damage they shall commit after he has lost them, and they have resumed their wild nature. 1 *Vent. 295.*

A *mastiff* going in the street unmuzzled, from the ferocity of his nature being dangerous, and cause of terror to H.M.'s subjects, seemeth to be a common nuisance, and consequently the owner may be indicted for suffering him to go at large.

A mastiff.

Persons infected with small-pox.

It is an indictable offence unlawfully and injuriously to carry a child infected with the small-pox along a public highway, in which persons are passing, and near to the habitations of the king's subjects. *R. v. Vantandillo*, 4 M. & S. 73.

And it is also an indictable offence in an apothecary, after having inoculated children, unlawfully and injuriously to cause them to be exposed in the public street, to the danger of the public health. *R. v. Burnett*, 4 M. & S. 272. *Le Blanc J.*, in passing sentence in this case, observed, that the introduction of vaccination did not render the practice of inoculating for the small-pox unlawful; but that in all times it was unlawful, and an indictable offence, to expose persons infected with contagious disorders, and therefore liable to communicate them to the public, in a place of public resort.

N. B. The defendant was sentenced to six months' imprisonment.

Removal of indictment by *certiorari*.

Costs where prosecutor is party grieved, magistrate, &c.

Prosecutor annoyed by a steam-engine; held to be the party grieved.

By 5 W. & M. c. 11. § 9., if a defendant suing out a *certiorari* (as mentioned in the act) be afterwards convicted, the court of K. B. shall give reasonable costs to the prosecutor, if he be the party grieved, or be a justice, &c. or other civil officer, who shall prosecute for any act that concerned them as officers to prosecute or present.

Where persons living near a steam-engine, and annoyed by the smoke issuing from it, indicted it as a nuisance, and defendants were convicted, after having removed the indictment by *certiorari*: Held, that the prosecutors were entitled to their costs, as parties grieved, under the above act. *R. v. Dewnap and another*, 16 East, 194.

II. Nuisances from non-repair of Highways and Bridges.

1. *What is a Highway.*
2. *Who are liable to repair, and the Means of enforcing Repairs.*
3. *Bridges, who are liable to repair, and the Means of enforcing Repairs.*

1. What is a Highway.

Three kinds of highways.

Difference between a highway and a private way.

There are three kinds of ways: (1.) A footway (a); (2.) A foot and horse way, which is also a pack or drift way; (3.) A foot, horse and cart way. 1 Inst. 56.

It seemeth that any one of the said ways, which is common to all the king's people, whether it lead directly to a market town, or only from town to town, and do not terminate there, but is also a thoroughfare to other towns, may properly be called a highway. 1 Haw. c. 76. § 1.

(a) There is no doubt that a public footway or bridleway is a highway. — *Fol. Allen v. Ormond*, 8 East, 4. It is a highway for foot-passengers, or for horse-passengers, &c. and the parish is bound to repair it till they can throw the onus upon others. *Per Ld. Ellenborough, C. J. R. v. Ingham*, 15 East, 97.

For there were highways before there were market towns. And if it were essential to the constituting of a highway that it should expressly lead from market town to market town, then would follow that the lord of a market, by forfeiting or surrendering his charter, might cause that to cease to be a highway which was a highway before; or the king, by granting a market any place where there was no market before, might thereby consequently change the way to it from a private way into a highway.

And therefore, the distinction which is taken in some books concerning this matter, seems to be very reasonable; that every way from town to town may be called a highway, because it is common to all the king's subjects; and consequently, that a nuisance therein is a common nuisance, and punishable by indictment; that a way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village which terminates there, and is for the benefit of the particular inhabitants of that parish, house, or village only, may be called a private way, it not a highway, because it belongeth not to all the king's subjects, but only to some particular persons, each of whom, as it seems, may have an action on the case for a nuisance therein. *Haw. c. 76. § 1. 1 Russ. 448.*

So, if I have a private way without a gate, and a gate is hung upon an action lies upon the case, for I have not my way as I had before. *Litt. R. 267.*

So, if one grant me a way, and afterwards dig trenches in it to my hinderance, I may fill them up again. *God. 53.*

But if a way which a man has, become not passable, or become very bad, by the owner of the land tearing it up with his carts, and so the same be filled with water, yet he who has the way cannot dig the ground to let out the water, for he has no interest in the soil. But in such case he may bring his action against the owner of the land for spoiling the way, or perhaps he may go out of the way, upon the land of the wrong-doer, as near to the bad way as he can. *God. 52.*

Taylor v. Whitehead, Doug. 745. This was an action of trespass for breaking and entering the plaintiff's close. The defendant (*inter alia*) pleaded a right of way by prescription, through the lane of the plaintiff's contiguous to the place in question, to the mill-bridge on the river Wharfe, in Yorkshire, and that the defendant and occupiers of those lands were from time whereof, &c. by reason of their tenure, bound to repair the land, and the banks thereof next to the river; that at several times the lane was out of repair and overflowed with water, so that the defendant could not use the way without imminent danger of the loss of his life and goods; and that he necessarily went over the lands adjoining, as near to the said way as he possibly could, as it was awful for him to do, &c. — This cause was tried before Lord Loughborough, at York, in 1780, and afterwards argued in the court of K. B. — By Lord Mansfield C. J. The question is upon the grant of this way. Now, it is not laid to be a grant of a way generally over the land; but of a precise specific way. The grantor says, you may go in this particular line; but I do not give you a right to go either on the right or left. I entirely agree with my brother Walker, that, by common law, "he who

Highway need not lead to a market town.

Not a highway, if used by particular inhabitants only.

Nuisance in and repairs of private ways.

Where a prescription way is out of repair, the passengers have no right to go upon the adjacent ground.

Otherwise as to
highways.

hath the use of any thing ought to repair it." The grantor *may* bind himself, but here he has not done it. He has not undertaken to provide against the overflowing of the river; and for aught that appears, *that* may have happened by the neglect of the defendant. Highways are governed by a different principle. They are for the public service, and if the usual tract be impassable, it is for the general good that people should be entitled to pass in another line. See also *Bullard v. Harrison*, 4 M. & S. 387.

And this was clear law established by a number of cases, particularly that of *Absor v. French*, B. R. M. 30 Car. 2. 2 Show. 21. S. C. Lev. 234. and *Hend's case*, Sir W. Jones, 296., that where a common highway is out of repair by the overflowing of a river or any other cause, passengers have a right to go upon the adjacent ground. So, if the water impair the banks of a navigable river (which is, indeed, considered as a highway), it is justifiable to go upon the nearest part of the field next adjoining. 1 *Ld. Raym.* 725.

How far outlets
are part of the
highway.

It hath been holden that if there be a highway in an open field, and the people have used time out of mind, when the ways are bad, to go by outlets on the land adjoining, such outlets are parcel of the way; for the king's subjects ought to have a good passage, and the good passage is the way, and not only the beaten track; from whence it follows, that if such outlets be sown with corn, and the beaten track be foundrous, the king's subjects may justify going upon the corn. 1 *Haw. c.* 76. § 2.

Waste lands
adjoining to
highways
belong
primâ facie to
owner of ad-
joining land.

Waste lands adjoining to public highways, are presumed, in the first instance, to belong to the owner of the adjoining land, and not to the lord of the manor, but that presumption prevails only so long as proof to the contrary is wanting. *Steel v. Prickett*, 2 *Stark. N. P.* 463.

Where strips of land lie between a highway and an adjoining enclosure, the *primâ facie* presumption is, that such strips of land, as well as the soil of the highway *ad medium filum viae*, are the property of the owner of the enclosure; but the presumption is to be confined to that extent, for if the narrow strip be contiguous to, or communicate with, open commons or larger portions of land, the presumption is either done away or considerably narrowed, for the evidence of ownership which applies to the larger portions applies also to the narrow strip which communicates with them. *Grose v. West and others*, 7 *Taunt.* 39.

Acc. where
the land is
copyhold.

The defendant's father having built a cottage on a slip of land lying between an inclosed copyhold tenement and a turnpike road, in ejectment the question was, whether such slip belonged to the adjoining copyholder or to the lord of the manor; the court decided that the same principle ought to prevail in the case of copyhold as of freehold; and *per Holroyd J.*, the rule that waste land near a highway is to be presumed *primâ facie* to belong to the owner of the inclosed land next adjoining, is not confined to a case where the owner of that land is a freeholder, but extends equally to cases where the owner is a leaseholder or copyholder: In either case evidence may be given to rebut the *primâ facie* presumption. *Doe d. Pring and another v. Pearsey*, 7 B. & C. 304.

Space by the
side of a road

On indictment for an encroachment on a highway, it appeared that certain inclosure commissioners were authorised to set out

public and private roads (the former to be sixty feet wide); and they set out the road in question, styling it a private road, but leaving sixty feet for the width, the centre of which space had been commonly used by the public as a carriage road, and had been repaired by the township for eighteen years. The question put to the jury was, whether the road, though originally meant to be a private one, had not been subsequently dedicated to the public. After verdict of guilty, on motion for a new trial, the rule was discharged; the court saying, that it was a case for the jury, and that they had found a right verdict: and *per Lord Tenterden*, I am strongly of opinion that when I see a space of fifty or sixty feet, through which a road passes between inclosures, set out by an act of parliament, that, unless the contrary be shewn, the public is entitled to the whole of that space, although, perhaps on economy, the whole may not have been kept in repair. If it were once held, that only the middle part which carriages ordinarily run upon was the road, you might by degrees inclose up to it, so that there would not be room left for two carriages to pass. The space at the sides is also necessary to afford the benefit of air and sun. If trees and hedges might be brought close up to the road actually used as the road, it could not be kept sound." *R. v. Wright*, 3 B. & Ad. 681.

In an action brought by the clerk of certain road commissioners for the recovery of a rate for lighting, cleansing, &c. footways, the question was, whether the local act which exempted the turnpike-road from the jurisdiction of the commissioners, exempted also the footpath which was formed by the side of the turnpike-road: on special case, stating the provisions of the several acts, the court gave judgment for the defendant, on the ground that the footpath in question was *part* of the turnpike-road; and *per Taunton J.*, a footpath by the roadside, included within the hedge or fence of the road, is as much part of a public highway as that which is travelled over by carriages. The 111th section of the general turnpike act (3 G. 4. c. 126.) shews that, of necessity, the footpath must form part of a turnpike-road. *Loveridge v. Hodsohl*, B. & Ad. 602.

In books of the best authority a river common to all men is called a highway. 1 *Haw. c. 76. § 1.*

The freehold of the highway is in him that hath the freehold of the soil; but the free passage is for all the king's liege people. *Inst. 705.* And see *Sir John Lade v. Shepherd*, *infra*.

The king has nothing but the passage for himself and his people; for the freehold and all profits belong to the owner of the soil, and all the trees upon it and mines under it, which may be extremely valuable. 1 *Burr. 143.*

Sir John Lade v. Shepherd, 2 Str. 1004. Upon trial of an action of trespass, a case was made that the place where the supposed trespass was committed was formerly the property of the plaintiff, who some years since built a street upon it, which has ever since been used as a highway; that the defendant had lands contiguous, parted only by a ditch, and that he laid a bridge over the ditch, the end whereof rested on the highway. It was insisted for the defendant that by the plaintiff's making it a street, it was a dedication of it to the public; and therefore, however he might be liable to an

set out under an inclosure act, held to be part of the road.

The footpath by the side of a turnpike-road forms part of it.

How far a river may be a highway.

To whom the freehold of a highway belongs.

What is a dedication to the public;

it is not a transfer of the soil.

indictment for a nuisance, yet the plaintiff could not sue him as for a trespass on his private property. — But by the court: It is certainly a dedication to the public, so far as the public has occasion for it, which is only for a right of passage; but it never was understood to be a transfer of the absolute property in the soil. So the plaintiff had judgment.

Public having the use for eight years, though not a thoroughfare.

Dedication by tenant may be presumed.

And under circumstances, the privity of the landlord may be presumed.

Notice to the steward.

No obstruction offered to the public.

Old gate restored.

Where the owners of the soil suffered the public to have the free passage of a street in *London*, though not a thoroughfare, for eight years without any impediment (such as a bar set across the street, and shut at pleasure, which would shew the limited right of the public), it was held a sufficient time for presuming a dedication of the way to the public. Though, if the land had been under lease during that time, or even for a much longer period, the acquiescence of the tenant would not, it seems, have bound the landlord, without evidence of his knowledge. *Trustees of the Rugby Charity v. Merryweather*, 11 East, 375. in the note. *Et vide per Mansfield C. J.*, 5 Taunt. 142. But see *Wood v. Fedd*, post, p. 581.

Yet it has been held, that where a way has been used by the public for a great number of years over a close, in the hands of a succession of tenants, the privity of the landlord, and a dedication by him to the public, may be presumed, although he was never in the actual possession of the close himself, and he is not proved to have been near the spot. *R. v. Barr*, 4 Camp. 16.

And in this case, it was also held, that where a way has been so used, notice of the fact to the steward is notice to the landlord. *S. C.*

In *R. v. Lloyd*, 1 Campb. 260., which was an indictment for obstructing a highway, it was said by Lord *Ellenborough C. J.*, that although a place be not a thoroughfare, yet if the owner of the soil throw open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public, and that although the passage were originally intended for private convenience, when the public have been long allowed to use it without interruption.

In *Lethbridge v. Winter*, *Somerset Spring Assizes*, 1808, 1 Campb. 263. (n.), trespass was brought for entering plaintiff's close and pulling down a gate. — Plea, that it was a public footway, and the gate wrongfully erected across the same. — Evidence, that the gate had recently been put up in a place where a similar gate had formerly stood, but where for the last twelve years there had been none. It was contended for the defendant, that from suffering a gate to be down so long, and permitting the public to use the way without obstruction for so many years, the plaintiff and those under whom he claimed must be considered as having completely dedicated the way to the public, and that the gate could not be replaced. Under the direction of the judge, a verdict was found for the plaintiff, and the court of K. B. refused a rule nisi to set it aside.

S. P.

And in *Roberts v. Karr*, *Kingston Lent Assizes*, 1808, 1 Campb. 262. (n.), *Heath J.* also decided the same point, viz. that the originally establishing a bar or obstruction rebuts the presumption of a dedication to the public, though it may have been down for some time.

He also said that there could not be a partial dedication to the public. 1 Russ. 310. But see *Ld. Stafford v. Coyney*, post, p. 584. It seems, also, that in every case the facts must be considered as sufficient to shew that the owner meant to give the public a right of way over his soil, before a dedication by him will be presumed. Thus in *Woodyer and another v. Hadden*, 5 Taunt. 125., when the plaintiff erected a street, leading out of a highway across his own close, and terminating at the head of the defendant's adjoining close, which was separated by the defendant's fence from the end of the street for twenty-one years, during nineteen of which the closes were completed, and the street publicly watched, cleansed, and lighted, and both footways and half the horseway paved, at the expense of the inhabitants, it was held (*dissentiente Chambre*), that this street was not so dedicated to the public that the defendant, pulling down his wall, might enter it at the end adjoining to his land, and use it as a highway.

Wood v. Veal, H. 2 G. 4. 5 B. & A. 454. Trespass for breaking and entering a certain yard and close of the plaintiff, in the parish of St. John, Westminster, and pulling down his fence, &c. were erected. The defendant justified the trespass under a public right of way. At the trial at the Westminster sittings, after the 11th Mich. term, before Abbott C. J., it appeared that the *locus in quo*, which was called *Little Abingdon Street, Westminster*, was not a thoroughfare, but that as far back as living memory could go, it had been used by all persons desirous of going there, and that in 11 G. 3. it had been enumerated amongst other streets in the act of parliament then passed for paving, cleaning, and lighting the squares, streets, &c. of Westminster. That the commissioners had accordingly paved and lighted it, and that watchmen had been stationed there, &c. On the part of the plaintiff, it appeared, that in the year 1719, a lease for 99 years of the plaintiff's premises, including the yard in dispute, had been granted by the then owner of the fee; which having expired in 1818, the plaintiff, in 1820, having for 24 years previously lived in the neighbourhood, erected the fence in question. The Lord Chief Justice left it to the jury to say, whether they thought there had been any dedication to the public previously to 1719, telling them, that in that case, they ought to find for the defendant; but if not, when he told them, that there could be no dedication to the public, except by the owner of the fee; and that the permission by the tenants for 99 years would not bind the landlord; and that the circumstance of the lease for 99 years, which had been proved, explained, in a great degree, the use by the public, as not being referable to a dedication by the landlord. Under this direction, the jury found a verdict for the plaintiff. — On motion for a new trial, Abbott C. J. said, I have great difficulty in conceiving that there can be a public highway which is not a *thoroughfare*, because the public at large cannot well be in the use of it. In this case, however, I left it to the jury to consider, whether there had been a dedication to the public, telling them that a highway might exist, although it was not a *thoroughfare*. Nothing done by the lessee without the consent of the owner of the fee would give the right of way to the public. Here, as the land was demised by the lease of 1719, which expired in 1818, it seems to me, that the proper question to consider was, whether there had been a

The facts must shew that the owner meant to dedicate it to the public.

In trespass and justification under a public right of way, the *locus in quo*, which was not a thoroughfare, had been under lease from 1719 to 1818, but as far back as living memory could go, it had been used by the public, and lighted, paved, and watched under an act of parliament, in which it was enumerated as one of the streets in Westminster. After 1818, the plaintiff, who previously lived for 24 years in its neighbourhood, inclosed it:

Held, that under these circumstances, the jury were well justified in finding that there was no public right of way, inasmuch as there could be no dedication to the public by the tenants for 99 years, nor by any one except the owner of the fee.

Quare, whether there can be a public highway which is not a thoroughfare?

dedication to the public before 1719, or subsequently to that period, with the consent of the owner of the fee. I am still of opinion that the case was presented properly to the consideration of the jury, and I think they have found a right verdict. — *Bayley J.* It is not necessary to decide upon the present occasion, whether there can be a highway which is not a thoroughfare. For the point in this case is, whether, supposing that to be so, there has been a dedication of this way to the public? Now in order to give the public that right, it must be done with the consent of the owner of the fee; for where it is given by an individual having a limited right, it can only continue for a limited period. Here, upon the evidence, it appears that the permission was given, if at all, by the lessee for 99 years. I think, therefore, that the case was properly left to the jury, and that they have found a proper verdict. — *Holroyd J.* The opinion of Lord Kenyon in the *Rugby Charity v. Merryweather*, 11 *East*, 375. (n.) (*ante*, p. 579.) is somewhat shaken by the observations of *Ld. C. J. Mansfield* in *Woodyer v. Hadden*, 5 *Taunt.* 142. (*ante*, p. 580.) But it is not necessary to determine that question here, for this case has been determined upon principles which assume the case of the *Rugby Charity v. Merryweather* to be good law. — *Best J.* I am quite satisfied with the verdict which the jury have found in this case, and with the manner in which the question was left to them. No man has a greater respect for the learned judge who decided the case of the *Rugby Charity v. Merryweather* than I have, but I think that that decision was a departure from principles usually received in the law. If a road be for the accommodation of particular persons only, it is not a public road; and, therefore, I can see no reason why the inhabitants in a street which is not a thoroughfare should not put up a fence at the end of it and exclude the public. It is not, however, necessary to decide that question in this case, because, independently of it, the plaintiff was entitled to the verdict. *R. R.*

Unfinished street, dedication presumed.

In an action on the case for personal injury sustained by the plaintiff, through defendant's negligence, from an unfinished house, the question was whether the street in which it happened had become a highway by dedication to the public. It was a new street, and was neither paved nor lighted, and it led from an old street to a road over fields; but the public had used it for four or five years. *Best C. J.* told the jury, that if they thought the public had used it as a highway with the assent of the owners of the soil, they might presume a dedication; and the verdict having done so, the court of C. P. refused to disturb it. *Jarvis v. Dean*, 3 *B.* 447.

Way over crown land used for near 20 years: Held no presumption of dedication.

In a case where there had been a right of footway over land which belonged to the crown, and by an inclosure act which passed nearly twenty years before, all roads were discontinued, unless where the commissioners awarded otherwise, and there was no such provision by the commissioners as to the foot-path in question, but the public had still continued to use it; the court recognised the authority of *Wood v. Veal* (see *supra*), which decided that the consent of the lessee alone was not sufficient to bind the owner, and that no legal dedication to the public was in this case to be presumed. *Harper v. Charlesworth*, 4 *B.* & *C.* 591.

Rex v. The Inhab. of the Parish of St. Benedict, in the Town and County of Cambridge, E. 2 G. 4. 4 B. & A. 447. Presentment in the usual form, by a magistrate against the defendants, for not repairing a highway. Plea, not guilty. The case was tried at the *Cambridge Lent Assizes*, 1820, before *Graham B.*, when a verdict was found for the crown, subject to the opinion of the court of K. B. on the following case:—The road, which was proved to be out of repair, was situate in the defendants' parish, and was originally made under the provisions of a local act passed in the 41 G. 3. By a clause in that act the commissioners were directed to set out two specific private roads, therein particularly described, which, when set out, were to be used by such persons only as were entitled to use an old occupation-road, running in the same direction with the latter of the two roads. The commissioners acting in execution of this power, by their award, dated *June 27. 1803*, set out the road presented as one of these two roads. From the date of the award, however, until the finding of the presentment, the road had been used by the public without interruption as a carriage-way. The question was, whether under these circumstances this was a public road which the parish was bound to repair? After argument, in which the cases of *The Trustees of the Rugby Charity v. Merryweather* (11 East, 375.), *The King v. The West Riding of Yorkshire* (2 East, 342.), and *Rex v. Lloyd* (1 Camp. 260.), were cited, *Abbott C. J.* said,—I am of opinion that this was not a public road, and that the parish are not bound to repair it. It was in this case, as appears from the clause in the local act, compulsory on the owner of the soil to permit a qualified passage, viz. to all persons entitled to use the old occupation-road. That circumstance distinguishes this from the cases cited. If this be a public road, it would follow that wherever, under an inclosure act, an occupation-road was set out, and it happened to be convenient for passage, it would become, almost immediately, a public road, and the burthen of repairing it would be thrown on the parish.—*Bayley J.* I do not accede to the doctrine, that because there is a dedication of the road by the owner of the soil, and the public use it, that the parish is therefore bound to repair. I think there ought to be, in addition to that, evidence (a) of an acquiescence by the parish in that dedication. In the case of bridges, there always is what is to be considered as an acquiescence by the county. The county is not liable except for bridges made in *highways*; the making of the bridge, and thereby obstructing the road while the bridge is making, may be treated as a nuisance, and the county may, if it think fit, stop its progress by indictment, and the forbearing to prosecute in that way is an acquiescence by the county in the building of the bridge. But in the case of a parish, they have no power to prevent the opening of a road, or to obstruct the public use of it. It would be unjust if, by the public use of what was at first a private road, the burthen of repairing it could be removed from the persons to whom the use of it was at first confined, and cast upon the parish. Admitting, therefore, that in this case there was a dedication to the public (which, I think, does not sufficiently appear), and the road was found to be a public benefit (which I am not sure is the

Rex v. Inh. of St. Benedict, Cambridge. Where a road was set out by the commissioners under a local act, and certain persons only were by the act to use it, but in fact it had been used by the public for many years. it was held that this was not sufficient evidence of a dedication to the public; and that if it was, there being no evidence that the parish had acquiesced in that dedication, it was not a public road which the parish were bound to repair.

(a) But see the next case.

Rex v. Inh. of St. Benedict, Cambridge.

Where the public have made use of a highway, no particular adoption by the parish is required.

Repairs done by the parish are a sufficient adoption.

Commissioners may dedicate a road to the public, if consistent with their trust.

Public permitted to use a road for a certain purpose only.

case,) I think that in consequence of the want of some act of acquiescence or adoption by the parish, they are not liable to the repair of this road. *Holroyd and Best Js.* concurred. Judgment for the defendants.

On the indictment of a parish for the non-repair of a road, it appeared on special case that certain commissioners under an act for the drainage of certain tracts of land, had formed a bank forty feet broad, by the side of a drain, and with earth which had been taken out of the drain; and the bank had been used for twenty-five years as a convenient and useful road for the public, during which time the parish had repaired it; and the land on which the bank was placed had been purchased by the commissioners. The court held, that where a highway had been made use of by the public, the parish must be charged with the repairs of it, and that no particular adoption of it by the parish was requisite; controverting in this respect what was laid down in *R. v. Benedict*; but that even if any adoption were necessary, the repair of it by the parish was a sufficient adoption: they further held, that there was no reason why such commissioners might not make a legal dedication of a highway, provided it were not inconsistent with the duties of their trust; but the court were divided in opinion whether in the present instance the commissioners could, consistently with the object of the act, make the dedication in question. *R. v. Inhabitants of Leake*, 5 B. & Ad. 469.

The Marquis of Stafford v. Coyney, 7 B. & C. 257. The plaintiff had suffered the public to use for several years a road through his estate for all purposes, except for carrying coals; and it was held that this was either a limited dedication of the road to the public, or no dedication at all, but only a licence revocable; and that a person carrying coals along the road after notice not to do so was a trespasser.

2. Who are liable to repair, and of the means of enforcing Repairs.

[13 G. 3. c. 78. — 34 G. 3. c. 74. — 42 G. 3. c. 90.]

Parish in general to repair.

It seems to be agreed that of common right (that is, by the common law) the general charge of repairing all highways lies on the occupiers of the lands in the parish wherein they are. But particular persons may also be burthened with the general charge of repairing a highway in two cases, namely, in respect of an inclosure, or by prescription.

And to such an extent is this obligation, that if the inhabitants of a township bound by prescription to repair the roads within the township be expressly exempted, by the provisions of a road-act, from the charge of repairing new roads to be made within the township, that charge must necessarily fall upon the rest of the parish. *R. v. Inh. of Sheffield*, 2 T. R. 106. 1 Russ. 320.

Where individuals liable to repair become insolvent.

And upon the same principle it was holden, that if particular persons were made chargeable to the repairs of such highways by a statute lately made, and became insolvent, the justices of peace might put that charge upon the rest of the inhabitants. *Anon.* 1 Ld. Raym. 725. 1 Russ. 320.

Where the road is placed by stat. under

And where a statute enacted that the paving of a particular street should be under the care of commissioners, and provided a

fund to be applied to that purpose, and another statute, which was passed for paving the streets of the parish, contained a clause that it should not extend to the particular street, it was held that the inhabitants of the parish were not exempted from their common law liability to keep that street in repair; that the duty of repairing might be imposed upon others, and the parish be still liable; and that the parish were under the obligation, in the first instance, of seeing that the street was properly paved, and might seek a remedy over against the commissioners. *R. v. Inh. of St. George, Hanover Square*, 3 Campb. 222. 1 Russ. 320. See acc. *R. v. Inhabitants of Netherthong*, 2 B. & A. 179.

the care of
commissioners.

No agreement can exonerate a parish from the common law liability to repair; and a count in an indictment against the corporation of *Liverpool*, stating, that they were liable to repair a highway, by virtue of a certain agreement with the owners of houses alongside of it, was held to be bad, on the ground that the inhabitants of the parish, who are *prima facie* bound to the repair of all highways within their boundaries, cannot be discharged from such liability by any agreement with others. *R. v. the Mayor, &c. of Liverpool*, 3 East, 86. And see 3 Bac. Abr. Highways, (F.) 1 Russ. 321.

No agreement
will exonerate
a parish.

It is an incontrovertible position, that by the general law of the land, the parish at large is *prima facie* bound to repair all highways lying within it, unless by prescription they can throw the onus on particular persons by reason of their tenure; but when that is the case, it is by way of exception to the general rule. *Per Ashhurst J., R. v. Inh. of Sheffield*, 2 T. R. 106. See also 2 Saund. 159 b. (n.)

Rex v. Inhab. of Kingsmoor, T. 1823, 2 B. & C. 190. Indictment stated, "that a certain way was an ancient common highway, and that a certain part situate in an extra-parochial hamlet was out of repair, and that the inhabitants of the extra-parochial hamlet ought to repair it:" Held, that this indictment was bad, as it did not allege that the inhabitants of the hamlet were immemorially bound to repair; nor that the hamlet did not form part of a larger district, the inhabitants of which were bound to repair. And *quære*, whether the inhabitants of the hamlet, being extra-parochial, would be liable to repair at common law if the indictment had contained the latter allegation? See *per Best J., S. C. ibid.* p. 195.

Indictment of
an extra-paro-
chial hamlet,
held bad.

R. v. Inh. of Cottingham, 6 T. R. 20. This was an indictment against the inhabitants of the parish of *Cottingham* for not repairing a road. By stat. 6 G. 3. c. 78. for inclosing certain common lands, the commissioners were empowered to set out both public and private roads, which public roads should be repaired in like manner as other public roads, and all private ways should be repaired by such persons and in such manner as the commissioners in their award should direct. The commissioners directed that all roads, whether public or private, should be repaired in like manner as other public highways are repaired, by the laws of this realm. The defendants pleaded that no allotment was made to or for the use or benefit of the inhabitants of the parish under this act; and that at the time of making the award under it, the inhabitants of the parish were not liable to repair the road in question, which was a private road, or any other private road over the lands inclosed. The prosecutor demurred to this plea: and, after argument,

Commissioners
under an inclo-
sure act (autho-
rising them to
set out public
and private
roads, which
public roads
should be re-
paired as other
public roads,
and which
private ways
should be re-
paired by such
persons and in
such manner as
the commis-
sioners should

R. v. Inh. of Cottingham.

direct) cannot direct that the private as well as public roads should be repaired as other public roads are by law to be repaired.

Award under an inclosure act rejected as evidence of a locality of a highway, the usage not having been pursuant to it, nor the proper notices proved.

Parish not liable, unless it be a public highway leading from one vill to another.

If parish have repaired, it is not conclusive as to their liability.

judgment was given for the defendants.—Lord *Kenyon* C.J. (*inter alia*) said, It is contended that the legislature meant that the parish, who derive no benefit from this act, should be made subject to the burthen of repairing this road. The act empowers the commissioners to set out all the roads, adding, that the public roads shall be repaired as other public roads are repaired, and that the private roads shall be repaired by *such person and persons*, and in such manner, as the commissioners shall direct. And the question is, whether the words “person and persons” extend to any strangers that the commissioners should name, the inhabitants of *Cornwall* or *Yorkshire* for instance, or whether they must be confined to *such persons as are interested in the inclosure*? Common sense requires that the latter construction should be adopted.

Upon an indictment against the parish of *Haslingfield*, for not repairing a highway, an award made by commissioners under an inclosure act, which awarded the highway to be in a different parish, was holden not to be admissible evidence for the defendants, without shewing that the commissioners had given notices which the act required to be given previously to the boundaries having been ascertained by them; it appearing that the usage had not been pursuant to the award; the defendants having, since the award, as well as before, repaired the highway. The learned judge who tried this cause reported that he should have no difficulty in admitting the award, and, if the usage had been pursuant to it, presuming that the proper notices had been given. *R. v. Inh. of Haslingfield*, 2 M. & S. 558.

R. v. Inh. of the Parish of Enfield, Sitt. after H. 1819, cor. Abbott C. J. MS. Indictment against the defendants for not repairing a road, called *Welch's Lane*, and the road over the marshes, leading from the turnpike road at *Enfield Wash* to the government foundry for small arms. Plea, not guilty. In support of the indictment it was contended, that this lane was an *ancient public highway*, and had been repaired by the parish time out of mind; that the commissioners under the *Enfield* inclosure act could not abolish it as a *public* road, without the order of two justices, which they never obtained; that the commissioners had set it out, and improperly called it a *private* road, but had directed the parish to repair it; that this was not like the *Cottingham* case, where the parish was not liable to the repair of the road previous to the inclosure, nor had any allotment under the act; for that here the parish of *Enfield* had always repaired this lane, which led from the turnpike road to the river *Lea*, and had also an allotment under the act, as well as a share of the timber growing on the chase, and that the commissioners were therefore justified, when they set out this road, in directing the parish to repair it. Upon the cross-examination of witnesses for the prosecution, it appeared, that at the lower end of *Welch's Lane*, a gate across a part of the road, leading over an ancient inclosure into the marshes, had been occasionally locked; and that the farmers holding lands in the marshes formerly paid three-pence or four-pence an acre for carrying their hay through this inclosure, when *Abbott C. J.* stopping the counsel for the crown, said, that unless the prosecutors were prepared to contradict their own witnesses, the case must end:—that a *public highway* must lead from one town or vill to another, and be *free* for the passage of all H. M.'s subjects; whereas, it was proved in evidence, that *Welch's Lane* led only to a farm-house,

and that the occupiers of the marshes had paid toll for the liberty of bringing their hay along that part of the road over the ancient inclosure; and as to the repairs heretofore done to *Welch's Lane*, it appeared that the tenant of the farm got into the office of surveyor, and put his hand into the parish purse to repair his own road; this, therefore, never was a *public* highway. The general inclosure act, which passed on the same day as the *Enfield* inclosure act, *directs*, that all roads over lands to be inclosed, not set out by the commissioners, shall be deemed part of the lands to be inclosed; the commissioners did set out this road, but expressly set it out as a *private* road; the parish, therefore, was not bound to repair it. Verdict, not guilty.

A record of conviction on an indictment against a parish for not repairing a road, will be conclusive evidence, on a plea of not guilty, of the liability of that parish to repair. *R. v. St. Pancras, Peake's N. P. C. 219. 2 Saund. 159. a. n. 10.*

By stat. 34 G. 3. c. 64. § 1., after reciting that it frequently happens that the boundaries of parishes pass through the middle of a common highway, and one side of such highway is situated in one parish, and the other side in another parish, whereby great inconveniences often arise in repairing the same, *it is enacted*, that two justices, on complaint of any surveyor of any parish (stating in writing, and by a plan thereunto annexed, that there is such a highway, one side whereof ought to be repaired by one parish, and the other side by another, and particularly describing the same by metes, bounds, and admeasurement thereof), may issue their summons with a copy of such writing and plan thereunto annexed, to the surveyor or one of the surveyors of such other parish, to appear before them on a day mentioned in such summons, not more than fourteen nor less than seven days, from the day of the date of such summons; and if the parties appear, such justices may then proceed finally to decide the matter in manner herein-after mentioned, in case all the parties shall consent thereto; but in case the surveyor summoned shall not appear on such first summons, or appearing shall require further time, such justices shall adjourn the further consideration of the matter for any further time, not more than 21 nor less than 14 days from the day of such adjournment, of which the surveyor not appearing shall have notice; on which day the said justices shall proceed to hear the parties and their witnesses, and whether the party summoned does or does not appear, shall proceed to examine and finally determine the matter in form following; (viz.) They shall divide the whole of such highway by a transverse line crossing the same into two equal parts, or into two such unequal parts and proportions, as, in consideration of the soil, waters, floods, the inequality of such highway, or any other circumstances attending the same, they in their discretion shall think just and right; and declare, adjudge, and order that the whole of such highway on both sides thereof, in one of such parts, shall be maintained and repaired by one of such parishes, and that the whole thereof on both sides in the other of such parts shall be maintained and repaired by the other of such parishes; and shall cause such their order, and a plan of such highway, and the allotment thereof as before mentioned, to be fairly delineated on paper or parchment, and filed with the clerk of the peace; and shall also cause such

Record of conviction conclusive against parish.

34 G. 3. c. 64. Highway lying in two parishes, two justices to determine what parts shall be repaired by each.

Order, &c. to be filed with clerk of the peace.

34 G. 3. c. 64.

posts, stones, or other such boundaries, to be set up in such highway as they shall think necessary for ascertaining such division and allotment aforesaid.

Each parish afterwards bound to repair the parts so allotted.

§ 2. And after such order and plan shall be so filed with the clerk of the peace as aforesaid, such parishes shall be bound as of common right to maintain and keep in repair such parts of such common highway so allotted to them as aforesaid, and shall be liable to be prosecuted and indicted for neglect of such duty, and shall in all respects whatsoever be liable and subject to all the provisions, regulations, and penalties contained in any act of parliament for the repair of the highways, in like manner as they are liable to repair any other common highway within such parishes respectively; and also shall be discharged from the repair of such parts of such highway as shall not be included in their respective allotments.

Costs of the proceedings.

§ 3. And all costs, charges, and expenses incurred, shall be defrayed by such two parishes, to be ascertained by such two justices; and if not paid, either such justices, or any other justice, may levy the same by distress and sale, with the costs of such distress, on the goods and chattels of any surveyor of the highways of the parish refusing or neglecting to pay.

Not to alter the boundaries of counties, &c.

§ 4. Provided, that nothing herein shall affect, change, or alter in any manner whatsoever, any boundaries of counties, lordships, hundreds, manors, or any other division of public or private property, nor the boundaries of any parishes, otherwise than for the purpose of repairing such particular portion of the highways in the manner herein-before mentioned.

Not to relate to highways repaired by bodies politic, tenure, &c. without consent.

§ 5. Nothing herein shall relate to highways repairable by bodies politic or corporate, townships, or other such places or private persons, by reason of tenure of lands, or otherwise howsoever, but shall be construed to relate to such highways, the repair of which belongs to parishes only; unless such bodies or persons be desirous that the same shall be placed under the regulations of this act; in which case such two justices may proceed therein in like manner as is herein directed with respect to parishes.

Appeal.

§ 7. Either of the two parishes, by an order in vestry specially called for the purpose, may appeal to the next quarter sessions of the county where such parishes shall lie after such order and plan are filed as aforesaid, who may make such order as shall appear to them to be just, either by affirming, quashing, or amending the order of the two justices; and shall allow costs to either party as they shall think right; which order of sessions shall not be removed by *certiorari* or otherwise, but shall be final to all intent and purpose whatsoever.

Certiorari.

Repairing in respect of an inclosure.

A man may be bound to the repair of a highway in respect of an inclosure of the land wherein it lies; as where the owner of lands not inclosed, next adjoining to the highway, inclose his lands on both sides thereof; in which case he is bound to make a perfect good way, and shall not be excused for making it as good as it was at the time of the inclosure, if it were then any way defective: because, before the inclosure, the people used, when the way was bad, to go for their better passage over the fields adjoining, out of the common tract; which liberty is taken away by the inclosure. 1 *Haw. c. 76.* § 6. 2 *Saund.* 160. n. 12.

And if the way is not sufficient, any passenger may break down the inclosure, and go over the land, and justify it, till a sufficient way be made. 3 *Salk.* 182.

Breaking fence to go over land.

Also it hath been holden, if one inclose land on one side, which hath been anciently inclosed on the other side, he ought to repair all the way : but if there be not such an ancient inclosure of the other side, he ought to repair but half that way. 1 *Haw. c.* 76. § 7.

Inclosing on one side.

Therefore, if there be an old hedge time out of mind on one side of the way, and a person having land on the other side make a new hedge, such person shall be charged with the whole repair. 1 *Sid.* 464.

But if one person make a hedge on one side of the way, and another person make a hedge on the other side of the way, they shall be chargeable to the repair thereof by moieties. *Ib.*

But it is said, that wherever one is bound to repair a highway, or part thereof, in respect of an inclosure, and he lays it open again as it was before, he shall be freed from the charge of such repair. 1 *Haw. c.* 76. § 7.

Charge removed by laying it open.

A particular person may be bound to repair a highway in respect of a prescription ; and it is said, that a corporation aggregate may be compelled to do it, by force of a general prescription, that it ought and hath used to do it, without shewing that it used to do so in respect of a tenure of certain lands, or for any other consideration ; because such a corporation, in judgment of law, never dies, and therefore if it were ever bound to such a duty, it must needs continue to be always so : neither is it any plea, that such a corporation have always done it out of charity ; for what it hath always done, it shall be presumed to have been always bound to do. But it is said, that a person cannot be charged with such a duty, by a general prescription from what his ancestors have done, unless it be for some special reason ; as the having lands descended from such ancestors, which are holden by such like service. 1 *Haw. c.* 76. § 8.

Repairing by prescription.

This applies to individual persons only, and not to an aggregate body of persons who compose the inhabitants of a district or division in a parish or township. *R. v. Inhabitants of Ecclesfield*, 1 *B. & A.* 348.

Not applicable to a body of inhabitants.

R. v. Inhab. of the Parish of St. Giles, Cambridge, T. 56 G. 3. 5 *M. & S.* 260. Presentment for not repairing a highway in the parish of *St. Giles, Cambridge*. Plea, that the inhabitants of the parish of *Great St. Mary*, in the town of *Cambridge*, from time whereof, &c. until the passing of the act 37 G. 3. c. 179., have repaired, and been used and accustomed to repair, and during all that time of right ought to have repaired, and but for the passing of the said act, and the provisions therein made respecting the repairs of the said part of the said king's common highway in the presentment mentioned to be in decay, from the passing of the said act hitherto of right ought to have repaired, and still of right ought to repair, the said part of the said highway, when and as often as it hath been or may be necessary ; and that by the said act, intituled, &c. it was (among other things) enacted, that the said part of the said highway (setting it out) should from and after the passing of the said act, be repaired by trustees therein mentioned ; and that the inhabitants of *Great St. Mary* should be exempted from repairing the same, in consideration of 150*l.*

Indictment against a parish for non-repair of a highway lying within it : Plea, that the inhabitants of another parish have repaired and been used and accustomed to repair, and of right ought to have repaired : Held ill, for the plea ought to have shewn a consideration.

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agreed to be contributed by them towards the expense of making and repairing the same; and that in and by the said act it was further declared, that the said act, and all the powers thereby given, should commence and take effect the day the same should receive the royal assent, and should continue thenceforth for 21 years next ensuing, and thence to the end of the next session of parliament; and that the said act is in full force. Without this, that the inhabitants of the said parish of *St. Giles* the said part of the highway ought to repair and amend, when and so often as should be necessary, as by the said presentment is above supposed, &c. Demurrer. Joinder. — After argument, *Ld. Ellenborough* C. J. said, “The principle of law I take to be clear, that the inhabitants of a parish are liable of common right to repair the highways lying within it, unless they can shew that this burthen is cast upon some other persons, under an obligation equally durable with that which would have bound the parish; which obligation must arise in respect of some consideration of a nature as durable as the burthen cast upon them. Now, in the present case, nothing of this kind appears; but all that is alleged is, that the parish of *St. Mary* has immemorially repaired. This I hold to be insufficient; and, therefore, the defendants having failed to shew any consideration binding upon the persons whose liability they would needs substitute, the burthen must rest with themselves. I do not go into the question touching the effect of the exemption, because my opinion is founded on this, that no consideration being pointed out whereby to subject the inhabitants of the parish of *St. Mary* to the reparation of a highway lying in *aliend parochiâ*, the law will not cast this burthen upon them. To hold otherwise would, I think, be raising a doubt as to the common law of liability of parishes to amend their own highways. It appears to me that the defendants are liable, inasmuch as they have not shewn any others who are.” — *Bayley* J. “There is not any case which looks to an obligation like the present. Particular persons cannot be charged by prescription without shewing a consideration; but a corporation, sole or aggregate, may be bound to repair by usage or prescription, without more. Here I find no consideration alleged. It was suggested, that the land over which the highway lies might originally have been dedicated to the public, in consideration that the parish of *St. Mary*, who were chiefly benefited by it, would undertake the burthen of its reparation; but upon consideration, I think that this cannot be; because the inhabitants of a parish cannot, as if they were a corporation, bind their successors: if they could, and were to become once liable, they must remain so for ever, however useless the highway might, in after ages, turn out to be.” — *Holroyd* J. “The only ground of distinction that can be suggested between this case and the case where particular individuals are to be charged has been suggested; viz. that inasmuch as a parish is composed of a body of inhabitants which has continuance by succession, in like manner as a corporation, a parish may also be charged as a corporation, although, like it, the parish, individually, is perpetually changing. It has been said, that it might have been for the convenience of the parish of *St. Mary* that this land was dedicated to the public for the purpose of a highway; and that in consideration of this boon the parish might have taken on themselves the burthen of its reparation.

But I think, upon reflection, that this could not be a legal consideration binding on the successors, because a burthen might thereby be imposed on them beyond the benefit which they were to receive; for they would have to repair the highway, not only for their own use, but also for the public. This plea, then, is improperly pleaded: for when the highway lies out of the parish, a consideration must be shewn. I say nothing as to the form of pleading where the highway lies within a township or division of a parish which is charged with the repairs. (See *R. v. Ecclesfield*, 1 B. & A. 348.) Judgment for the crown.

See *R. v. Inhab. of W. R. of Yorkshire*, 4 B. & A. 623. See post, § *Bridges*, p. 607.

It seems, that an indictment, charging a tenant in fee simple with having used of right to repair such a way by reason of the tenure of his land, is certain enough, without adding, that his ancestors, or those whose estate he hath, have always so done; for that is implied. 1 *Haw. c.* 76. § 8.

But the indictment must set forth where those lands lie. 2 *Hale*, 181.

And in the case of *Rider v. Smith*, 3 T. R. 766., it was determined that in an action on the case for not repairing a private highway leading through the defendant's close, it is sufficient to allege that the defendant, by reason of his possession of the said close called, &c. and of two closes of land with the appurtenances, contiguous and next adjoining thereto, is bound to repair the said way.

Under the head of prescription may be considered the case where not the whole parish, but particular townships or other divisions within the parish, have for time immemorial repaired particular roads within that parish; which prescription, being ancient, and without interruption, is presumed to have had its origin by licence on an inquisition of *ad quod damnum*, or other legal commencement; and it would be very prejudicial in large parishes, if every inhabitant were liable to repair throughout that whole parish, when the time occupied in going and returning might exceed the time appointed by the law for labour.

But a private agreement amongst the inhabitants, not being ancient, nor confirmed on an inquisition of *ad quod damnum*, that some of the inhabitants shall repair one part of the highway, and some of them another part, is not good: it may be binding amongst the parties thereunto, so as on a breach thereof one party may have an action upon the case against the other; but with respect to the public, they continue equally liable as before; for such private agreement cannot alter the law. *R. v. The Mayor, &c. of Liverpool*, 3 East, 84.

In the case of *R. v. Inhab. of Great Broughton in Cumberland*, 5 Burr. 2700., an indictment was brought in the usual form, alleging that a certain part of the highway, &c. at the parish of *Bridekirk*, in the county aforesaid, was ruinous, &c., and that the inhabitants of the division of *Great Broughton* in the parish of *Bridekirk* aforesaid, the common highway aforesaid (so as aforesaid being in decay), from the time whereof the memory of man is not to the contrary, ought to repair and amend, when and so often as it shall be necessary. On a verdict being found against the inhabitants, a writ of error was brought in the K. B.; and the

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Mode of charging tenant in fee simple in indictment.

In civil action.

Townships or other divisions within a parish may be liable to repair.

Private agreement concerning repair of highways not binding with respect to the public.

On indictment, the reason why a particular division is liable must be set forth.

assignment of error was, "that it is not shewn or alleged in the indictment that the inhabitants of this division *have used and been accustomed*, and of right ought to repair and amend this highway, or in what right or for what cause they ought to repair and amend it." By the court: At the common law, and of common right, the inhabitants of a parish at large are bound to repair the highways; and here is no reason shewn why this particular division should be obliged to do it. It ought to appear upon the face of the indictment, by what right the charge was laid upon this particular division. If you lay a charge upon persons against common right, you must shew how they are bound; and it is not enough to shew what they immemorially ought to repair, but it should be shewn that they *have repaired*. The court, therefore, held this indictment for that reason to be bad, and reversed the judgment.

S. P.

So in the case of *R. v. The Hamlet of Penderryn*, 2 T. R. 513., it was decided, that a presentment under stat. 13 G. 3. c. 78. § 24. against a smaller district than a parish, must state expressly *how* the inhabitants thereof are liable to the repairs of the roads.

Where township is exempt, it falls on the rest of the parish.

But if the inhabitants of a township, who were bound by prescription to repair the roads within the township, be expressly exempted by the provisions of the road act from the charge of repairing new roads to be made within the township, that charge must necessarily fall on the rest of the parish. *R. v. Inhab. of Sheffield*, 2 T. R. 106.

And the quantity of road which they must repair, should be shewn.

If the inhabitants of a parish plead that several included townships are bound by prescription to repair the highways within them, and that part of the highway in question is within one of those townships, and the residue within the other, the plea must specify how much lies within the one, and how much within the other. *R. v. Inhab. of Bridekirk*, 11 East, 304.

Where the inhabitants of a parish pleaded that the inhabitants of a particular district were bound by prescription to repair all common highways situate within that district, save and except one common highway within the said district, it was holden that the plea might be supported, although it appeared that the excepted highway was of recent date; and it was also holden that in such a plea it was not necessary to state by whom the excepted highway was repairable; and such a plea will be good, although it does not state any consideration for the liability of the inhabitants of the district. *R. v. Inhabitants of Ecclesfield*, 1 Stark. N. P. 393. 1 B. & A. 348. See also *Gateward's case*, 6 Rep. 60. and *R. v. Inhab. of Yorkshire*, 4 B. & A. 623. See *post*, § Bridges, p. 607.

Where in an indictment against a township for non-repair of a road, the prescription stated and proved was, that its inhabitants had been immemorially used to repair all roads situate within it, which,

R. v. The Inhab. of the Township of Hatfield, M. 1 G. 4. 4 B. & A. 75. Indictment against defendants for non-repair of a highway. The first count alleged a prescription, that the defendants, from time immemorial, had repaired and been accustomed to repair, and of right ought to have repaired, and still of right ought to repair, as often as it should be necessary, such and so many of the common king's highways, situate within their township, as would otherwise, and but for such usage or prescription, be repairable by the inhabitants of the parish of *Hatfield* at large. The second count varied only in stating the prescription to be for the several and respective townships within the parish of *Hatfield* to repair separately from each other the several roads situate

within each township, &c. respectively. Plea, general issue. At the trial at the last York assizes, before *Bayley J.*, a verdict for the crown was found by the jury, subject to the opinion of the court of K. B., on a case which stated, that the road, a part of which formed the subject of this indictment, was one leading from *Doncaster to Epworth*, and other places in the county of *Lincoln*. Its course lay along a bank commonly called the *Low Level Bank*, elevated one or two feet above the adjacent country. It was bounded on one side by a large open drain, and on the other by fence ditches. This bank was made by the earth of the drain. By articles of agreement, dated 24th May, in the second year of the reign of *Charles I.*, between that king and *Cornelius Vermuyden*, esquire, which recited that the king was seised in fee of *Hatfield Chase and Ditch Marsh*, and of divers manors and lands adjoining, and that certain lands, wastes, commons, and waste grounds, situate, lying, and being upon each side of the river *Idle*, and abutting on the rivers *Dun* and *Ayre* to the north, and the river *Trent* towards the south, being parcel of the said premises, and containing, by estimation, 60,000 acres, or thereabouts, were subject to be surrounded and drowned with water, in such manner that little or no benefit could be made thereof, unless special care was taken for inning and draining the same. The said articles contained an agreement on the part of *Cornelius Vermuyden* to drain these lands, in consideration of himself or his nominees having the fee-simple of one third part of the lands when drained. In this agreement were the following clauses:—“And it is further agreed, and H. M. doth hereby declare, that the said *Cornelius Vermuyden*, and others the parties aforesaid, shall and may, at their wills and pleasures, and as to him or them shall be thought most necessary and expedient, cut, dig, and make, or cause to be made, such and so many channels, watercourses, banks, highways, sosses, sluices, and other receptacles for water, and shall have for himself and his servants and workmen, with carts and carriages fit and convenient, free ingress and regress for the perfecting and performance of the said works, and draining the lands and grounds aforesaid, without the let, denial, hinderance, or interruption of any person or persons whatsoever, and shall also have and take such quantity and proportion of earth, reed, and other things and materials within the said grounds for perfecting the said work as by him or them shall be thought necessary and useful; and shall also have for his and their use and uses, freely, without interruption, the benefit of all and singular channels, watercourses, and sluices, which are now already made or digged within the said lands or grounds, and the same to turn, change, or alter for the more necessary draining of the said grounds, and perfecting the said works, or as he or they shall think fit: and it is hereby further concluded and agreed, that if the said *Cornelius Vermuyden*, and other the parties and undertakers by him to be employed as aforesaid, shall have cause at any time or times to use any of the lands and grounds lying or being without the compass of the grounds hereby intended to be drained and laid dry as aforesaid, and not subject to surrounding for any passage of water or otherwise, then it shall and may be lawful to and for the said *Cornelius Vermuyden*, and other the parties aforesaid, to use the same, so far as shall be necessary, in and for the performance of the said

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but for such usage, would be repairable by the parish at large: Held, that this places the township in the situation of a parish, and that it is necessary for the defendants to show by evidence some other persons in certainty who are liable, in order to deliver themselves from their liability to repair.

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works. The drainage having been partly executed in the 11th year of the reign of *Charles I.*, 12,459 acres, being one-third part of the lands then drained, were, in pursuance of the above agreement, conveyed in fee to Sir *William Curciene* and others, the nominees of *Cornelius Vermuyden*. The participants of the *Level of Hatfield Chase* were the persons who were the owners of the lands subsequently conveyed under the above articles to *Cornelius Vermuyden*, or his nominees. The road in question, which ran through these lands, had been, as far back as living memory went, repaired by the participants out of their general scots. These repairs were made by sand which was brought from a distance, and by throwing soil from the adjacent drains, when cleansed out by the participants for the purposes of the drainage, sand being the usual material for the repairs of that road. The participants were not a corporation, nor was it ascertained at the trial who all the different individuals composing that body were, though the names of some were proved. No repairs were proved to have been done by the defendants upon the particular road indicted; but their prescriptive liability, as stated in the indictment, was proved. The question for the opinion of the court was, whether the inhabitants of the township of *Hatfield* were liable to repair this road; and the court were to be at liberty to make any presumption which they should think the jury ought to have made. After argument, *Abbott C. J.*—The prescription stated in this indictment, and which has been proved in evidence, is one which places the inhabitants of this township in the same situation as the inhabitants of a *parish*, as to their legal liability to the repair of roads locally situated within their district. This circumstance distinguishes the case from those where the prescription stated on the record applies only to the particular road indicted. Then the question is, whether, in this case, the defendants have, with any degree of certainty, shewn that any other persons are liable to the burthen? If the case had stopped with the repairs done by the participants, it would have been sufficient, but it does not; for we have the history of those participants stated in it, who are, it seems, the representatives of *Cornelius Vermuyden*, to whom *King Charles* the first assigned one third of certain crown lands, then of little value, as a compensation for draining the whole. In pursuance of this agreement, the drain and bank were, in all probability, executed; and on the bank this road has since been made. I am, therefore, not at all satisfied that the road had any immemorial existence; and if so, that reduces the commencement of the repair, given in evidence, to the reign of *Charles* the first, which negatives any prescriptive liability on the part of these participants. I do not think, therefore, that the defendants have established that the participants are liable *ratione tenuræ*. And the circumstances seem also to me to negative their liability, by reason of inclosure. Upon the whole, I am of opinion, that there must be judgment for the crown.—*Bayley J.* The prescription stated in this indictment makes the township, for all legal purposes, as to repair of roads, a *parish*. Then, if so, these defendants are liable, unless they can throw the burthen on some other persons. I entirely agree with my Lord Chief Justice, that from the circumstances stated in this case, we cannot make the presumption, that this was an immemorial highway, or that the participants are liable to repair it

ratione tenuræ. The repairs done by them are either referable altogether to mistake, or to a disinclination, on their part, to throw the burthen on the township. — *Holroyd J.* In this case the township is, by the prescription, placed on the same footing as a parish, both as to immemorial roads, and also as to any new highways which may have been subsequently made; and, therefore, whether the road indicted be an immemorial highway or not, the defendants must repair it, unless they can shew with certainty some other persons who are liable. The usage to repair, proved at the trial, would have been conclusive against the participants, unless there had been evidence to rebut it. That evidence, however, seems to me to be satisfactory. Here the wastes and commons originally surrounded by rivers were drained, and one-third part of them was allotted as a reward to *Vermuyden*, for the drainage. This formed a new division, which had not existed before, and the repairs proved are only co-extensive with that new division. It seems to me, therefore, to follow, as a very strong presumption, that the usage to repair could not have any existence, previously to the drainage, but commenced at that time; for if it had commenced before, in all probability other lands, as well as those of the participants, would have also been chargeable. I think, therefore, that the defendants have failed in making out, that the participants are liable *ratione tenuræ.* As to their liability *ratione clausuræ*, it appears on the evidence that the road was contemporaneous with the inclosure. But if it were clear, that the fence ditches were made at a subsequent period, still that would not make the participants, as a body, liable, but only those persons who actually made and continued the inclosure; and we have no evidence to shew who those persons were, or that they ever repaired the road. Judgment for the crown.

Indictment for non-repair of a bridge and highway, charging defendant, and those whose estate he had in a certain mill, with having immemorially repaired the same: it appearing in evidence that the mill was not in existence prior to the time of H. 8., *Findal C. J.*, who tried the case, directed an acquittal. It was further ruled at the same trial, that persons rated to the parish in which the bridge and highway were situate, were competent witnesses under 54 G. 3. c. 170. § 9. *Exeter Summer Assizes, 1829, 2 v. Hayman, 1 M. & M. 401.* See tit. Evidence.

By stat. 13 G. 3. c. 78. § 23., Every surveyor shall, from time to time, give information upon oath to the justices, or any two of them, of all such highways, and of all bridges, causeways, or pavements, upon such highways, as are out of repair, and ought to be repaired by any person or persons, bodies politic or corporate, by reason of any grant, tenure, limitation, or appointment, of any charitable gift, or otherwise howsoever; and the said justices shall limit a time for repairing the same, of which notice shall be given by the said surveyor to the occupier or occupiers of the lands or tenements liable to the burthen of such repairs, or to such other person or persons, bodies politic or corporate, as are chargeable with the same; and if such repairs shall not be effectually made within the time so limited, the said justices shall, and are hereby required to present such highways, bridges, causeways, or pavements, so out of repair, together with the person or persons, bodies politic or corporate, liable to repair the same, at the next

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Liability to repair by tenure of a mill negatived by shewing that mill did not exist within legal memory. Rated inhabitants competent witnesses.

13 G. 3. c. 78. Justices, on information of surveyor, may order highways, liable to be repaired by tenure, &c. to be repaired within a limited time; and if not repaired within that time, may present them.

13 G. 3. c. 78.

general quarter sessions of the peace for the limit wherein such highway shall lie, and the justices at such quarter sessions may, if they see just cause, direct the prosecution to be carried on at the general expense of such limit, and to be paid out of the general rates within the same.

Persons enfeoffed with lands for the maintenance of causeways, highways, and bridges shall let them to farm at the most improved value.

§ 51. Where any lands have been, or shall be given, for the maintenance of causeways, pavements, highways, and bridges, all such persons who are, or shall be enfeoffed or trusted with any such lands, shall let them to farm at the most improved yearly value, without fine; and the justices of the peace, in their open sessions, shall inquire, by such ways and means as they shall think fitting, into the value of all such lands so given, or to be given, and order the improvement and employment of the rents and profits thereof according to the will and direction of the donor of such lands, if they find that the persons so entrusted have been negligent or faulty in the performance of their trust, (except such lands have been given for the uses aforesaid to any college or hall in either of the universities of this kingdom, which have visitors of their own.)

Presentments.

All defects of repairs of highways shall be presented in the county where they lie, and not elsewhere.

A presentment by a justice of the peace under stat. 13 G. 3. c. 78. § 24. of a nuisance in a highway, must expressly allege the offence to be done against the form of the statute. *R. v. Winter*, 13 East, 258.

It is not enough to state that the justice, by virtue of the act, &c. presented, &c. S. C.

Parish lying in two counties.

If a parish lie in two distinct counties, an indictment must be brought against the whole parish. It was held, indeed, in a case in 5 Burr. 2507., that in such a case the indictment should be against that part of the parish in which the road lies. See *R. v. Broughton*, ante.

But it has been more recently decided, that if part of a parish be situate in one county, and the rest in another, and a highway lying in one part be out of repair, an indictment against the inhabitants of that part only is bad; and that the indictment should have been against the whole parish. *R. v. The Inhab. of Clifton*. 5 T. R. 498.

Indictment must be in the county where the bad road lies.

And it appears to have been always considered that the indictment under such circumstances must be preferred in that county wherein the ruinous part of the road lies. *R. v. Inhab. of Clifton*. 5 T. R. 498. *R. v. Weston*, 4 Burr. 2507.

In every indictment against a parish for not repairing a highway, there are three essential averments: the first, that the road is a highway; the second, that it is out of repair; and the third, that it is situated in the parish. 2 Stark. C. P. 693. note. 1 Russ. 478. S. P.

If the highway be not alleged in a presentment or indictment to lie in the parish indicted, the parish is not bound to repair it, and such presentment or indictment is erroneous. *R. v. Hartford*. 1 Cowp. 111.

Must shew it to be a highway.

The indictment must shew that the way is common to all the king's people; for which cause it hath been resolved that an indictment for a nuisance to a horseway, without adding that it is a highway, is naught. 1 Haw. c. 76. § 89.

On an indictment for a nuisance in obstructing a highway, it was described as a public highway for all the liege subjects, &c. to go, return, &c. with their horses, coaches, carts, and carriages, and along the same, &c. It appeared that the road in question was under an archway, and of such dimensions, that carts of a particular kind, and loaded in a particular way, could not pass. After conviction of one of defendants, a motion was made on the ground of a variance, but the court decided against the objection; holding the meaning of the indictment to refer to such carts, &c. the road would permit to pass; it not being laid as a road for all carts, &c. *H. T. 1824, R. v. Lyon and another, 1 R. & M. 1. P. 151.*

The length and breadth of this way, and from whence and whither, are necessary to be ascertained in these indictments; but I do not remember any authority that holds it necessary to say it is a highway, for this or that particular carriage; for if it be a common highway, it is a highway for all manner of things. *Per Ld. Hardwicke C.J., R. v. Hatfield. Cas. temp. Hardw. 315.*

In *Aspinall v. Brown, 3 T. R. 265.*, the court of K. B. held that, in indictments for nuisances to highways, it is not necessary to state the highway to have been such "from time whereof the memory of man is not to the contrary," or "from time immemorial." It is sufficient to state, in a compendious manner, that it is a highway. See also *2 Saund. 158. b. (n.) 4.*

It is more safe in the indictment to shew both the place from which, and also the place to which the way supposed to be out of repair doth lead; yet exceptions for want of such certainty have sometimes been disallowed. However, it seems certain, that there is no necessity to shew that a highway leads to a market-town, because every highway leads from town to town. *1 Haw. c. 76. 86.*

And it has been expressly decided, that in pleading a public highway, it is not necessary to state the places from and to which the way led, though it is otherwise in the case of a private way; nevertheless, if a defendant will state the *termini* in his justification, he is bound to prove them. *Rouse v. Bardin and others, 1 H. Black. 351. 2 Stark. C. P. 693. n. (l.)*

It is necessary in the indictment expressly to shew in what place the nuisance complained of was done; for which cause an indictment for stopping a way at *D.* leading from *D.* to *C.* is not good; for it is impossible that a way leading from *D.* should be in *D.*, and no other place is alleged. *1 Haw. c. 76. § 87.*

R. v. Inhab. of Gamlingay, 3 T. R. 513. 1 Leach, 528. This was an indictment against the parish of Gamlingay, for not repairing a highway leading from the parish of Hailey, St. George, towards and unto the parish of Gamlingay, both in Cambridgeshire, which was determined to be bad; for the road is described as leading from Hatley unto Gamlingay, which excludes Gamlingay. It was also ruled that that defect was not aided by a subsequent allegation that a certain part of the same highway called *H.*, situate in the said parish of Gamlingay, was in decay, &c.; and it has been decided that from and to are both exclusive. See *R. v. Knight and others, 7 B. & C. 413.*

It hath been adjudged that an indictment against particular persons must specially charge them every one. *1 Haw. c. 76. § 92.*

Highway, where carts of a particular description could not pass; question of variance.

Need not be shewn when it became a highway.

Not necessary to shew the places from and to which it leads.

Place where the nuisance is.

"From" and "to" held to be exclusive.

Against particular persons.

Must set forth
how much is
out of repair.

It ought also certainly to shew, to what part of the highway the nuisance did extend; as by shewing how many feet in length and how many feet in breadth it contained, or otherwise the defendant will never know the certainty of the charge against which he is to make his defence, nor will the court be able from the record to judge of the greatness of the offence, in order to assess a fine answerable thereunto; and it hath been resolved that the place is not sufficiently ascertained by shewing that it contained so many feet in length and so many in breadth, by *estimation*. 1 *Haw. c. 76. § 88.*

Must set forth
the fact clearly.

Also the fact alleged must be expressed in such proper terms, that it may clearly appear to the court to have been a nuisance; and for this cause it hath been resolved, that a presentment for *diverting* a highway is not good, because a highway cannot be diverted, but must always continue in the same place where it was, howsoever it be *obstructed*, and a new way made in another place. 1 *Haw. c. 76. § 91.*

Persons in-
dicted to have
notice.

It seems to be implied in the construction of all penal statutes, that no one ought to be convicted of any offence against them without having notice of the accusation made against him, and an opportunity of defending himself: and therefore it seems certain that generally no one ought to be punished for any of the above-mentioned offences, without being called upon to answer for himself, and having liberty to traverse the matters alleged against him. 1 *Haw. c. 76. § 83.*

Plea by a
parish.

By an indi-
vidual.

Upon an indictment against a parish for not repairing, they can give nothing in evidence upon the plea of *not guilty*, but that the way is in repair; but if it be against a particular person, he may give evidence that others ought to repair it. 1 *Mod. 112. R. v. Ireton, Comb. 396.*

Individual
charged *ratione*
tenuræ may dis-
charge himself
on the general
issue.

The same point was also ruled in *R. v. the Inhab. of the City of Norwich*, 1 *Str. 177. 110. 183, 184.*; where *Eyre J.* said, if a man would discharge himself on a particular account, he must plead it especially; but not where the common right is his defence. If a man is charged to repair *ratione tenuræ*, he may throw it upon the parish by the general issue.

The parish is
always primar-
ily liable.

The defendants ought not to plead that they ought not to repair, without shewing who ought. 1 *Haw. c. 76. § 93.* To this point see *R. v. Inhab. of Bridekirk, ante, p. 592.*

Where a statute enacted that the paving of a particular street should be under the care of the commissioners, and provided a fund to be applied for that purpose, and another statute, which was passed for paving the streets of the parish, contained a clause that it should not extend to the particular street, *Ld. Ellenborough C. J.* held, that the inhabitants of the parish were not exempted from their common law liability to keep that street in repair; that the duty of repairing might be imposed upon others, and the parish be still liable; and that the parish were under the obligation, in the first instance, of seeing that the street was properly paved, and might seek a remedy over against the commissioners. *R. v. Inhab. of St. George's, Hanover Square, 3 Camp. 222.*

Parish must
shew the liabil-
ity of some
other person.

And Mr. *Hawkins* says, that if a particular person be bound to repair a highway, either by inclosure or by prescription, the parish cannot take advantage of it upon the plea of *not guilty*.

out ought to set forth their discharge in a special plea. 1 *Haw.* 76. § 9.

It is no excuse for the inhabitants of a parish, being indicted at common law for not repairing the highways, that they have done all that is required of them by statute; for since these statutes are wholly in the affirmative, and made in aid of the common law, and to supply the defects thereof, they shall not be construed to derogate any provision thereby made for these purposes. 1 *Haw.* 76. § 18.

The defendants shall not be discharged by submitting to a fine, or a *distringas* shall go in *infinitum* till they repair. 1 *Haw. c.* 79. 94.

By stat. 13 *G. 3. c.* 78. § 65., if the inhabitants of any parish, township, or place, shall agree at a vestry or public meeting to prosecute any person by indictment for not repairing any highway within such parish, township, or place, which they apprehend such person was obliged by law to repair, or for committing any nuisance upon any highways, or shall agree at such vestry meeting to defend any indictment or presentment preferred against any such parish, township, or place, it shall and may be lawful for the suror of such parish, township, or place, to charge in his account the reasonable expenses incurred in carrying on or defending such respective prosecutions, after the same shall have been agreed to by such inhabitants at a vestry or public meeting, or allowed by justice of the peace within the limit where such highway shall be; which expenses, when so agreed to or allowed, shall be paid by such parish, township, or place, out of the fines, forfeitures, compositions, payments, and assessments, authorised to be collected and raised by virtue of this act.

And by § 66., in all cases where a vestry or public meeting of the inhabitants of any parish, township, or place, is authorised or directed by this act, there shall be public notice given of the day, hour, and place of holding the said meeting at the church or chapel of such parish, township, or place, on the *Sunday* next preceding such meeting, and also notice thereof in writing, specifying the purpose of such meeting, fixed at the same time upon the door of such church or chapel, and the same shall not be held till three days at least after such notice given; and if there be no church or chapel, the like notice of such meeting shall be given in writing, and put up at the most public place therein, three days at least before such meeting.

§ 64. It shall be lawful for the court before whom any indictment or presentment shall be tried for not repairing highways, to award costs to the prosecutor, to be paid by the person or persons so indicted or presented, if it shall appear to the said court that the defence made to such indictment or presentment was frivolous; or to award costs to the person indicted or presented, to be paid by the prosecutor, if it shall appear to the said court that such prosecution was vexatious.

It has been held, that it is a matter to be determined by inquiry whether a person is or is not the prosecutor within this section of the statute; and that a court of quarter sessions, before whom a parish is acquitted upon the trial of an indictment for not repairing a highway, may, by their order, award *C.* and *E.* to pay costs to the parish, although the names of *C.* and *E.* be not on the

Fine and
distringas.

13 *G. 3. c.* 78.
Inhabitants at
a meeting may
agree to prosecute
an indictment.

The notice required for holding vestries or public meetings.

Court may award costs to the prosecutor or defendant upon an indictment or presentment.

Court may inquire who the real prosecutor is.

What the order need state.

Sufficient to state that the defence was frivolous.

Court which tries the indictment can alone award costs.

Provision of 13 G. 3. c. 78. s. 64. as to costs, does not apply where K. B. has granted a new trial, with special directions about costs.

New trial refused after a verdict of not guilty upon an indictment for not repairing a road, where the verdict does not bind the right.

A new trial is not allowed after acquittal.

back of the indictment, and although the indictment originated in a presentment of *A.* and *B.* constables, whose names are on the indictment; and it was also held to be enough if the order is entitled as on the prosecution of *C.* and *E.*, without shewing further that *C.* and *E.* are prosecutors; and that it need not appear on the face of the order that the indictment was tried, if that appear by the record of the proceedings; and also that the order is good in form if it be for the payment of the costs to the solicitor of the parish. *R. v. Commerell and Ellis*, 4 M. & S. 203.

That the defence was frivolous.] *R. v. the Inh. of Clifton*, 6 T. R. 344. The defendants were indicted for not repairing a road. On the trial before *Buller J.* they were convicted, and he certified on the back of the record that the defence was frivolous, without also awarding costs in express terms. But the court were clearly of opinion that there was no precise form of words to be used, and that this certificate was in effect an awarding of the costs.

R. v. The Inhab. of Chatterton, 5 T. R. 272. An indictment for not repairing a high road, having been removed by *certiorari*, went down for trial to the assizes, when the defendants were acquitted for want of prosecution. *Wood* moved for a rule on the prosecutor to compel him to pay the defendants their costs, on the ground that this was a vexatious prosecution, under the above act of 13 G. 3. c. 78. But *per curiam*:—The statute only gives the court “before whom the indictment is tried” power to award costs. An application should therefore have been made to the judge at *Nisi Prius*, who might have awarded costs to the defendants; but we have no such power. Rule refused.

An indictment for non-repair of a road, having been found at the quarter sessions, was removed into K. B., and, after a conviction, the court granted a new trial, on certain terms, and (*inter alia*) that prosecutor's costs of both trials should abide the event. On the second trial, defendants were acquitted, and the judge certified that the prosecution was vexatious. On motion, the court held that defendants could not claim their costs, under 13 G. 3. c. 78. § 64.; for that this section applied only to trials that took place in the ordinary course, and not to a case where the court set aside the first verdict, and granted a new trial under special terms. *R. v. Inhab. of Salwick*, 2 B. & A. 136.

R. v. The Inhab. of Burbon, M. 57 G. 3., 5 M. & S. 392. Indictment for non-repair of a highway. Plea, not guilty. Upon the trial before *Wood B.*, at the *Westmorland Sum. Ass.* 1816, there was a verdict of not guilty. And now, *Scarlett* moved for a new trial, upon the ground that the verdict was against all the evidence; and he said, that the prosecution was for the purpose of trying a civil right only. But *per Ld. Ellenborough C. J.*—In general, the rule is not to grant a new trial in a criminal proceeding after a verdict of not guilty. And inasmuch as the right will not be bound on the plea of not guilty, we do not think it would be proper to break into the general rule, on the suggestion that the prosecution was merely intended to determine a civil right. *R. R.*

The general rule of a new trial never being allowed where the defendant is acquitted in a criminal case, has been held to prevail in a prosecution for not repairing a highway, though such prosecution is usually carried on for the purpose of trying or enforcing

ing a civil liability. *R. v. Mann*, 4 M. & S. 337. *R. v. Cohen and Jacob*, 1 Stark. N. P. 516. See 1 Russ. 395. *R. v. Burbon*, *supra*.

But where the defendants had been acquitted on an indictment for not repairing a road, the court of K. B., though they refused a new trial, yet, upon very special circumstances, suspended the entry of the judgment, so as to enable the parties to have the question reconsidered upon another indictment, without the prejudice of the former judgment. *R. v. The Inhab. of Wandsworth*, 1 B. & A. 63.

S. P.
Judgment suspended.

Indictment for non-repair of a bridge *ratione tenuræ*; and after verdict for defendant, a new trial was moved for, on the ground of misdirection, and also on account of the improper rejection of evidence; in support of which it was contended, that this proceeding is in the nature of a civil remedy, its object not being punishment, but the ascertainment of a right; but the court, adhering to the principle laid down in *R. v. Wandsworth*, 1 B. & A. 63., made the rule absolute for suspending the judgment, in order to allow time for preferring a new indictment. *R. v. Sutton*, 5 B. & Ad. 52.

S. P.
Judgment suspended.

By stat. 13 G. 3. c. 78. § 24., every justice of assize, justices of the counties palatine of *Chester*, *Lancaster*, and *Durham*, and of the great sessions in *Wales*, shall have authority by this statute, upon his or their own view, and every justice of the peace, either upon his own view, or upon information on oath given to him by any surveyor of the highways, to make presentment at their respective assizes or great sessions, or in the open general quarter sessions of such respective limit, of any highway, causeway, or bridge not well and sufficiently repaired and amended, or of any other default or offence committed and done contrary to the provision and intent of this statute. And all defects in the repair thereof shall be presented in such jurisdiction where the same do lie, and not elsewhere. And every such presentment shall be as effectual as if the same had been presented and found by the oaths of twelve men. Saving to every person affected by such presentment his lawful traverse to the same, as well with respect to the fact of non-repair as to the duty or obligation of repairing the said highways, as they might have had upon any indictment of the same presented and found by a grand jury. (a)

13 G. 3. c. 78.
Justices may present on their own view.

May be traversed.

The high constable of a hundred, having presented a nuisance in a highway, he signed a writing to that effect, and the clerk drew it up in the form of an indictment; but the constable did not give evidence before the grand jury, nor was it submitted to their consideration. The court held, that to warrant such a proceeding, the constable ought to have given his evidence on oath before the grand jury; that it was therefore bad, and made the rule absolute for quashing it. *R. v. Bridgewater and Taunton Canal Company*, 7 B. & C. 514.

Constable presenting must go before the grand jury.

§ 24. The justices, at their general quarter sessions, or the major part of them, may, if they see just cause, direct the prosecutions upon such presentment as shall be made at the quarter sessions to be carried on at the general expense of such limit, and to be paid out of the general rates within the same. And for every such

13 G. 3. c. 78.
Sessions may order the prosecution to be carried on at the expense of the division.

13 G. 3. c. 78. default so presented, the justices of assize, counties palatine, and great sessions, at their respective courts, and the justices of the peace at their general quarter sessions, shall have authority to assess such fines as to them shall be thought meet. And no such presentment, nor any indictment for any such default or offence, shall be removed by *certiorari* or otherwise, out of such jurisdiction, till the same be traversed, and judgment thereupon given; except where the duty or obligation of repairing may come in question.

No *certiorari* till after judgment, except where liability to repair is in question.

Costs on removal by *certiorari*.

In the case of *R. v. Kettleworth*, 5 T. R. 33., it was determined that where a justice of peace indicts a road for being out of repair (the indictment being afterwards removed by *certiorari*), he is entitled to costs under stat. 5 & 6 W. & M., c. 11. § 3. if the defendant be convicted.

S. P.

And according to *R. v. The Inhab. of Penderryn*, 2 T. R. 260., where a magistrate makes a presentment of a road, as being out of repair, and another person, by the magistrates' consent and approbation, sues out a *certiorari*, the *certiorari* is well sued out, though the court will look to the magistrate as the person responsible. He is answerable for all the costs, if the presentment should turn out to be improper.

Right of repair may come in question on plea of not guilty by a parish.

And in *R. v. The Inhab. of Taunton St. Mary*, 3 M. & S. 465., it was held that upon an indictment against a parish for not repairing a highway, the right of repair may come in question so as to entitle the parish to remove it by *certiorari*, though the parish plead *not guilty*; it being stated in an affidavit filed by the defendants, that on the trial of the indictment, the question, whether the parish were liable to repair, and the right to repair, would come in issue. It was also held that several persons were entitled to costs under it as prosecutors of an indictment, removed by *certiorari*, for not repairing a highway; one, as constable of the manor within which the highway lay; the others, as parties grieved: they having used the way for many years in passing and repassing from their homes to the next market town, and being obliged, by reason of the want of repair, to take a more circuitous route.

Costs to several prosecutors.

Presentment must purport to have been on information on oath given to the justice.

R. v. The Inhab. of Fylingdales, 7 B. & C. 438. Where a magistrate presented a road in the township of F., "upon the information upon oath of A. B., surveyor of the highways for the township of C., which is 35 miles distant from the township of F.," &c.: held, in arrest of judgment, that this presentment was bad, for that it did not appear that the information upon oath was given to the presenting magistrate, and the surveyor of the highways in C. had no authority under 13 G. 3. c. 78. § 24. to give information as to the road in F.

Indictment for not repairing a common ancient Highway.

County of _____ } *THE jurors for our lord the king upon their oath present, that from the time whereof the memory of man is not to the contrary, there was and yet is a common and ancient king's highway, leading from the town of _____, in the county of _____, towards and unto the market town of _____, in the county of _____, used for all the liege subjects of our said lord the king and of his predecessors, with their horses, coaches, carts,*

and carriages to go, return, pass, ride, and labour at their will and pleasure, and that a certain part of the same king's common highway, situate, lying, and being in the parish of ———, in the county of ——— aforesaid, beginning at the place called ———, and so continued towards the market town of ——— aforesaid, for the length of ——— feet, and being of the breadth of ——— feet, on the ——— day of ———, in the ——— year of the reign of ———, and continually afterwards, until the day of the taking of this inquisition, was and yet is in great decay, for the want of due reparation and amendment of the same; so that the subjects of our said lord the king passing and travelling through the same, with their horses, coaches, carts, and carriages, could not, during the time aforesaid, nor yet can go, return, pass, ride, and labour, without great danger: to the great damage and common nuisance of all the liege subjects of our said lord the king passing through that way, and against the peace of our said lord the king, his crown and dignity; and that the inhabitants of the said parish of ——— in the said county of ——— the common highway aforesaid (so as aforesaid being in decay) ought to repair and amend, when and so often as it shall be necessary.

Or, that A. O. of ——— aforesaid, gentleman, ought, by reason of the tenure of his lands and tenements, situate, lying, and being at ——— aforesaid, in the county aforesaid, to repair and amend the said highway when and so often as it shall be necessary.

Indictment for not repairing an ancient Horse and Footway.

County of } **THE** jurors for our lord the king upon their oath
 ——— } present, that from the time whereof the memory of
 man is not to the contrary, there was, and yet is, a certain common
 and ancient highway, leading from ———, in the county of ———,
 to ———, in the county of ———, for all the liege subjects of our
 said lord the king and his predecessors, on horseback and on foot, to
 go, return, pass, ride, labour, and drive their cattle at their will,
 and that a certain part of the same common highway, situate, lying,
 and being within the parish of ———, in the county of ———
 aforesaid, beginning at a place called ———, and so continued to-
 wards the said ——— of ———, in the county of ——— afore-
 said, of the length of ——— feet, and the breadth of ——— feet,
 on the ——— day of ———, in the ——— year of the reign of
 ———, and continually afterwards until the day of taking this
 inquisition, at the parish of ——— aforesaid, in the county afore-
 said, was and yet is very ruinous, miry, deep, broken, and in such
 decay, for want of due reparation and amendment of the same, that
 the liege subjects of our said lord the king by and through the same
 way, with their horses and cattle, could not, during the time afore-
 said, nor yet can go, return, pass, ride, and labour as they ought
 and were wont to do, without great danger of themselves and of
 their goods, to the great damage and common nuisance of all the
 liege subjects of our said lord the king, through the same highway
 going, returning, passing, riding, and labouring, and against the
 peace of our said lord the king; and that the inhabitants of the
 same parish of ———, in the county aforesaid, the same common
 highway so as aforesaid being in decay, ought to repair and amend,
 when and so often as it shall be necessary.

Indictment for encroaching upon a Highway by building thereupon.

_____ } *THE* jurors for our lord the king upon their oath
to wit. } present, that A. O. late of _____, carpenter, the
_____ day of _____, in the _____ year of the reign of _____,
with force and arms, at _____, in and upon a common highway, in
a certain place, commonly called _____, there leading from _____
to _____, by a certain building there, containing in length _____
feet, and in breadth _____ feet, by him the said A. O. erected and
built, hath unlawfully and unjustly encroached, and doth yet encroach,
and the building aforesaid, so as is aforesaid erected and built by
him the said A. O. from the aforesaid _____ day of _____, in the
year aforesaid unto the day of exhibiting this information, at _____
aforesaid, in the county aforesaid, with force and arms, unlawfully
and unjustly hath continued, and doth continue, by reason whereof
the common highway aforesaid hath become and is greatly straitened,
so that the liege subjects of the said lord the king upon and through
the same common highway aforesaid, with their horses, carts, and
carriages, cannot go, pass, ride, and labour as they ought and were
wont to do, to the great and common nuisance of all the liege sub-
jects of the said lord the king in and through the said common
highway going, passing, riding, and labouring, and against the peace
of our said lord the king. Trem. 196. (a)

Indictment for inclosing the Highway.

_____ } *THE* jurors for our said lord the king upon their
to wit. } oath present, that whereas from the time whereof
the memory of man is not to the contrary, the liege subjects of our
said lord the king had and lawfully used a certain common highway
at _____, in the said county, in a certain place there called _____
leading from the town of _____ aforesaid, to the town of _____
for themselves and their goods, without any stoppage or hinderance
by any ditches, hedges, or other obstacles whatsoever; nevertheless,
one A. O. of _____ aforesaid, in the county of _____ aforesaid,
yeoman, on the _____ day of _____, in the _____ year of the
reign of _____, with force and arms at _____ aforesaid, in the
county of _____ aforesaid, in the place aforesaid, called _____
upon the common highway aforesaid, a certain ditch and quickset
hedge did make, and the said ditch and quickset hedge so as aforesaid
made, doth yet continue and keep; to the great stoppage and hin-
derance of the liege subjects of our said lord the king passing in and
through the said common highway, and against the peace of our said
lord the king.

(a) Indictment for not repairing a house standing on the highway, ruinous and like to fall down. See *Ld. Raym. Entries*, 25. *Reg. v. Watts*, 2 *Ld. Raym.* 856. 1 *Salk.* 357.

Indictment for laying Timber or other Obstructions in the Highway.

_____ } *THE* jurors for our lord the king upon their oath
to wit. } present, that A. O., late of _____, in the county
aforesaid, yeoman, on the _____ day of _____, in the _____
year of the reign of _____, and on divers other days and times, as
well before as afterwards, with force and arms, at _____, in the
said county, in and upon the king's common highway there, leading
from _____ unto the town of _____, divers great pieces of timber
put and placed, and caused to be put and placed, and the same great
pieces of timber so as aforesaid put and placed, from the aforesaid
_____ day of _____, in the _____ year aforesaid, until the day
of exhibiting this information in and upon the king's common high-
way aforesaid, to be, lie, and remain, hath permitted, and doth still
permit, to the grievous and common nuisance of all the lieges and
subjects of the said lord the king, upon and through the king's
common highway aforesaid going, passing, riding, and travelling,
and against the peace of our said lord the king, his crown and
dignity.

Or, _____ great quantity of dung and other filth, by reason
whereof divers hurtful and unwholesome smells from the said dung
and other filth did then and there arise, and thereby the air there
became, was, and is corrupted and infected _____.

Or, _____ cart loads of rubbish _____, by reason whereof the
said highway for the whole time aforesaid was straitened and
obstructed, so that the liege subjects of our said lord the king could
not so freely pass and repass about their lawful business, through
the said common highway there, as they ought and have been accus-
tomed _____.

Indictment for stopping up a Watercourse, whereby the Highway is overflowed.

_____ } *THE* jurors for our lord the king upon their oath
to wit. } present, that A. O. late of the parish of _____, in
the county aforesaid, yeoman, on the _____ day of _____,
in the _____ year of the reign of _____, with force and
arms, at the parish aforesaid, in the county aforesaid, a certain
ancient watercourse adjoining to the king's common highway, within
the said parish, leading from the town of _____, in the county
aforesaid, towards and unto _____, with gravel and other materials
unlawfully and injuriously did obstruct and stop up; and the said
watercourse, so as aforesaid obstructed and stopped up from the
said _____ day of _____, in the year aforesaid, until the
day of the taking of this inquisition at the parish aforesaid, in the
county aforesaid, unlawfully and injuriously hath continued and
still doth continue, by reason whereof the rain and waters that were
wont and ought to flow and pass through the said watercourse on the
same day and year, and divers other days and times afterwards,
between that day and the day of the taking of this inquisition, did
overflow and remain in the king's common highway aforesaid, and
thereby the same was and yet is greatly hurt and spoiled; so that
the liege subjects of our said lord the king, through the same way with

their horses, coaches, carts, and carriages, then and on the said other days and times, could not nor yet can go, return, pass, ride, and labour as they ought and were wont to do, to the great damage and common nuisance of all the liege subjects of our said lord the king, through the same highway, going, returning, passing, riding, and labouring, and against the peace of our said lord the king.

Certificate of two Justices, that an indicted Road is in good Repair. (a)

—— } *WE, two of his majesty's justices of the peace of the*
to wit. } *county of ——, acting in and for the said county,*
do hereby certify that we have this day viewed and surveyed a certain
part of a common and ancient king's highway leading [here describe
the road], indicted at the last —— assizes [or, at the last general
quarter sessions of the peace] for the said county, and that the said
part of the said highway so indicted as aforesaid, is now in good
and sufficient repair, and likely so to continue. Given under our
hands and seals this —— day of ——.

J. P. (L. S.)

K. P. (L. S.)

3. Bridges, who are liable to repair, and of the Means of enforcing Repairs.

[9 H. 3. c. 15.—22 H. 8. c. 5.—12 G. 2. c. 29.—14 G. 2. c. 33.—43 G. 3. c. 59.—52 G. 3. c. 110.—55 G. 3. c. 143.—1 G. 4. c. 16.—7 & 8 G. 4. c. 30.]

General law of making and repairing bridges.

By the Great Charter, 9 H. 3. c. 15., *no town nor freeman shall be distrained to make bridges nor banks, but such as of old time and of right have been accustomed.*

And none can be compelled to make new bridges, where never any were before, but by act of parliament. 2 Inst. 701.

By the common law, counties are chargeable with the repair of public bridges.

By the common law, also, some persons (spiritual or temporal, corporate or not corporate), are bound to repair bridges by reason of the tenure of their lands or tenements; and some by reason of prescription only.

Individuals may be bound by tenure.

By tenure, in the case of private individuals, by reason that they and those whose estate they have in the lands or tenements, are bound in respect thereof to repair the same. 2 Inst. 700.

Corporate bodies, by prescription and usage.

By reason of prescription, only as against corporate bodies. But herein there is a diversity between bodies politic or corporate, spiritual or temporal, and natural persons: for the bodies politic or corporate, spiritual or temporal, may be bound by usage and prescription only, because they are local, and have a succession perpetual; but a natural person cannot be bound by act of his ancestor, without a lien, or binding, and assets. 2 Inst. 700.

(a) A certificate of justices, certifying that a highway, which is the subject of an indictment, is in a state of repair, is admitted, in common practice, as an adjudication of the state of repair, after a plea of guilty pleaded by the parish. *Rez v. Sir Joseph Mawbey, Bart. and others*, 6 T. R. 630. 635. 1 Phill. Er. 6th ed. 362.

And in *R. v. Inhab. of Ecclesfield*, H. 58 G. 3., 1 B. & A. 359. *Ld. Ellenborough C. J.* said,—"As the case of parishes, and highways within them, is analogous to that of counties and bridges, the charge of repairing a highway shall fall upon the parish, in default of usage and custom to charge the particular portion of the parish wherein it is situate; and as a hundred, or parish, or other known portion of a county may by usage and custom be chargeable to the repair of a bridge erected within it, so in like manner a township or other known portion of a parish may by usage and custom be chargeable to the repair of the highways within it. And upon an attentive perusal of the passages of *Ld. Coke's* commentary, we think it plain, that in drawing the distinction between bodies politic and natural persons, the learned writer speaks of individual persons, and not of an aggregate of the inhabitants of parishes or other places."

Law similar to that of highways.

R. v. The Inhab. of the West Riding of Yorkshire, T. 2 G. 4., 4 B. & A. 623. Indictment in the usual form against the defendants, for the non-repair of 300 feet of the highway next adjoining the south end of *Leeds* bridge, in the West Riding of the county of *York*. The plea admitted, that, as to seventy-five feet next adjoining the south end of the said bridge, the inhabitants of the West Riding were liable to repair the same; but stated, as to the residue of the said highway, that the bridge was an ancient bridge, situate from time immemorial within the township of *Leeds*, in the said riding, and that the said residue of the said highway, from time immemorial, had also been situate in the said township, and from time immemorial had been repaired by the inhabitants of the township of *Leeds*. Demurrer and joinder. After argument, *Abbott C. J.* said, the uniform course of pleading is to state the prescription, as in the present case. The case of *R. v. St. Giles, Cambridge* is quite distinguishable on the grounds stated in the judgment of the court in *R. v. Ecclesfield*, 1 B. & A. 359. (a) Here the highway is situate within the township of *Leeds*. The object of the form of the plea in *R. v. Ecclesfield*, probably was to allow greater latitude to the evidence in support of it, and also because possibly the road indicted in that case was not an immemorial highway. Here it is the ordinary case of a township, liable to repair a part of a bridge situate within it, of which there are many instances in the books. There must, therefore, be judgment for the defendants. See *R. v. Inhab. of the West Riding*, 7 East, 88.

In a plea by the inhabitants of a county, that the inhabitants of a particular township have immemorially repaired the highway at the end of a county bridge situate within the township, it is not necessary to state any consideration for such prescription.

R. v. The Inhab. of Machynlleth and Pennegoes, T. 4 G. 4., 1 B. & C. 166. Writ of error upon a judgment of the court of quarter sessions for the county of *Montgomery*, upon an indictment for not repairing a bridge; which charged, that a certain ancient bridge over the river *Diflas*, commonly called *Pontfelin-errig* bridge, and situate within the parishes of *Machynlleth* and *Pennegoes*, in the said county of *Montgomery*, on the king's highway there, the same being from the time whereof the memory of man is not to the contrary, a common king's highway used for all the king's subjects, with their horses, coaches, carts, and carriages, to go, return, and pass at their will and pleasure, on, &c., and for the space of two years thence next following, was very

An indictment stated that an ancient bridge, situate within the parishes of *Machynlleth* and *Pennegoes*, was out of repair, and that the inhabitants of the said parish of *Pennegoes* and town of *Machynlleth* aforesaid from time immemo-

Rex v. Machynlleth and Pennegoes.

rial, by reason of the tenure of certain lands in the said parish of Pennegoes and town of Machynlleth, have repaired the bridges: Held, upon error, that the indictment was bad, because it did not appear that the bridge was situate within the town, and therefore that the inhabitants of the town were not liable, unless a special consideration were shewn; and that here no sufficient consideration was shewn, inasmuch as the inhabitants could not hold land, and therefore could not be liable by reason by law.

Immemorial usage is sufficient to charge a parish with repair of bridge.

So a hundred or a corporation.

ruinous, &c. for want of due reparation thereof, so that the subjects of the king, with their horses, &c. could not pass as they ought, and were wont to do. The indictment then stated, that the inhabitants of the said parish of *Pennegoes*, and the inhabitants of the said town of *Machynlleth aforesaid*, in the said county of *Montgomery*, from the time whereof, &c. and by reason of the tenure of their lands and tenements in the said parish of *Pennegoes* and town of *Machynlleth*, have repaired, &c. the said bridge, &c. It was then alleged upon the record, that *A. B.* of the said parish of *Pennegoes*, and *C. D.* of the said town of *Machynlleth*, two of the inhabitants of the said parish of *Pennegoes* and the town of *Machynlleth*, came into court and pleaded not guilty. The trial of the indictment was then stated, and that defendants were found guilty; and that it was adjudged that the said inhabitants in the indictment specified should pay a fine of 400*l.* The following errors were assigned: first, that the inhabitants of the parish of *Pennegoes*, and the inhabitants of the town of *Machynlleth*, were stated to be jointly liable to the repair of the bridge; and, secondly, that it was not stated in the indictment that any part of the bridge was within the town, or that the inhabitants of the parish of *Pennegoes*, and the inhabitants of the town of *Machynlleth*, were a body corporate. The case was now argued by Sir *W. Owen* in support of the errors assigned, and *Campbell* in support of the indictment.—*Bayley J.* The objection to this indictment is fatal. The bridge is described as situate within the parishes of *Machynlleth* and *Pennegoes*. But the parishes are not alleged to be within the town. And unless the bridge be situate within the town, the inhabitants of the town would not be liable unless a special consideration be shewn. And here they cannot in their character of inhabitants be liable by reason of the tenure of lands. For they cannot as such hold lands.—*Holroyd J.* It is quite clear that the judgment cannot be supported. The word *town* cannot be rejected, and if it could, it would not then appear upon the record that any person came to defend for the parish of *Machynlleth*.—*Best J.* The case of the *King v. The Inh. of St. Giles, Cambridge*, 5 *M. & S.* 260., is an authority to shew that the inhabitants of a township cannot be liable for the repair of a road situate out of the township, unless a consideration for such repair be shewn. Here that is attempted to be shewn, by alleging that the inhabitants of the parish and the town were liable by reason of the tenure of certain lands; but, as inhabitants, they could not hold lands, and it is not shewn that they are incorporated. The consideration, therefore, fails, and it is not being shewn that the bridge was within the town, the common law liability does not attach, and therefore the judgment cannot be supported. Judgment reversed.

The parish of *Hendon* was indicted for the non-repair of a public bridge situate in the said parish, charging that the inhabitants of the said parish have from time whereof, &c. repaired and amended. After conviction, a motion was made in arrest of judgment, on the ground that some consideration ought to have been shewn: the court, however, held, that immemorial usage was sufficient to charge a parish with the repair of a bridge, and refused the rule. *R. v. Inhab. of Hendon*, 4 *B. & Ad.* 628.

And the same law prevails with respect to a hundred and to a corporation. *R. v. Oswestry*, 5 *M. & S.*, 361., and see 13 *Rep.*, 35.

If a man make a bridge for the common good of all the subjects he is not bound to repair it; for no particular man is bound to reparation of bridges by the common law, but by tenure or prescription. 2 Inst. 701.

And if none are bounden by tenure or prescription at common law, then the whole county or franchise shall repair it. *Ib.*

The authorities on this subject were all considered in *R. v. West Riding of Yorkshire*, 5 Burr. 2594. 2 Bla. R. 685., in the case of *Glusburne* bridge, where to an indictment against the riding for he non-repair, the plea stated, that there was an ancient foot-bridge over the stream, which the township of *Glusburne*, who were bound to repair it, took down, and in lieu thereof erected the carriage-bridge in question; and had repaired the new bridge since its erection; that the new bridge was of public utility, and used constantly, till carried away by a flood; that the ancient foot-bridge stood sixty yards below the new bridge, in the same highway: And all the court held the riding liable to the repair, on the general principle, that if a private person build a bridge which afterwards becomes a public convenience, the county is bound to repair it.

The public benefit is the grand criterion. If a man wantonly erects an useless, or a mere ornamental bridge, neither he nor the public are bound to sustain it. And if it is principally for his own benefit, and only collaterally of benefit to others, the public have nothing to do with it. But where it is of public utility, the public, which reaps the benefit, ought to sustain the burden of repairing. Else it would be a great discouragement to public-spirited persons to erect a beneficial bridge, provided they must either repair it themselves, or it must run to ruin. S. C.

R. v. West Riding of Yorkshire, 2 East, 342. (The case of *Peace Gate Bridge*.) The defendants were indicted for non-repair of a public bridge, and the indictment stated the bridge to be situated upon a rivulet in a public highway. The defendants pleaded that, after the making of a certain turnpike act, the said bridge was first made by the order of certain trustees in that act named, in pursuance of the directions, and for the purposes in that same act contained and named, upon the said road in the said act mentioned; and that no bridge had ever been there before that time erected.—To this plea there was a demurrer. The question was argued at much length before the court of K. B., and the judgment of that court was also very full and able.—*Per Lord Ellenborough* C. J. “By the common law, counties are chargeable with the repair of public bridges; unless it be shewn as the statute 2 H. 8. c. 5. (which was founded on the common law, and of which hereafter), says, ‘what persons, lands, tenements, and estates politic, ought to make and repair such bridges.’ In the absence of such proof, that burthen is, by the operation of the common law, thrown on the inhabitants of the county in which the bridge lies. But in order to effect this, it is not enough that a new bridge shall be built in a highway used by the public; it must also be useful to the public. I do not lay stress on the idea of the public having adopted the bridge by passengers going over it, because, if it occupy the highway, they cannot help using it; I only rely on the using of it, so far as to shew that it does not

Bridge built by a private person, which is afterwards used by the public.

When the county shall repair.

The county is bound to repair a new bridge, built by a private person, if it be of public utility.

Bridge built by turnpike trustees under act of parliament.

County liable to repair, if useful to the public.

R. v. W. Riding
of Yorkshire.

appear to have been treated as a nuisance, but to have been acquiesced in by the public. If, however, it be built in a slight or incommodious manner, no person can at his choice impose such a burthen on the county, and it may be treated altogether as a nuisance, and indicted as such. But if the public lie by without objection, and make use of it for some time, it is evidence that they adopt the act, and the bridge becoming of public benefit, the burthen of repair ought properly to fall upon the public. Now that this bridge is for the common good is proved by the use of it by all the king's subjects passing that way, by its not having been treated as a nuisance, but acquiesced in. Then, after having enjoyed the benefit of it, shall the public object to it, when they begin to feel the burthen of repair?"—The rule laid down by *Aston J.* in the *Glusburne* bridge case seems to be the true one, that "if a man build a bridge, and it becomes *useful* to the county in general, the county shall repair it." And as to the adoption of it by the public, there is good sense in not relying on that, except as evidence of its being a public bridge, and of utility to the public.—*Per Grose J.* It being stated in the plea that the bridge was erected by the trustees of a turnpike road, under a public act of parliament, I cannot suppose that it was not a public bridge built for the benefit of the public, and of public utility; and not merely for ornament, or for private benefit. If it were shewn that a bridge had been built at first, in a slight and imperfect manner, for the purpose of throwing the expense immediately on the county, I should think that it was a public nuisance, and indictable.—*Lawrence J.* agreed, and said,—The principle to be collected from the *Glusburne* bridge case is, that if the bridge be of public utility, the county who derive advantage from it must support it; and said, that as the bridge was erected by trustees of a turnpike road, under an act of parliament, they could not suppose it was erected for other purposes than the public utility.

Non-liability
of turnpike
trustees to
repair bridge
built by them
under act of
parliament.

In the same case of *Pace Gate Bridge*, upon the particular question of the liability of the trustees of the road, Lord *Ellenborough* C. J. said,—As to the objection, that it ought to be repaired by the commissioners of the turnpike by whom it was erected, and who have authority to raise tolls for the purposes of the act, I cannot find any authority for them to erect bridges under this act: however, I will suppose they were authorised to erect the bridge: yet no fund having been specially provided by the legislature for the repair of it, the burthen must necessarily fall where the common law has placed it, viz. on the riding. I am aware of the extent of this opinion, and if the trustees under similar acts throw this burthen generally on the counties, it may be necessary to make special legislative provision in future.—*Per Lawrence J.* As to the objection that the trustees are empowered to take tolls, that is, supposing that they are to derive some private advantage from the tolls, which is not the case; whatever tolls are raised must be laid out on the maintenance of the roads. It might as well be contended, that if a parish were to build a new bridge on a road within their limits, they would be bound to keep it in repair afterwards, and that the county would not be liable, as that the trustees are in this case, because the bridge is built in the turnpike road; in truth, the trustees are merely substituted in lieu

of the parish ; — and *Le Blanc J.* observed, that the circumstance of the bridge being built by trustees under an act of parliament, to which the defendants must be considered as parties and assenting, and by those to whom the legislature delegated the trust of determining whether it were proper to build the bridge, made the case stronger against the defendants than where an individual had in the first instance exercised his own discretion.

Rex v. Inhabitants of Oxfordshire, 4 B. & C. 194. Indictment against a county for not repairing a bridge in a public highway. Plea, that by a certain act of parliament for amending this road, certain trustees were directed to lay out the tolls thereby granted in repairing the roads, and were empowered to make and repair bridges ; that the bridge in question was erected by the trustees under and by virtue of that act, and that the trustees were liable, and ought to repair. — Replication, that the trustees were not liable to repair. Held, that the bridge, being built for public purposes in a public highway, the common law liability to repair attached upon the inhabitants of the county as soon as it was built ; and that the plea was clearly insufficient to exonerate them, as it did not aver that the trustees had funds adequate to the repair of the bridge. — *Semle*, that if that fact had been averred and proved, still the county would have been primarily liable, and must have taken their remedy against the trustees.

Rex v. Inhab. of the County of Kent, 13 East, 220. The company of proprietors of the navigation of the river *Medway*, under the authority of an act of parliament (16 & 17 C. 2.), deepened a particular spot in the bed of the river *Medway*, which spot had before that time been fordable by foot passengers, but afterwards, in consequence of such deepening, became impassable for foot, and most for horses. Upon threat of an indictment for the destruction of the highway across the ford, the company, in 1767, built a bridge, and repaired it, till its destruction by a flood. The same act which empowered them to *cleanse, scour, dig, widen, and make navigable* the said river, also empowered them to *amend or alter such bridges or highways as might hinder the said passages or navigation*, (leaving them or others as convenient in their room.) — and *per Lord Ellenborough C. J.* The power given to the company to take or alter the old highway was upon condition of leaving another passage as convenient in its room : and if they do not perform the condition, they are not entitled to do the act : it is a continuing condition, and when the company thought proper for their own benefit to alter the highway in the bed of the river, so that the public could no longer have the same benefit of the ford, they were bound to give another passage over the bridge, and to keep it for the public. The other judges agreed.

Rex v. Inhab. of the County of Kent, 2 M. & S. 513. Where a person about 45 years back erected a mill and dam thereto for his own profit, *per quod* he deepened the water of a ford, through which there was a public highway, but the passage through which was, before the deepening, very inconvenient at times to the public, and the miller afterwards built a bridge over it, which the public had ever since used ; the court of K. B. held that the county and not the miller was chargeable with the reparation.

Rex v. West Riding of Yorkshire, 2 East, 553. (n.) Defendants

Though certain tolls are made applicable for repairs, still the county is primarily liable.

Repair of bridge erected where a ford existed till deepened for purposes of navigation ; county not liable.

Ford deepened and bridge built by a private person.

Horse bridge

enlarged to carriage bridge ; township liable before continues liable *pro rata*.

Foot, horse, or carriage bridges.

Horse and foot bridges equally repairable by the county as a carriage bridge.

were indicted for not repairing a public carriage bridge : Plea, that certain townships had *immemorially* repaired. Issue taken thereon. The facts were, that there had been immemorially a *foot* bridge till 1745, when the townships enlarged it to a *horse* bridge, and afterwards to a *carriage* bridge, at their own expense. That the riding had never repaired it. It was held, that this evidence did not maintain the defendants' plea ; and further, that where a party is bound to repair a foot bridge, he shall not discharge himself by turning it into a horse or carriage bridge, but shall still repair it as a foot bridge, i. e. *pro rata*.

All public bridges are *prima facie* repairable by the inhabitants of the county, without distinction of foot, horse, or carriage bridges, unless they can shew that others are bound to repair particular bridges.

The King v. The Inhab. of the County of Salop, 13 East, 95. This was a presentment by a justice of peace upon his own view, that from time immemorial there was and yet is a certain common bridge called *Pilson Bridge*, over a brook or river called *Sleazy Meese*, used for all the liege subjects, &c. with their horses and on foot to pass, &c. situate in the townships of *Pilson* and *Chetwynd* in the parish of *Chetwynd*, in the county of *Salop*, in the king's common highway there, leading from the market town of *Maria Drayton*, in the said county, towards and unto the market town of *Newport*, in the county aforesaid ; and that the bridge aforesaid situated, &c. on the 13th of *September*, 49 G. 3. and continually afterwards, until the present day, was and yet is ruinous for want of due repair, &c. against the peace, &c. To this two of the inhabitants of the county appeared, and pleaded for themselves and the rest of the inhabitants of the county (except the inhabitants of the said townships of *Pilson* and *Chetwynd*), that the inhabitants of the said townships, independent of the other inhabitants of the said county, from time immemorial have been used and accustomed and of right ought to repair the said bridge as often as occasion required, and that the said bridge is and from time immemorial hath been used for the king's subjects with their horses *as on foot only* to pass, &c., and that the same hath not been used for the king's subjects with their carriages, &c. to pass, &c. ; and that the same bridge hath from time immemorial been situate in the townships of *Pilson* and *Chetwynd*, and that by reason of the premises, the inhabitants of those townships, independently of the rest of the inhabitants of the said county, during all the time is the said presentment mentioned, ought to have repaired and still of right ought to repair the said bridge, and traversed that the inhabitants of the county were bound to repair it. The presentment was tried at the sessions by a jury, who found the defendants guilty, *subject to the opinion of the court of K. B. on the following CASE : —*

The bridge comprised in the above presentment is a horse bridge, and not wide enough for a cart or other carriage to pass over it. The bridge is situate on one side of the public highway, the road for carriages being through the ford in the brook or river on the other side of the said highway. The bridge is situate part in the township of *Chetwynd*, in the parish of *Chetwynd*, in the county of *Salop*, and the other part in the township of *Pilson*, in

the said parish of *Chetwynd*, over the water which divides those townships, which townships have immemorially repaired their respective highways. No proof of any repairs having been ever done to the bridge at the expense of the defendants, the inhabitants of the county of *Salop*, or any one else, was produced. The bridge is of public utility, and the question, therefore, was, Whether the inhabitants of the said county were liable *primâ facie* to repair this horse and foot bridge, the same as if it were a carriage bridge? When this case was called on in the crown paper, Lord *Ellenborough* C. J. said, — There is no doubt that a public footway or bridleway is a highway (*Vide Allen v. Ormond*, 8 *East*, 4.): it is a highway for foot passengers or for horse passengers, &c., and the parish is bound to repair it till they can throw the *onus* upon others. So all public bridges are *primâ facie* repairable by the inhabitants of the county, without distinction of foot, horse, or carriage bridges, unless they can shew that others are bound to repair particular bridges. [*Rex v. Inh. of W. Riding of Yorkshire*, 5 *Burr*. 2594. (*ante*, p. 609.) was the case of an ancient foot bridge repaired by the inhabitants of the township of *Glusburne*, which bridge was taken down, and in lieu of it, 60 yards above, in the stream in the same highway, was built a carriage bridge, with the repairs of which the county was fixed. And *vide Rex v. the Inh. of the West Riding of Yorkshire*, 2 *East*, 342., and *Rex v. the Inh. of Bucks*, 12 *East*, 192., upon the construction of the statute of bridges, 22 *H. 8. c. 5.*, which statute mentions bridges generally, without distinguishing between the different kinds of bridges; and Lord *Coke* observes, (2 *Inst.* 701.) that “the indictment upon this statute saith, *quod pons publicus et communis situs in altâ regiâ viâ super flumen seu cursum aquæ*, &c.] but it is quite a new thing, that a case should be reserved upon the trial of an indictment by a jury at the sessions. It is a very great irregularity, and ought to be noticed, in order to prevent the repetition of it. We shall take no notice of the case reserved. The indictment is well removed by the *certiorari*, but we shall take no notice of the case; we shall leave the matter as it is, and pronounce no judgment upon it.

To an indictment for not repairing a public foot bridge, called *low-foot-bridge*, the county pleaded that it was part of a public carriage bridge, which one *G. P.*, *ratione tenuræ* of certain lands, was bound to repair. — Replication admitted the liability of *G. P.* to repair the carriage bridge, but denied that the foot bridge was part of the said bridge which *G. P.* ought to repair in manner and form, &c. On issue thereon and trial, a case was stated, by which it appeared that the carriage bridge was built across the river soon after the year 1100, with the repair of which certain abbey lands were charged, of a part of which lands *G. P.* was the holder. That, in 1736, the trustees under a road act, with the consent of the proprietors of the abbey lands, added the foot bridge in question to the carriage bridge, placing it on the outside of the parapet wall of the old bridge, which foot bridge has proved of great use and accommodation to the public. The court held that *G. P.* was not bound to repair the foot bridge, on the principle that a party charged with the repair of a bridge cannot be called upon to mend it; and consequently that the owners of the abbey lands

R. v. *Salop.*

Foot or bridle way is a highway

No case can be reserved on the trial of an indictment at the sessions.

County liable to the repair of a new foot bridge, though part of an ancient bridge which was liable to be repaired by individuals *ratione tenuræ*.

enlarged to carriage bridge; township liable before continues liable *pro rata*.

Foot, horse, or carriage bridges.

Horse and foot bridges equally repairable by the county as a carriage bridge.

were indicted for not repairing a public carriage bridge: Plea, that certain townships had *immemorially* repaired. Issue taken thereon. The facts were, that there had been immemorially a foot bridge till 1745, when the townships enlarged it to a horse bridge, and afterwards to a carriage bridge, at their own expense. That the riding had never repaired it. It was held, that this evidence did not maintain the defendants' plea; and further, that where a part is bound to repair a foot bridge, he shall not discharge himself by turning it into a horse or carriage bridge, but shall still repair as a foot bridge, i. e. *pro rata*.

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The King v. The Inhab. of the County of Salop, 13 East, 9
This was a presentment by a justice of peace upon his own view that from time immemorial there was and yet is a certain common bridge called *Pilson Bridge*, over a brook or river called *Slat Meese*, used for all the liege subjects, &c. with their horses and foot to pass, &c. situate in the townships of *Pilson* and *Chetwynd* in the parish of *Chetwynd*, in the county of *Salop*, in the king's common highway there, leading from the market town of *Marl Drayton*, in the said county, towards and unto the market town of *Newport*, in the county aforesaid; and that the bridge aforesaid situated, &c. on the 13th of September, 49 G. 3. and continued afterwards, until the present day, was and yet is ruinous for want of due repair, &c. against the peace, &c. To this two of the inhabitants of the county appeared, and pleaded for themselves and the rest of the inhabitants of the county (except the inhabitants of the said townships of *Pilson* and *Chetwynd*), that the inhabitants of the said townships, independent of the other inhabitants of the said county, from time immemorial have been used and accustomed and of right ought to repair the said bridge as often as occasion required, and that the said bridge is and from time immemorial hath been used for the king's subjects with their horses and on foot only to pass, &c., and that the same hath not been used for the king's subjects with their carriages, &c. to pass, &c.; and that the same bridge hath from time immemorial been situate in the townships of *Pilson* and *Chetwynd*, and that by reason of the premises, the inhabitants of those townships, independently of the rest of the inhabitants of the said county, during all the time in the said presentment mentioned, ought to have repaired and still of right ought to repair the said bridge, and traversed that the inhabitants of the county were bound to repair it. The presentment was tried at the sessions by a jury, who found the defendants guilty, subject to the opinion of the court of K. B. on the following CASE:—

The bridge comprised in the above presentment is a horse bridge, and not wide enough for a cart or other carriage to pass over it. The bridge is situate on one side of the public highway, the road for carriages being through the ford in the middle of the river on the other side of the said highway. The bridge is in the township of *Chetwynd*, in the parish of *Chetwynd*, in the county of *Salop*, and the

remained liable to the burthen of repairing the carriage bridge only, but that the county was liable at common law to repair the foot bridge, which is useful to the public. Judgment for the crown. *Rex v. Inhab. of Middlesex*, 3 B. & Ad. 201.

County liable to repair a bridge built in the highway, and used by the public above 40 years, though originally erected for the convenience of an individual.

Bridge erected in lieu of ferry.

The county is liable to repair a bridge built in the highway, and used by the public above forty years, though originally erected for the convenience of an individual. *Rex v. Inhab. of Glamorganshire*, 2 East, 356. (n.)

Rex v. Inhab. of the County of Bucks, 12 East, 192. The inhabitants of the county of Bucks were indicted for not repairing *Datchet* bridge. They pleaded specially, and were found guilty, subject to the opinion of the court upon a case, stating that Queen Anne, for her greater convenience in passing to and from Windsor castle, built a bridge over the Thames, at *Datchet*, in the common highway leading from London to Windsor, in lieu of an ancient ferry, where she kept boats for the public accommodation, and received tolls. She and her successors repaired the bridge till 1796, when it having in part fallen in and become impassable, the whole was removed, and the materials converted to the use of the king, who re-established the ferry. The question was, whether this was a public bridge, and the defendants liable to repair and rebuild? — After an elaborate argument and full consideration, Lord *Ellenborough* C. J. delivered the opinion of the court, that this bridge, situate in a principal highway, and used, as it so long was, for all persons as a public bridge, and being also of great public use and convenience, was and is a bridge repairable by the county of Bucks, in which it was, until the period of its late dilapidation and destruction, situate.

Bridge over a navigable cut parallel to a river fordable at its intersection of a highway; which cut rendered the highway impassable; county not liable.

Rex v. the Inhab. of the parts of Lindsey in the county of Lincoln, 14 East, 317. The indictment was for not repairing a certain public and common bridge, in *Coningsby*, over the river *Bain*, at a place called *Butt's Ford*. The plea was, that the company of proprietors of the *Horncastle* navigation, in the county of Lincoln, mentioned in an act of the 32 G. 3., for their own use and benefit, under the authority of that act, made a navigable cut near the side of the *Bain*, and communicating with it, for the purpose of straightening its course; and, under the same act, erected the said bridge upon the said navigable cut, and not upon the ancient course of the river, no bridge being there before, or required there, until the making of the said cut; and that the said company have maintained and still maintain the said cut for their own benefit. The act referred to enacts, that the proprietors may make cuts near to the side of the *Bain*, to straighten its course, and erect upon the same so many bridges as they shall think requisite for the purposes of the act; and from time to time may alter, repair, amend, or discontinue the same, or any of them. At the time of the passing of the act, the *Bain* intersected a common highway at *Bain's Ford*; here the river was fordable, excepting in floods, and there had never been any bridge over it. The cut above mentioned was made by the company under the act, and was 100 yards from *Butt's Ford*. This cut rendered the highway impassable, and the company built over it the bridge in question. The bridge has never been repaired by the inhabitants of the parts of *Lindsey*, but by the company, in the only instance in which it

wanted repair. They also collect tolls upon the navigation. — Lord *Ellenborough* C. J. The act authorises the company not only to alter, repair, and amend, but even to *discontinue* any of the works before authorised to be erected; amongst others, *any bridge*. And the inhabitants of a county can never have, by law, a permanent burthen thrown upon them to repair a bridge, of which they have not the permanent use and enjoyment secured to them. — *Grose* J. agreed. — *Le Blanc* J. after saying, that this was very like the case of *Rex v. The Inhab. of Kent*(a), said, that the authority given to the company to make the cut, which rendered the highway impassable without a bridge, must create an obligation in them to erect the bridge, though the word *authorise* in the act would not of itself create the obligation. — *Bayley* J. The bridge is rendered necessary for the purposes of the company, but not for the purposes of the inhabitants of the parts. Verdict and judgment for the defendants.

Rex v. Kerrison, 3 M. & S. 526. Where certain persons and their successors were authorised, by act of parliament, to make a river navigable, and to cut the soil of any person for making any new channel, &c. by virtue of which they cut through a highway, and rendered it impassable, and a bridge was built over the cut, over which the public passed, and which had been repaired by the proprietors of the navigation; the court of K. B. held, that the proprietors and not the county were liable to repair. After argument in this case, Lord *Ellenborough* C. J. said, — “The undertakers of this navigation have a duty, as it seems to me, arising out of the execution of their own powers under the act. The act enables them to cut new channels as occasion should require; and if occasion requires them to cut through a public highway, their duty is to furnish a substitute to the public by means of a bridge.” — *Bayley* J. said, — “This differs from the last case of *Rex v. Inhab. of Kent*. (a) There the county derived a very essential benefit from the bridge; they had before but a passage through the ford, which is always an inconvenient one: but what benefit does this county derive from passing over a bridge instead of the solid highway.” Judgment for the crown.

Rex v. Inhab. of Oxfordshire, M. 1812, 16 East, 223. Indictment against a county for not repairing a bridge. Plea, that M. is liable to repair the same, *ratione tenuræ*. Evidence, that the estate of M. was part of a larger estate (b), which part was purchased by M. of the former owner, Lord *Cadogan*, who retained the rest, and as well before as since the purchase, repaired the bridge. — Lord *Ellenborough* C. J. The defendants have not maintained their plea. It is pleaded that M. and all those whose estate he hath, have immemorably repaired. Now, there is no evidence that he and those who had the estate have repaired, for it appears that since he purchased the estate another person has repaired. It would have been more correct to have pleaded that “he and those whose estate he hath, with others, have repaired,” instead of which, the burthen is cast on him impartibly, without giving him the benefit of a contribution from Lord *Cadogan*. But I should be sorry to conclude the county from bringing forward their case,

Certain commissioners and their successors, being empowered by statute to make a navigation, cut through a highway, and built a bridge: held that they were liable for its repair.

Averment of immemorial repair, in plea of repair *ratione tenuræ*.

(a) See *antè*, p. 611.

(b) See *R. v. Duchess of Buccleugh*, *post*, p. 623.

as it is clear they have never repaired. — The court directed that the rule should be drawn up for staying the judgment, on payment of the costs of the prosecution; and Lord *Ellenborough* C.J. added, that if the public exigency required it, the county must repair, without prejudice to their case; and *Le Blanc* J. said, that the county might proceed to indict the parties whom they contended to be liable.

Charging an individual as owner of a navigation, bad.

Rex v. Mathias Kerrison, 1 M. & S. 435. Indictment charging an individual with the repair of a bridge by reason of his being owner and proprietor of a certain navigation, is not equivalent to charging him *ratione tenuræ*, but is erroneous; and if judgment be given thereon, upon error brought, it will be reversed. It seems that a count charging him by reason of being owner of a navigation under a private act of parliament, must set forth the act.

The inhabitants of a county, upon a plea of *not guilty* to an indictment for not repairing a public bridge, may give evidence of the bridge having been repaired by private individuals.

A bridge may be a public bridge which is used by the public at all such times as are dangerous to pass through a river.

Rex v. Inhab. of the County of Northampton, 2 M. & S. 262. The second count of this indictment, on which the verdict was entered for the crown, was for not repairing a public bridge over the river *Welland*, in a highway leading from *Northampton* to *Leicester*, used by the subjects of the king, with their horses, carts, and carriages, *at all such times as and when it hath been or is dangerous to pass through the river by the side of the bridge*. Plea *not guilty*. At the trial before *Thompson* B., at the last assizes, it appeared that this bridge was used by the public at all times on foot and with horses, but only occasionally with carriages, except in times of flood or frosts, when it was unsafe to pass through the river, at which times carriages always passed over the bridge. In ordinary times the carriage road went through the ford, and the bridge was sometimes barred against carriages by means of a post and chain, which was locked. There was no doubt upon the evidence of the bridge being out of repair, but the counsel for the defendants proposed to give evidence to shew that the feoffees of certain estates had repaired the bridge, and that one *Rous*, as their agent, had the control of the key. To this it was objected, that repairs done by individuals could not be evidence to shew the bridge not a public bridge, which was the only issue upon these pleadings. The learned judge was of that opinion, and rejected the evidence. — A rule *nisi* for a new trial was moved upon the rejection of this evidence; and exception was also taken to the count, that it did not shew the bridge to be a public bridge, but only a bridge to be used on particular occasions, which could not be if it were a public highway; for there could not be a partial dedication to the public. — But Lord *Ellenborough* C. J. said, Though it must be an absolute dedication to the public, still it might be definite as to time: with respect to the admissibility of the evidence, his lordship said, he doubted whether in the extreme rigour of correctness it ought not to have been received, though, certainly, if it had stood by itself, it would have had but little effect. The only question was, whether this was a public bridge? Repairs done by an individual are *prima facie* rather to be ascribed to motives of private interest in his own property, than as done for the public benefit; and if an inference might have been drawn from the fact, the jury ought to have had an opportunity of judging of that inference. He thought the evidence barely admissible, and that the

earned judge would have exercised a more correct discretion by receiving it. *R. A.*

But "for the more clearly ascertaining the description of bridges hereafter to be erected, which inhabitants of counties shall be liable to repair and maintain," it is enacted by stat. 43 G. 3. c. 59. § 5. "that no bridge hereafter to be erected or built in any county, by or at the expense of any individual or private person or persons, body politic or corporate, shall be deemed or taken to be a county bridge, which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, or person appointed by the justices of the peace at their general quarter sessions assembled, or by the justices of the peace of the county of Lancaster, at their annual general sessions; and which surveyor or person so appointed, is hereby required to superintend and inspect the erection of such bridge, when thereunto requested by the party or parties desirous of erecting the same; and in case the said party or parties shall be dissatisfied, the matter shall be determined by the said justices respectively at their next general quarter sessions, or at their annual general sessions in the county of Lancaster."

§ 7. Provided "that nothing herein contained shall extend to any bridges or roads which any person or persons, bodies politic or corporate, is, are, or shall be liable to maintain or repair by reason of tenure, or by prescription, or to alter or affect the right to repair such bridges or roads."

Where a carriage bridge had been built by the trustees of a turnpike road previously to the 43 G. 3. c. 59., and had been used by the public for many years, and since the passing of that act had been widened by the trustees, on an indictment against the county for not repairing it, it was objected that the county was exempt, because the alteration of its width had not been effected under the direction of the county surveyor, as required by that statute. After verdict of guilty, and motion to enter an acquittal, the court held that the widening of a bridge was not within the purview of the statute, which applied only to new bridges, and that the enlargement of it did not destroy its identity, for it continued the same bridge, though wider, and that the county was liable. *R. v. Inhabitants of Lancashire*, 2 B. & Ad. 813.

To the presentment of a county for the non-repair of a bridge it was pleaded that such bridge was built by the trustees of a turnpike after the passing of 43 G. 3. c. 59., and that it was not erected in a substantial or commodious manner under the direction of the county surveyor; and on demurrer, it was contended that the trustees did not fall within the terms "private persons, body politic or corporate," in § 45. of that statute. The court, however, were clear that the provisions of the statute applied to the trustees, and that, as they had not complied with the conditions required, the county was not liable. *R. v. Inhabitants of Derby*, B. & Ad. 147.

On the indictment of the county for the non-repair of a bridge, it appeared that there was a carriage bridge previous to the passing of 43 G. 3. c. 59., which the county repaired, constructed of

43 G. 3. c. 59. Counties not liable to repair of bridges, unless substantially built, under direction of county surveyor.

County surveyor may be required to superintend.

Act not to extend to bridges repaired by reason of tenure.

Bridge widened by trustees since 43 G. 3. without the sanction of the county surveyor, not within that statute.

Where turnpike trustees build a bridge, the county will not be liable unless it is built under the direction of the county surveyor, according to 43 G. 3. c. 59.

Wooden bridge destroyed by flood and re-

placed on old abutments by a bridge somewhat wider, not within 43 G. 3.

wood, with abutments of stone. Some years afterwards all the woodwork was carried away by a flood: the old materials were collected and new ones added, and the bridge was rebuilt upon the old abutments, but was made about two feet wider: this was done at the expense of the parish, and the bridge has since been used by the public. It was objected, that as the bridge had not been so re-erected under the direction of the county surveyor, the county was not bound to repair it. A verdict of guilty was found under the direction of the judge, and afterwards, on motion in K.B., the court held that the county was liable, for that the bridge was substantially the same, and that it was rather the repairing of the old bridge than the building of a new one. *Littledale J.* threw out, that if it had been a new bridge built on the site and in lieu of the old one, it would seem to have been within the intention of the legislature. *R. v. Inhabitants of Devon, 5 B. & Ad. 383.*

22 H. 8. c. 5. Counties and cities, &c. how liable.

By stat. 22 H. 8. c. 5. § 2, 3., Whereas in many places it cannot be known and proved what hundred, &c. town, parish, person, or body politic ought to repair bridges broken in the highways; in every such case the said bridges, if they be without a city or town corporate, shall be made by the inhabitants of the county; if within a city or town corporate, then by the inhabitants of such city or town corporate; if part be in one shire, city, or town corporate, and part in another, or part within the limits of a city or town corporate, and part without, the inhabitants of the shire, cities, or towns corporate shall repair such part as lies within their limits.

Bridges broken in the highways.] This extendeth only to common bridges in the king's highways, and not to private bridges, to mills, or the like; the remedy in which case is not by indictment, but by action. 2 Inst. 701.

Within a city or town corporate.] It hath been questioned whether a borough, which hath no bridge within its own limits, be not liable to contribute to the repairs of a county bridge. 1 Haw. c. 77. § 19. 1 Keb. 68.

Where townships have enlarged a bridge, which they were before bound to repair as a foot bridge, to a carriage bridge, they shall be liable *pro ratâ*. *Rex v. W. R. of Yorkshire, 2 East, 353. (n.) antè, p. 610.*

By the inhabitants.] The persons to be charged by this act are comprehended under the word *inhabitants*; which word, being the largest word of the kind, is needful to be explained.

Inhabitants, who?

Persons occupying land, &c. though not residing.

First, although a man be dwelling in a house, in a foreign county, city, or town corporate; yet if he hath lands in his own possession and manurance in the county, city, or town corporate, where the decayed bridge is, he is an inhabitant, both where his person dwelleth, and where he hath lands in his own possession.

Secondly, if a man dwelleth in a foreign shire, city, or town corporate, and keepeth a house and servants in another shire, city, or town corporate, he is an inhabitant in each shire, city, or town corporate within this statute.

Mere inhabitants not liable.

Thirdly, *Ex vi termini*, every person that dwelleth in any shire, city, or town corporate, though he hath but a personal residence, yet he is said in law to be an inhabitant, or a dweller there, as servants or the like; but this statute extendeth not to them, but

o such householders who may be distrained for non-payment: and it would be infinite and impossible to tax every inhabitant living in no householder.

Fourthly, every corporation and body politic, residing in any county, city, or town corporate, or having lands or tenements in any county, city, or town corporate, which they keep in their own hands and occupation, are said to be inhabitants there, within the view of this statute.

Fifthly, an infant, that hath house or lands by descent or purchase, is liable to the public charge; and so is the husband of a feme covert. 2 *Inst.* 702.

A tenant at will of a house, which adjoins to a common bridge, bound to repair the house, so that the public be not prejudiced by the want of repair, although, being only tenant at will, he be not bound to repair as to his landlord. *Reg. v. Watson*, 2 *Ld. Raym.* 56. 1 *Salk.* 357. S. C.

The freehold of bridges is in him that hath the freehold of the soil; but the free passage is for all the king's liege people. *Inst.* 705.

Harrison v. Parker and another, 6 *East*, 154. In this case, which was an action of trespass for taking and carrying away the plaintiff's goods, and to which the defendant pleaded not guilty; appeared that the plaintiff, being lord of the manor, had contracted with one who was lord of an adjoining manor, for himself and his heirs, for liberty and licence to build a bridge over a river which divided the two manors, with liberty to lay the foundations at the close of the lordship, together with the free use for the plaintiff, &c. and all other persons to and from a certain town or parish from and to the said bridge, the said bridge to be kept in repair by the plaintiff and his heirs, and also a road (describing it) on each side thereof; and that the said bridge and roads should never be public highways, not subject to any toll. The bridge was built: the defendants took down a part of it, and carried away the stones for their own use. And it was held by the court, that a qualified property subsisted in the plaintiff after the dedication of the bridge to the public, which, upon the severance of the materials, became a perfect right of property in him; and that, therefore, the plaintiff might, as against a wrong-doer, maintain this action. That the only thing given to the public was a right of passing over these materials in the form of a bridge; when they ceased to be a part of the bridge, they reverted to the plaintiff, discharged of the right of use by the public.

By stat. 1 *G. 4. c. 116. § 2.*, such parts of all former acts relating to bridges as enact, that if any person or persons shall wilfully and maliciously blow up, pull down or destroy any bridge or any part thereof, or attempt so to do; or unlawfully and without authority remove or take any works thereto belonging, or in anywise direct or procure the same to be done, such offender or offenders being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy; shall from and after the passing of this act (*viz.* 25. *July* 1820) be, and the same are hereby repealed.

By 7 & 8 *G. 4. c. 30. § 13.*, if any person shall unlawfully and maliciously pull down or in anywise destroy any public bridge, or

Bodies politic and corporate liable.

Infants liable. So husband of feme covert.

Repair of house adjoining a bridge.

Freehold in bridges.

Where a person built and dedicated a bridge to the public, the property in the materials ceasing to be part of the bridge, was held to revert to the original proprietor.

1 *G. 4. c. 116.* Destroying bridges, &c.

7 & 8 *G. 4. c. 30.* Pulling down

or rendering a bridge dangerous.

do any injury with intent and so as thereby to render such bridge, or any part thereof, dangerous or impassable, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and if a male, to be once, twice, or thrice publicly or privately whipped, if the court shall so think fit, in addition to such imprisonment.

22 H. 8. c. 5.
Power of justices in sessions, as to bridges.

Decays of bridges are presentable in the leet or torn. — 2 Inst. 701.

By stat. 22 H. 8. c. 5. § 1. 5., *the justices of peace in every shire of this realm, franchise, city, or borough, or four of them at least (1 Q.), shall have power to inquire, hear, and determine in the general sessions all manner of annoyances of bridges broken in the highways, to the damage of the king's liege people, and to make such process and pains upon every presentment against such as ought to be charged to make or amend them, as the king's bench usually doth, or as it shall seem by their discretions to be necessary and convenient for the speedy amendment of such bridges.*

Four of them at the least.] If the bridge be within a franchise which hath not four justices and a sessions of its own, the justices of the county shall inquire; but if the franchise be a county of itself, and hath not four justices (1 Q.), it is not within this statute, but is left to the remedy which it had at common law. 2 Inst. 702.

Justices may make process into another county.

And to make process.] By § 5., where the bridge is in one shire, and the persons or lands which ought to be charged in another shire; or where the bridge is within a city or town corporate, and the persons or lands that ought to be charged are out of the said city; the justices of such shire, city, or town corporate shall have power to hear and determine such annoyances, being within the limits of their commission; and if the annoyance be presented, then to make process into every shire of the realm against such as ought to repair the same, and to do further in every behalf as they might do, if the persons or lands chargeable were in the same shire, city, or town corporate where the annoyance is.

As the king's bench usually doth.] The presentment at common law might be before the king's bench, or at the assizes. 2 Inst. 701.

The court of quarter sessions cannot impose more than one fine for the non-repair of a bridge.

Rex v. The Inhab. of Machynlleth and Pennegoes, E. 2 G. 4. 4 B. & A. 469. The following order of sessions of the county of Montgomery was removed by *certiorari* into the court of K.B.: "It is ordered, that the fine heretofore imposed by the court on the inhabitants of the township of *Machynlleth* and the parish of *Pennegoes*, for not repairing *Pontfelingerrig Bridge*, be, and the same is hereby increased by the sum of 200*l*." A rule *nisi* was obtained for quashing the order. It appeared from the affidavits that the defendants had been presented at the *January* sessions 1818, for the non-repair of the bridge in question: to which presentment they, at the same sessions, submitted, and a fine of 50*l*. was imposed, and afterwards levied upon them. At *Michaelmas* sessions 1820, the fine not having been sufficient, the order in

question was made, imposing a second fine of 200*l.* The court, after hearing counsel in support of the order of sessions, were of opinion, that the power of the sessions was at an end after the first fine, and that they had no jurisdiction to impose a second; and they referred to *Rex v. The Inhab. of Old Malton* (a) as an authority directly in point. Order of sessions quashed.

By stat. 22 *H. 8. c. 5. § 9.*, such part and portion of the highways, as well within franchises as without, as lie next adjoining to any ends of any bridges, distant from any of the said ends by the space of 300 feet, shall be made, repaired, and amended as often as need shall require; and the justices, or four of them (1 *Q.*), shall have power to inquire, hear, and determine, in the general sessions, all manner of annoyances of and in such highways, so being and lying next adjoining to any ends of bridges, distant from any one of the ends of such bridges 300 feet, and to do in every thing concerning the making, repairing, and amending of such highways, in as ample manner as they may do for the making, repairing, and amending of bridges.

The county is by law bound *primâ facie* to repair the road at the ends of every bridge, which bridge it is bound to repair; the statute has fixed the length of 300 feet. *Per Ld. Eldon C., R. v. Inhab. of W. R. of Yorkshire, Dom. Proc., M. 44 G. 3., 5 Taunt. 284.*

R. v. Inhab. of Devonshire, 14 East, 477. The county of *Devon* is divided from the county of *Dorset* by the river *Yarty*, over which there is a bridge maintained by *Dorset*, the inhabitants of which, in course, under stat. 22 *H. 8. c. 5.*, maintained the road for 300 feet on the *Devonshire* side from the bridge, as part of such bridge. At the distance of 150 feet from the bridge, on the same side, the road about thirty years ago led through a ford, occasioned by a small stream which runs into the *Yarty*; but about that time, in order to avoid the inconvenience of the ford, a smaller bridge was built over it by an individual, which having been generally used by the public ever since, was considered as having been adopted by the county. The smaller bridge having fallen into decay, and requiring repair, the inhabitants of *Devon*

22 *H. 8. c. 5. s. 9.*
County to repair 300 ft. at the ends of bridges.

The inhabitants of a county in which a new bridge was built within 300 ft. of an old bridge in another county, were held liable to repair such new bridge.

(a) *Holroyd J.* read the following MS. note of the case :

The King against The Inhabitants of the Parish of Old Malton, Yorkshire, Sum. Ass. 9th August, 1794, cor. Lawrence J.

This was an indictment for not repairing a highway. The defendants had submitted to a fine which had been apportioned between the parishioners and the trustees of the turnpike (the road indicted being turnpike), pursuant to the power given by the general turnpike act. *Holroyd* applied for a further fine, the whole fine being laid out on the way, and the way being still out of repair. — *Lawrence J.* doubted his power to give any further fine, on the ground that the court had given their judgment; and though *Salk. 358.* (see *S. C. 6 Mod. 163.*) states that the judgment is not at an end by the defendants coming in and submitting to a fine; and that if the road is not put in repair, writs of *distringas* shall issue against the defendants till the road is completed: he held, that those writs are now the only remedy on the present indictment; that the fine is the punishment for the neglect and offence of which the defendants are indicted; and though the court may compel an actual repair, yet the punishment has been inflicted, and they cannot inflict a further punishment or fine; that the parish may be again indicted, and a fine imposed and apportioned on such indictment. *Vide also 1 Hawk. c. 76. § 94.*

were called upon to repair it: which they objected to, on the ground, that being within 300 feet of the former bridge over the *Yarty*, which was repairable by *Dorset*, the inhabitants of *Devon* were no more bound to repair the smaller bridge than they were the road for that distance before that bridge was built, though lying within the limit of their county. Whereupon this indictment was preferred against them for the non-repair of the smaller bridge, and a verdict passed for the crown. And upon a motion for a new trial, *Ld. Ellenborough C. J.* said, — Each is a substantive bridge in a different county, and the new bridge cannot be considered as an appendage to the other. The statute of *H. 8.* attaches equally on the inhabitants of each county in respect to its own bridge. It makes no difference that the new bridge was first built by an individual, if it were afterwards adopted by the public as of great public utility. While it continued a road, it was repairable as part of the old bridge; but now that there is a substantive bridge built on the *Devonshire* side, it is repairable as a bridge by the inhabitants of the county in which it is situate, according to the statute.

Causeway with arches for letting off flood-water, being a continuation of a bridge over a stream, not repairable by the county as part of such bridge.

In an indictment against a county for not repairing a bridge, it appeared that a bridge constructed over the river *Thame* was continued by a causeway across meadows, and had several arches for the purpose of letting off the water, which frequently flooded the meadows in the winter, and that, unless the water was so let off, the bridge itself would have been endangered; and the water often lay under the arches when the meadows were dry. The arches in question, which were out of repair, were distant more than 300 feet from the end of the main bridge. After verdict for the crown, and argument on *R. N.*, the court held, that the prosecution could not be sustained, on the ground that a county was not by law bound to the repair of any bridge, unless such a one as was built over water flowing in a channel between banks more or less defined, though such channel might be occasionally dry; and they ordered a verdict to be entered for the defendants. *R. v. The Inhab. of Oxfordshire*, 1 *B. & Ad.* 289.

Nor is it repairable by the county as a separate bridge.

On a former occasion, an indictment had been preferred against the county for the non-repair of the same arches, considering them as a separate and independent bridge, and not as part of the bridge over the river; and a special case being stated, the court gave judgment for the defendants. *R. v. The Inhab. of Oxfordshire*, *T. T.* 1827, 1 *B. & Ad.* 297. n.

12 G. 2. c. 29. Of the laying out of money on repairs.

By stat. 12 G. 2. c. 29. § 13., no money shall be applied to the repair of bridges until presentment be made by the grand jury at the assizes or sessions of their insufficiency, inconveniency, or want of reparation.

55 G. 3. c. 143.

But by stat. 55 G. 3. c. 143. § 5., county bridges, repaired under contract, may be repaired without presentment.

Indictment must shew the kind of bridge.

An indictment for not repairing a bridge ought to shew what sort of a bridge it is, whether for carts or carriages, or for horses or for footmen only. 2 *Ld. Raym.* 1175.

County *primæ facie* liable for a bridge used by the public.

R. v. Inhab. of the West Riding of Yorkshire, 2 *East*, 348. In the indictment, the bridge was alleged to be in the king's highway, and used for all his subjects. And Lord *Ellenborough C. J.* said, this was at least sufficient to throw the *onus* upon the inha-

bitants of the county of shewing who else was bound to repair, if they were not.

Note.— There was a special plea that certain trustees under a temporary act built the bridge, &c. And to this plea there was a demurrer.

The same learned judge said, — “Where it is stated to be used by the public, it cannot be presumed to be useless to them: but if intended to be objected to on the ground of inutility, it must be so stated in the plea.” 2 *East*, 349, 350. — *Le Blanc J.*, in the same case, said, — As to this not being expressly stated to be for the public benefit, it is sufficient when the indictment states that the bridge was used for all the king’s subjects. *Ib.* 354, 355.

If a man be indicted for that “*by reason of the tenure*” of certain lands he is bound to repair a bridge, it must be alleged where those lands lie. 2 *Hale*, 181.

R. v. Sir John Bucknall, 2 *Ld. Raym.* 804. Information for not repairing a bridge. It was alleged in the information that he ought to repair, “because he now is and for divers years past hath been lord of the manor of B.,” &c. And upon a motion in arrest of judgment, it was held, that although the defendant was lord of the manor, yet that was no reason that he should repair the bridge, but some particular charge ought to be shewn, as *ratione tenuræ*, or by prescription.

A corporation may be charged in the indictment as being bound by prescription. 13 *Rep.* 33.

Any particular inhabitant of a county, or tenant of land charged to the repairs of a bridge, may be made defendant to an indictment for not repairing it, and be liable to pay the whole fine assessed by the court, for the default of repairs, and shall be put to his remedy at law for a contribution from those who are bound to bear a proportionable share in the charge; for the necessity of the case requires the greatest expedition in cases of this nature; for bridges, being of absolute necessity, are not to lie unrepaid till suits are determined. 1 *Haw. c.* 77. § 2.

Where a man is obliged to repair a bridge, his tenant for years, being in possession, will be obliged to do it; and if he fail he may be indictable for it. 2 *Ld. Raym.* 804.

If a manor be held by the service or tenure of repairing a common bridge or highway, and that manor afterwards comes to be divided into several hands; every one of these alienees being tenants of any parcel, either of the demesnes or services, shall be liable to the whole charge, and they are contributory among themselves. And though the lord of the manor might upon the several alienations agree to discharge those that purchased of him of such repairs, yet that shall not alter the remedy for the public, but only bind the lord and those that claim under him. As the whole manor, and every part of it, in the possession of one tenant, was once chargeable with the reparations, so it shall remain, notwithstanding any act of the proprietor: it shall not be in his power to apportion the charge whereby the remedy for public benefit shall be made more difficult, or by alienations to persons unable to render it, in respect of the parts which should come into such hands, quite frustrate. *R. v. Duchess of Buccleugh*, 1 *Salk.* 358.

Of the plea.— It hath been resolved that it is not sufficient for

Charge *ratione tenuræ*, how to be averred.

Corporation.

Any inhabitant, &c. of a county may be indicted.

Lessee of land liable, &c. may be indicted.

Manor held by tenure of repairing a bridge; and coming into possession of divers alienees. Each liable to be indicted.

Plea must

shew who is
liable to repair.

the defendants to an indictment for not repairing a bridge, to excuse themselves, by shewing either that they are not bound to repair the whole, or any part of the bridge, without shewing what other person is bound to repair the same; and it is said that in such case the whole charge shall be laid upon such defendants, by reason of their ill plea. 1 *Haw. c. 77. § 4.*

R. v. West Riding of Yorkshire, 7 East, 588. 3 Smith's Rep. 467. This was an indictment for not repairing a highway. A special verdict was found. The indictment alleged that a certain part of the highway, at the township of *Quick*, in the *West Riding*, &c. to wit, a certain part thereof lying next adjoining the west end of a certain public bridge there, called *Tamewater Bridge*, and within the distance of 300 feet thereof, &c. &c. was and yet is very ruinous, &c. &c. And that the inhabitants of the *West Riding* of, &c. of right ought to repair, &c. *Plea, n. g.* The evidence (as far as it is material to this point) was, that the township of *Quick* lay in the parish of *Saddleworth* in the said riding, which parish had been immemorially divided into four districts called *Mears*, in one of which mears, called *Shaw Mear*, the highway in *Quick* (herein-before mentioned) lay; and that the 300 feet at the other end of the bridge lay in another mear; and that each mear had respectively repaired the said respective highways, &c. &c. The main argument was upon the liability of the county to repair these *ends* of 300 feet each, in the same manner as they were liable to repair the bridge. This was decided in the affirmative. But in arguing, it was said by Mr. *Holroyd*, who was counsel for the crown, and not contradicted by the court, that no question could arise as to any special liability of the respective mears, because the general issue only was pleaded; and any question of that sort, he said, could only be raised by a special plea. He cited *R. v. City of Norwich, 1 Str. 180. 182.* The counsel for the defendants argued against this, upon the principle of assuming that these *ends* were *highways*, and not parts of the bridge. This, however, the court overruled.

A special liability cannot be given in evidence under the general issue of not guilty.

Who ought to be jurors.

It seemeth that no inhabitant of a county ought to be a juror, for the trial of an issue, whether the county be bound to such repairs or not; and, therefore, the jury must come from some adjacent county. 1 *Haw. c. 77. § 6.*

What justices may try the indictment.

And it seemeth that the same objection may lie as to the justices, where they are (as it may probably happen) all interested. In which case it seemeth that the trial shall be in the next county. For where an impartial trial cannot be had in the proper county, it shall be tried as near to the same as may be. As in the case of *R. v. the Inh. of the County of the City of Norwich*, concerning a county bridge, the trial was in *Suffolk. 2 Barr. 859, 860.*

1 Ann. st. 1. c. 18.

But now, by a special statute, viz. 1 Ann. st. 1. c. 18., an inhabitant of the county in such case may be a witness.

Inhabitants witnesses.
Fines, how applied.

By § 4., no fine, issue, penalty, or forfeiture, upon any presentment or indictment, for not repairing bridges, or the highways at the end of bridges, shall be returned into the exchequer, but shall be paid to the treasurer, to be applied towards the said repairs, and not otherwise.

By § 5., no presentment or indictment for not repairing bridges,

or highways at the ends of bridges, shall be removed by *certiorari* out of the county into another court.

Removed by certiorari.] In the case of *R. v. Inhabitants of Cumberland*, 6 T. R. 194., the chief question was, Whether an indictment for not repairing a bridge could be removed by *certiorari* or not? To shew that it could *not*, the defendant relied on the above clause: but the prosecutor contended that it was intended only to prevent *defendants* removing such presentments or indictments, and did not take away the *certiorari* from the prosecutor.—*Ld. Kenyon* C. J. stated several cases in which informations and indictments for non-repair of bridges had been removed by writs of *certiorari* applied for by the prosecutors. And that therefore the court were of opinion that the *certiorari* was properly issued. He also stated, that if it were otherwise, it would be an anomalous case in the law of *England*, for that in these cases the defendants are the inhabitants of a county, and if the indictments cannot be removed by *certiorari*, they must be tried by the very persons who are parties to the cause.

This case afterwards came by writ of error before the house of lords, where the above judgment was affirmed. 3 Bos. & Pull. 354.

A *certiorari* lies to remove an order made by the justices concerning the repair of a bridge, pursuant to a private act of parliament; and the justices ought to return the private act upon which their order is founded. *Dall.* 504.

R. v. the Inhab. of Hamworth, 2 Str. 900. Upon motion to quash a *certiorari* to remove an indictment against the defendants at sessions, for not repairing a bridge, it was insisted, that by stat. 1 Ann. c. 18. the *certiorari* is taken away. To which it was answered, and resolved by the court, that this act extendeth only to bridges where the county is charged to repair; and that where a private person or parish is charged, and the right will come in question, the act of the 5 & 6 W. 3. c. 11. hath allowed the granting a *certiorari*. And therefore they refused to quash.

By stat. 12 G. 2. c. 29. § 1., the charges of repairing and mending bridges, and highways at the ends of bridges, shall be aid out of the general county rates. (See 52 G. 3. c. 110. *post.*)

By stat. 22 H. 8. c. 5. § 4., the justices of peace within the hires or ridings wherein such decayed bridges be, out of cities and towns corporate; and if it be within cities or towns corporate, then the justices of peace within every such city, &c. or four of them the least (1 Q.), within the limits of their commissions and authorities, shall have power to name and appoint two surveyors, with salaries, to see the bridges amended.

And this business of surveying the bridges, for the more convenience, is usually annexed by the justices to the office of the high constables; for which they have by this clause power to low them salaries.

And by stat. 43 G. 3. c. 59. (called *Lord Gower's act*), after reciting, that whereas the inhabitants of counties in *England* "are by law bound to repair, support, and maintain the public bridges, commonly called *county bridges*, within such counties respectively, and the roads at each of the ends thereof, for limited distances; but the laws empowering them so to do are insufficient

Removal by *certiorari*, not denied to prosecutors.

Nor to defendants where there is a special charge of repair.

12 G. 2. c. 29. Charges of repairing.

22 H. 8. c. 5. Appointing surveyors;

usually the high constables.

43 G. 3. c. 59.

Surveyors of county bridges empowered to get materials for the repair of bridges in the same manner as surveyors of highways under 13 G. 3. c. 78.

and defective: And whereas doubts have arisen how far the said inhabitants are liable to improve such bridges when they are not sufficiently commodious for the public," it is enacted, "that it shall be lawful to and for the surveyor of bridges and other public works, in each and every county respectively within *England*, appointed or to be appointed by the justices at any general quarter sessions of the peace to be holden for such county, and the said surveyor is hereby authorised and empowered to search for, take, and carry away gravel, stone, sand, and other materials, for the repair of such bridges and roads at the ends thereof, as the inhabitants of counties are bound to repair; and to remove obstructions and annoyances from such bridges and roads, in such and in the same manner as the surveyor or surveyors of any common highway within this kingdom is or are by stat. 13 G. 3. c. 78. authorised to do: and the several powers and authorities thereby vested in the surveyor or surveyors of highways, as well for the getting of materials as the preventing and removing of all nuisances and annoyances from such bridges and roads, shall be, and the same are hereby vested in the surveyor and surveyors of county bridges, and the roads at the ends thereof as aforesaid; and the several penalties, forfeitures, matters, and things in the said act contained, relating to highways, shall be and the same are hereby extended and applied, as far as the same are applicable, to such bridges, and the roads at the ends thereof as aforesaid, as fully and effectually as if the same and every part thereof were herein repeated and re-enacted; the said surveyor or surveyors making satisfaction and compensation for all trespass and damage done in the execution of the powers of this act, in such and the same manner as the surveyors of highways are required to make in and by the said act of the 13 G. 3. c. 78."

54 G. 3. c. 90. Above provisions extended to smaller divisions than counties.

And by stat. 54 G. 3. c. 90. § 2., all the powers and provisions of stat. 43 G. 3. c. 59. (except as to bridges hereafter to be erected) are extended "as well to bridges and the roads at the ends thereof repaired by the inhabitants of hundreds, and other general divisions in the nature of hundreds, as to bridges and the roads at the ends thereof repaired by the inhabitants of counties."

55 G. 3. c. 143.

And by stat. 55 G. 3. c. 143. § 1., after reciting the above-mentioned provisions of statutes 43 G. 3. c. 59. § 1. and 54 G. 3. c. 90., and that whereas "it is expedient, that surveyors of county bridges and other persons being under contract for the rebuilding or repairing such bridges, or bridges repaired by the inhabitants of hundreds and other general divisions of counties in the nature of hundreds, should have a more extended power for procuring materials than is at present vested in such surveyors of county bridges, by the operation of the said first recited act, so far as relates to the procuring of stone for such purposes from quarries;" it is enacted, that "it shall and may be lawful to and for every surveyor of such bridges in each and every county within *England*, appointed or to be appointed by the justices at any general quarter sessions of the peace to be holden for such county; and also to and for the bridge-master or all and every persons or person who may at the passing of this act, or from and after the passing thereof, be under contract for the rebuilding or repairing of any public bridge, built or repaired at the ex-

Surveyors of county bridges, and other persons employed under contracts, empowered to take stones for the repair of county bridges.

se of the inhabitants of any such county, hundred, or general division as aforesaid; and such surveyor and surveyors, and also such other person or persons are hereby authorised and empowered, with the consent and by the order of two justices of the peace, acting for the county in which such bridge is intended to be rebuilt or repaired, first had and obtained for that purpose, to search for, work, dig, get, and carry away any stone in, from, or out of any quarry or quarries whatsoever within the county or counties to which such bridge may belong; other than and except such quarries as may be situated within a garden, yard, avenue to a house, lawn, park, paddock, or inclosed plantation, or as may now or hereafter have ornamental timber trees growing hereon, without the licence or consent of the owner or owners of such quarry or quarries, as such surveyor or other person or persons shall judge necessary for the rebuilding or repairing of such bridges respectively, provided such quarry or quarries shall have been worked within the last three years preceding the time when such bridge shall be about to be rebuilt or repaired; the said surveyor or other person or persons making such satisfaction and recompence for the value of such stone, and also for the damage to be done to such quarry or quarries by the getting and carrying away the same, as shall be agreed upon between him or them, and the owner, occupier, or other person interested in such quarry or quarries respectively; and in case they cannot agree, or such owner or occupier or other person interested shall refuse to treat, then and in every such case the justices of the peace at their general or quarter sessions, or any two or more of them appointed for that purpose, fourteen days' notice having been given to the owner or his agent of the intention to require a jury, shall cause the value of such stones and amount of such damage to be inquired into and ascertained by a jury of indifferent men of the county, riding, division, city, town, liberty, or precinct wherein the same shall be situated; and to that end shall summon and call before such jury, and examine upon oath (which oath any two or more of such justices of the peace is and are hereby empowered to administer) any person or persons whomsoever; and such justices of the peace, or any two of them, shall, by ordering a view or otherwise, use all ways and means for the information of themselves and of such jury in the premises; and when such jury shall have inquired of and ascertained the value of such stones and amount of such damage, the said justices of the peace shall hereupon order that the sum or sums which shall so appear to be the value of such stones and amount of such damage shall be paid; which verdict or inquisition and order shall be filed of record by the clerk of the peace, or other officer having the custody of the records of the said county, riding, division, city, town, liberty, or precinct, and shall be final and conclusive to all intents and purposes whatsoever, against all parties and persons whomsoever claiming or to claim in possession, remainder, reversion, or otherwise, their heirs and successors, as well absent as present, infants, lunatics, idiots, and persons under coverture, or any other disability whatsoever, corporations, guardians, committees, husbands, trustees, and attorneys, or any other person or persons whomsoever."

55 G.S. c. 143.

Consent and order of two justices of the peace necessary.

Quarries situated in gardens and pleasure grounds, not to be used without consent of the owners.

Satisfaction to be made for stone, and damage done.

In case of refusal to treat, justices at general or quarter sessions shall cause the value of the stones, and amount of the damage done, to be ascertained by a jury.

Witnesses, called before the jury, may be examined upon oath.

55 G. 3.c. 143.

Justices of the peace may require sheriffs or bailiffs to return juries.

Jury.

Penalty on jury refusing to appear or to be sworn, and on persons summoned to attend, refusing to give evidence.

Expenses of the jury, how to be defrayed.

Persons aggrieved may appeal to jus-

§ 2. "And for the summoning and returning such juries," it is enacted, "that such justices of the peace, or any two of them, may issue their warrant or warrants to the sheriff or bailiff of any particular county, riding, division, city, town, liberty, or precinct, within the limits of which the quarry or quarries shall be situated, requiring him to impanel, summon, and return an indifferent jury of 24 persons qualified to serve on juries, to appear before the said justices, or any two of them, at such time and place as in such warrant or warrants shall be appointed; and such sheriff or bailiff is and are hereby required to impanel, summon, and return such number of persons accordingly; and out of the persons so impanelled, summoned, and returned, or out of such of them as shall appear upon such summons, the justices of the peace, or any two of them, shall, and they are hereby empowered and required to draw by ballot, and to swear or cause to be sworn, twelve men, who shall be the jury for the purposes aforesaid; and in default of a sufficient number of jurymen so returned, the said sheriff or bailiff shall take such other honest and indifferent men of the by-standers, or that can speedily be procured to attend that service, to make up the number of 12; and all persons concerned shall have their lawful challenges against any of the said jurymen when they come to be sworn; and the said justices of the peace, or any two of them, shall have power from time to time to impose a fine or fines on such sheriff or bailiff, or his deputy or deputies, making default in the premises, and on any of the persons who shall be summoned and returned on such jury, and who shall not appear, or appearing shall refuse to be sworn on the said jury, or being sworn, shall refuse to give or shall not give a verdict, or shall in any other manner wilfully neglect his or their duty therein, and also on any person who, being summoned and required to give evidence before the said jury, shall refuse or neglect to appear, or appearing shall refuse to be sworn or to give evidence, so that no such fine be more than 10*l.* nor less than 20*s.*, on any one person for one offence."

§ 3. enacts, "That in case any jury shall give in and deliver a verdict for more money as the value of such stones and amount of such damage, than what shall have been offered for the purchase thereof by such surveyor or other person or persons as aforesaid, the costs and expenses of summoning and maintaining the jury and witnesses shall be borne and paid out of the rates to be collected within such county respectively; but if such jury shall give in and deliver a verdict for no more or for less money than the money which shall have been so offered by such surveyor or other person or persons as aforesaid, then the costs and expenses of summoning and maintaining the said jury and witnesses shall be borne and paid by the person or persons with whom such controversy or dispute touching the value of such stones and amount of such damage shall arise, and shall be levied by the warrant of one of the said justices, by distress and sale of the goods and chattels of the person or persons made liable to the payment thereof."

§ 4. Provided, "that if any person shall think himself aggrieved by any thing done in pursuance of this act, such person may, within the space of three calendar months next after the cause

of complaint shall have arisen, appeal to the justices of the peace at any general quarter sessions of the peace to be holden for the next term wherein the cause of complaint shall arise, every such appellant first giving 14 days' notice at least in writing, of his intention to bring such appeal, and of the cause or matter thereof, to the person or persons against whom such complaint shall be made, and within three days next after such notice entering into a recognizance before some justice of the peace acting for the county wherein the cause of complaint shall arise, with two sufficient sureties conditioned to try such appeal, and to abide by the order and pay such costs as shall be awarded by the justices at such session aforesaid; and the said justices at such session, upon due proof of such notice being given as aforesaid, and of the entering to such recognizance, shall hear and finally determine the cause and matter of every such appeal in a summary way, and make such award to the party appealing or appealed against, as the said justices shall think proper; and the determination of such justices assembled shall be binding and conclusive, to all intents and purposes."

It seemeth to be clear that those who are bound to repair bridges, must make them of such height and strength as shall be answerable to the course of the water, whether it continue in the old channel, or make a new one. 1 *Haw. c. 77. § 1.*

And persons are not trespassers for entering on any adjoining lands for repairing bridges, or laying thereon the requisite materials.

In *Rex v. Justices of Glamorganshire*, 5 *T. R.* 279. *Buller J.* said, — "As to the power of justices to change roads, by changing the local situation of a bridge, there certainly are old cases against it, and they were properly decided; because previous to act. 14 *G. 2. c. 33.* the sessions had no power to change the situation of bridges; but that act impliedly gives them that power, for it enables them to purchase lands adjoining any county bridge, for the more commodious enlarging and convenient rebuilding the same. This, therefore, impliedly gives them the power of altering the position of the bridge to suit the convenience of the public. *vide stat. 43 G. 3. c. 59. post, p. 630.*

And in one case the court strongly intimated, that if a bridge used for carriages, though formerly adequate to the purposes intended, were not now of sufficient width to meet the public exigencies, owing to the increased width of carriages, the burthen of widening it must be borne by those who are bound to repair the bridge. And *Lord Kenyon C. J.*, in giving the judgment in this case, said, that upon this question there could not be entertained much doubt. *Rex v. Inhab. of Cumberland*, 6 *T. R.* 194. *antè.* See also *Rex v. W. R. of Yorkshire*, *antè.*

However, where the same case came, by error, before the house of lords, the lord chancellor (*Ld. Eldon*) expressed great doubts whether the same persons who are bound to repair a bridge are also bound to widen it, if the exigencies of the public should require it. *Inhab. of Cumberland v. The King, in Error*, 3 *Bos. & Pull.* 354.

An indictment having been preferred against the county, charging that a certain common public bridge was out of repair,

55 *G. 3. c. 143.*

Justices assembled in general quarter sessions.

Appellant to enter into recognizance.

Justices to determine the matter of appeal in a summary way.

Manner of repairing.

May enter on the lands adjoining.

Changing the situation of bridges.

Widening bridges. But see *infra*.

A county cannot be called

upon to widen
a bridge.

and was also too narrow, so that the king's subjects could not pass and re-pass without great danger, &c.; it was found, by a special verdict, that the bridge was not out of repair, but that it was too narrow, so that passengers could not go over it without danger, but that it was as wide as it ever had been. After argument, the court held, that there was no authority for calling upon a county to widen an old bridge, any more than for compelling it to build a new bridge, or for indicting a parish for not widening a highway which was inconveniently narrow. Judgment for defendants. *R. v. Inhab. of Devon*, 4 B. & C. 670.

43 G. 3. c. 59.
Quarter ses-
sions may alter
the situation of
county bridges,
and roads at the
end thereof, or
widen the same.

The defects in the laws for repairing and rebuilding county bridges, by enabling the justices at sessions to purchase lands under certain circumstances for such purposes, (which was in some degree supplied by stat. 14 G. 2. c. 33. § 1.) are more completely remedied by stat. 43 G. 3. c. 59. § 2., by which it is enacted, "That where any bridge or bridges, or roads at the ends thereof, repaired at the expense of any county, shall be narrow and incommodious, it shall and may be lawful to and for the said justices, at any of their general quarter sessions, to order and direct such bridge or bridges, and roads, to be widened, improved, and made commodious for the public; and that where any bridge or bridges, repaired at the expense of any county, shall be so much in decay as to render the taking the same wholly down necessary or expedient, it shall and may be lawful to and for the said justices, at any of their said general quarter sessions, to order and direct the same to be rebuilt, either on the old site or situation, or on any new one more convenient to the public, contiguous to or within two hundred yards of the former one, as to such justices shall seem meet; and if, for the purpose of altering the situation, or of widening or enlarging any such bridge or bridges, road or roads as aforesaid, it shall be necessary to purchase any land or ground [or by stat. 54 G. 3. c. 90. 'any building or buildings, or other erections,'] it shall and may be lawful for such county surveyor or surveyors, by and under the direction of such justices at their general quarter sessions as aforesaid, to set out and ascertain the same, not exceeding in the whole one acre at any one such bridge as aforesaid, and to contract and agree with the owner or owners of such land, and persons interested therein, for the purchase thereof, either by a sum in gross, or by an annual rent, at the option of such owner or owners; and if the said surveyor or surveyors cannot agree with the said owner or owners for the purchase thereof, or the recompence to be made for the same, or by reason of such owner or owners not being to be found, shall be prevented from treating, then and in every such case, the said justices in their general quarter sessions shall impanel a jury, and assess the compensation and satisfaction for such land, and for the trespass and damage to be done by the execution of the powers of this act, in the same manner as they are authorised and empowered to do by the said above-mentioned act of the 13 G. 3. c. 78. in relation to highways; and all and every the clauses, powers, provisions, exemptions, penalties, matters, and things, in the said act contained, as well with respect to impanelling juries, examining and swearing witnesses, payments of expenses, enabling bodies politic, corporate, and colle-

54 G. 3. c. 90.

giate, and other incapacitated persons, to sell and convey, and all other the powers and provisions of the said act, shall be, and the same are hereby extended and applied to the works by this act authorised to be done and performed, as far as the same are applicable, as fully and effectually, to all intents and purposes, as if the same were herein particularly repeated and re-enacted: *Provided*, that no money shall be applied to the amendment or alteration of any such bridge or bridges, until presentment shall have been made of the insufficiency, inconvenience, or want of repair of such bridge or bridges, in pursuance of some or one of the statutes made and now in force concerning public bridges."

§ 4. And the inhabitants of counties shall and may sue for any damages done to bridges and other works maintained and repaired at the expense of such counties respectively, and for the recovering of any property belonging to such counties, in the name of their surveyor, and also shall and may be sued in the name of such surveyor; and no action or prosecution to be brought or commenced by or against the inhabitants of counties, by virtue of this act, in the name of the said surveyor, shall abate or be discontinued by the death or removal of such surveyor, or by the act of the surveyor, without the consent of the justices at their general quarter sessions, but the surveyor for the time being shall be deemed the plaintiff or defendant in such actions, and the case may be: Provided that every such surveyor in whose name any action or suit should be so commenced, prosecuted, or defended, shall be reimbursed and paid out of the monies in the hands of the treasurer of the public stock of such county respectively, all such costs and charges as he shall be put unto or become chargeable with by reason of his being so made plaintiff or defendant therein; and also all the costs and charges of prosecuting any indictment or indictments, or other proceedings against any person or persons whomsoever.

§ 6. All orders and proceedings within the county of York, relative to county bridges, shall in future be made and had by the justices of the respective ridings, assembled at the annual and general quarter sessions holden the first whole week after *Easter* and at no other sessions whatever, within such ridings, except at such adjournment as shall be made at the above annual and general quarter sessions, so holden as aforesaid, for the express purpose of carrying such orders into effect: Provided, that it shall be lawful for any two justices of the said ridings respectively, in cases of emergency, to give such orders for making temporary bridges, or such temporary repairs as shall be necessary for the temporary accommodation of the public.

Rex v. The Justices of Dorset and others, 15 East, 594. The justices of *Dorset* having, under stat. 43 G. 3. c. 59., contracted for the building of a new bridge in a different site in lieu of the old one, which was ruinous; and having directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials to be used by the contractor in finishing the new bridge; the court of K. B. refused a writ of prohibition to them to restrain them from pulling down the old before the new bridge was passable; though there were strong affidavits of the

43 G. 3. c. 59.

Presentment to be made.

Inhabitants of counties may sue for damages done to bridges in the name of the surveyor.

Orders respecting county bridges in the county of York, to be made by the sessions held the first week after Easter.

Case of justices pulling down old bridge previous to the building of new bridge in a different site. Prohibition refused by K. B.

inconvenience and loss to be sustained by the neighbourhood in being obliged to use a round-about way in the interval; referring the complainants to the ordinary remedy by indictment, if the pulling down the old bridge under these circumstances were a nuisance; and seeing no occasion to interfere by applying a prompt remedy of a novel kind in modern practice. Lord *Ellenborough* C. J. asked (15 *East*, 600.), What must have been the case if the magistrates had ordered the bridge to be rebuilt on the old site; when it would have been impossible to continue the old bridge standing until the new one was finished?

3 G. 4. c. 126.
Materials for
repairing
bridges.

By stat. 3 G. 4. 126. § 32., materials for the repairs of bridges carried along a turnpike road are exempted from toll. See *Ormond v. Widdicombe*, 2 B. & A. 49. and stat. 3 G. 4. c. 126. § 32.

12 G. 2. c. 29.
Justices in
quarter sessions
may contract
for rebuilding,
repairing, &c.
for a term of
years.

By stat. 12 G. 2. c. 29. § 14., when any public bridges, ramparts, banks or cops, or other works, are to be repaired at the expense of the county, city, riding, &c., the justices at their general or quarter sessions, after presentment made by the grand jury of want of reparation thereof, may contract with any person for rebuilding, repairing, and amending the same, for any term not exceeding seven years, at a certain annual sum.

In order to which, they shall at their general quarter sessions give public notice of their intention of contracting with any person for rebuilding, repairing, and amending the same.

And such contracts shall be made at the most reasonable price which shall be proposed by the contractors; who shall give sufficient security for the due performance thereof to the clerk of the peace, or the town clerk, or chief officer of such county, &c.

Contract to be
entered in a
book, and open
to inspection.

And all contracts when agreed to, and all orders relating thereto, shall be entered in a book to be kept by the clerk of the peace, &c. for that purpose; who shall keep the same amongst the records of the county, &c. to be inspected by any of the justices within their limits, at all seasonable times, and by any person employed by any parish or place contributing to the same, without fee.

52 G. 3. c. 110.
Recital.

By stat. 52 G. 3. c. 110. § 1., reciting, that whereas by stat. 12 G. 2. c. 29. "no part of the money to be raised and collected in pursuance of that act shall be applied to the repair of any bridges, gaols, prisons, or houses of correction, until presentments be made by the respective grand juries at the assize, great sessions, general gaol delivery, or general or quarter sessions of the peace, held for any county, riding, division, city, town corporate, or liberty, of the insufficiency, inconveniency, or want of reparation of their bridges, gaols, prisons, or houses of correction: and that "when any public bridges, ramparts, banks, or cops, or other works, are to be repaired at the expense of any county, city," &c. "it shall and may be lawful to and for the justices of the peace, at their general or quarter sessions respectively, or the greater part of them then and there assembled, if they think proper and convenient, after presentment to be made as aforesaid of the want of reparation of such bridges, ramparts, banks, or cops, to contract and agree with any person or persons for the rebuilding, repairing, and amending of such bridges, ramparts, banks, or cops, as shall be within their respective counties," &c.

"and all other works which are to be repaired and done by assessment on the respective counties," &c. "for any term or terms of years, not exceeding seven years, at a certain annual sum, payment, or allowance for the same, such contractor giving sufficient security for the due performance thereof to the respective clerk of the peace for the time being, or the town clerk, high bailiff, or chief officer of any city, town corporate, or liberty; and that such justices, at their respective general or quarter sessions, shall give public notice of their intention of contracting for rebuilding, repairing, and amending the bridges, ramparts, banks, or cops, and other works aforesaid, and that such contracts shall be made at the most reasonable price which shall be proposed by such contractors respectively; and that all contracts, when agreed to, and all orders relating thereto, shall be entered in a book, to be kept by the respective clerk of the peace for the time being, or the town clerk, high bailiff, or chief officer of any city, town corporate, or liberty, for that purpose, who is and are hereby required to keep them amongst the records of such county," &c. "to be from time to time inspected at all seasonable times by any of the said justices within the limits of their commissions, and by any person or persons employed or to be employed by any parish, township, or place, contributing to the purposes of this act, without fee or reward: and whereas great expense in the repairs of county bridges, ramparts, banks, cops, or other works appertaining to the same, and of the roads over the same, and of so much of the roads at the ends thereof as by law is to be repaired at the expense of any county, riding," &c. "and great inconvenience to the public may be often in a great measure prevented by timely and immediate repair of any inconsiderable damage, injury, defect, or sudden want of repair or amendment of the same, without the delay which must generally arise from the necessity imposed by the aforesaid act, of a presentment by the grand jury at the assize, great sessions, or general or quarter sessions of the peace held for any county, city," &c. "of the want of reparation of the same; by means of which delay the aforesaid want of repair is often very much increased, to the great expense of the county, and great inconvenience of the public: and whereas it is also expedient that the justices of the peace of any county, city," &c. "at their general quarter sessions respectively, before any presentment shall have been made as aforesaid, as directed by the aforesaid act, of the want of repair of such roads, should be enabled without any such presentment to contract and agree with certain persons herein-after mentioned, for the repairing and amending of the same; and also for keeping the same in repair when so repaired and amended:" *it is enacted*, "that it shall and may be lawful for the justices of the peace of any county, city," &c. "at their general quarter sessions or great sessions respectively, to be holden in the week next after the clause of *Easter*, or the greater part of them then and there assembled, to appoint annually two or more justices acting in and for any division of justices in such county, city," &c. "in or near which any such county bridge, or any bridge which is in part a county bridge, ramparts, banks, cops, or other works appertaining to the same, or any part or parts thereof, or the roads over the same, or so much of the roads

Quarter sessions may appoint annually two or more justices near to superintend roads and bridges.

52 G. S. c. 110. at the ends thereof as by law is to be repaired at the expense of any county, city," &c. "shall be situate, to superintend the same; and whenever it shall appear on their own inspection to be necessary for the purpose of preventing the further decay and injury of the same, to order any immediate repairs or amendments to be done to the same or to any part thereof; but it shall and may be lawful for any two justices so to be appointed as aforesaid, by a written order (A), signed by their hands respectively, to order such immediate repairs to be done by such person as to them shall seem fit:" Provided, "that in no case the sum to be expended by them in such repairs shall exceed the sum of 20*l.*; and further, that such appointments of such justices as aforesaid shall remain in force until one week after the following *Easter* sessions respectively; and that in case of the death of, or removal of, or refusal to act by any such justice so appointed as aforesaid, the said court of general quarter sessions or great sessions may at any other of the four quarterly sessions appoint any other justice to act for the remainder of the then current year, in the place of any such justice so dying, removing, or refusing to act as aforesaid."

And they may expend 20*l.*
The two justices to remain in office for one year, finishing one week after quarter sessions.

Quarter sessions to order payment for repairs.
Not exceeding 10*l.*

Though no presentment made.
Certificate signed by two of the said justices.

Justices may contract for the repair of bridges and of the roads at the end of them.

§ 2. The justices of the peace of any county, city, &c. "at the general quarter sessions or great sessions which shall next happen after such repairs so ordered to be made by such justices so appointed as aforesaid shall be completed, or the greater part of them then and there assembled," may "order the payment of such sum or sums of money not exceeding 10*l.* as shall be sufficient to pay for such repairs, to be made out of the county rate, to such persons who shall have so repaired the same, by such order of such justices as aforesaid, although no presentment shall have been made by any grand jury at the assize, great sessions, or general quarter sessions of the peace of any county, city," &c. "in which such repairs shall have been done, of the want of such reparation, as by the said" stat. 12 G. 2. was directed: "Provided nevertheless, that before such payment be ordered to be made as aforesaid, a certificate (B) be returned to such justices so assembled at such last-mentioned sessions, signed by two at the least of such justices so appointed as aforesaid, who shall have so ordered such repairs as aforesaid, stating the nature of such repairs, and the defects, damage, or injuries which they had so ordered to be repaired, and their reason for so ordering such immediate repairs as aforesaid: Provided also, that such justices so assembled as last aforesaid be satisfied by the parties concerned that the charges made by them for such repairs are reasonable and just."

§ 5. After *July* 1. 1812, "it shall and may be lawful for the justices of the peace for any county, city," &c. "at their general quarter sessions respectively, or the greater part of them then and there assembled, if they shall think proper and convenient, to contract and agree with the commissioner or trustee of any turnpike road within the said county," &c. "or with their surveyor or clerk, or with both their surveyor and clerk, or with the surveyor or surveyors of the highway of any parish, place, or tything within the said county," &c. "respectively, or with any other persons, for the maintaining and keeping in repair roads over any county

bridges, and of so much of the roads at the ending thereof as by law is to be repaired at the expense of any such county, &c. or any part of the same, for any term not exceeding seven years, nor less than one, although no presentment shall have been made as directed by the said" stat. 12 G. 2. "of the insufficiency, inconvenience, decay, or want of repair of the same; subject, however, to all the rules," &c. required by the said stat. 12 G. 2. "in case where the same shall have been presented or directed by that act."

And by stat. 55 G. 3. c. 143. § 5., reciting, that whereas it is expedient that the powers contained in stat. 43 G. 3. c. 59. for authorising the justices of the peace of any county, city, riding, division, town corporate, or liberty, at their general quarter session of the peace, to contract for maintaining and keeping in repair roads over county bridges, and so much of the roads at the ending thereof as by law is to be repaired at the expense of counties, although no presentment shall have been made of the want of repair, as directed by an act passed in the twelfth year of his late majesty king *George* the second, intituled "An act for the more easy assessing, collecting, and levying of county rates" (12 G. 2. c. 29.), should be extended to the bridges as well as to the roads at the end thereof; it is enacted, that "it shall and may be lawful to and for the justices of the peace of any county, city, riding, division, town corporate or liberty, at their general quarter sessions respectively, to contract and agree, or to authorise any other person or persons to contract and agree with any person or persons, for the maintaining and keeping in repair any county or hundred bridge, and the road over such county or hundred bridge, and so much of the road at the ends thereof as are by law liable to be repaired at the expense of any such county, hundred, city, riding, division, town corporate, or liberty, or any part of the same; and the said justices are hereby empowered to order such sum or sums of money as may be contracted for and agreed to be paid for the repairing, amending, and supporting such bridges, and the roads over the same, or the ends thereof, to be paid (in cases where the county is liable to the repair thereof) by the treasurer of the county out of the county rate, or (in cases where the hundred is liable to the repair of the same) by the bridge-master (or other public officer charged with the repair of bridges) of the hundred by which such bridge is liable to be repaired, for any term not exceeding seven years, nor less than one, although no presentment of the insufficiency, decay, or want of repair of the same shall have been made, and although no public notice shall have been given by the said justices at their respective general or quarter session, of their intention to contract for the repair of such bridges, or the roads at the ends thereof, as respectively directed by the said act of the twelfth year of his late majesty king *George* the second: Provided nevertheless, that before any such contract shall be made, the said justices shall cause notices to be given in some public paper circulated in such county, city, riding, hundred, division, town corporate, or liberty, of their intention to contract."

52 G. 3. c. 110.

55 G. 3. c. 143.
Enabling justices to contract for the repair of county bridges, &c.

Though no presentment shall have been made.

Notices to be given in some public paper.

- A. A. Order of Two Justices to repair a County Bridge, under
stat. 52 G. 3. c. 110. § 1. *antè*, p. 634.

County of } *To* _____, of the parish of, _____ in the said
_____ } county. *We* _____ and _____, two of his
to wit. } majesty's justices of the peace in and for the said
county, duly appointed in pursuance of the statute in that case made
and provided, to superintend the county bridges, ramparts, banks,
cops, and other works appertaining to the same, and the roads over
the same, and so much of the roads at the ends thereof as by law is
to be repaired at the expense of the said county, within the division
or hundred of _____ in the said county, having on this day in-
spected the county bridge, _____ situate in the parish of _____, in
the said county, and within the said division or hundred; and it
appearing to us, on our own inspection thereof, to be necessary for
the purpose of preventing the further decay and injury of the same,
to order the immediate repairs and amendments to be done to the
same, as in the schedule of particulars by you prepared and signed,
and hereto annexed: Now, therefore, we, the said justices, do hereby
order and direct you, immediately, to repair and amend the said
county bridge, according to the said schedule of particulars by you
prepared and signed, and hereto annexed, provided that the sum to
be expended in such repairs shall not exceed the sum of _____.
Given under our hands this _____ day of _____ 18—.

- B. B. Certificate to be returned to the Sessions, pursuant to
stat. 52 G. 3. c. 110. § 2. *antè*, p. 634.

County of } *To* the justices of the peace at the general quarter
_____ } sessions, to be holden at _____, in the said county,
to wit. } the _____ day of _____ 18—. *We* _____
and _____, two of his majesty's justices of the peace in and for the
said county, duly appointed in pursuance of the statute in that case
made and provided, to superintend the county bridges, ramparts,
banks, cops, and other works appertaining to the same, and the
roads over the same, and so much of the roads at the ends thereof as
by law is to be repaired at the expense of the said county, within the
division or hundred of _____ in the said county, do hereby certify
to the said court of quarter sessions, that on the _____ day of _____
last, we did inspect the county bridge _____ situate in the parish of
_____ in the said county, and within the division aforesaid; and
it having appeared to us, on our own inspection thereof, that _____
and that it was necessary for the purpose of preventing the further
decay and injury of the same, to order the immediate repairs and
amendments to be done to the same, as follows, viz. _____;
therefore we, the said justices, did, on the said _____ day of
_____, make our order, in writing, signed with our respective
hands, and did thereby order and direct _____ of the parish
of _____ in the said county of _____ immediately to make the
said repairs and amendments, provided that the sum to be expended
in such repairs should not exceed the sum of _____ pounds. And
we, the said justices, do hereby further certify, that the said repairs,

so directed to be made as aforesaid, have been made accordingly, by the said ———, and that the reasonable price and charges payable to the said ——— for the same, amounts to the sum of ——— as per account hereto annexed, and verified on the oath of ———. Given under our hands this ——— day of ———, in the year of our Lord 18—.

Indictment of a Bridge out of Repair.

County of } *BY* the oath of ——— good and lawful men of
the county of ——— aforesaid, then and there
sworn and charged to inquire for our lord the king, and the body
of the county aforesaid, it is presented, that a certain common
bridge over the river ———, commonly called ——— bridge,
lying and being in the parish of ——— in the county aforesaid,
in the king's common highway there, leading from the market town
of ——— to the market town of ——— in the said county,
altogether and from the time whereof the memory of man is not
to the contrary, being a common king's highway for all the lieges
and subjects of our said lord the king and of his ancestors, with
their horses, carts, and carriages, to go, pass, ride, and travel at
their pleasure, on the ——— day of ——— in the ———
year of the reign of ——— was, and yet is in great decay,
broken, and ruinous; so that the lieges and subjects of our said
lord the king, upon and over the said bridge with their horses, carts,
and carriages, could not and cannot go, pass, ride, and travel, with-
out great danger, to the grievous damage and nuisance of all the
lieges and subjects of our said lord the king, upon and over the same
bridge going, passing, riding, and travelling, and against the peace
of our said lord the king, his crown and dignity. And that the in-
habitants of the county aforesaid the common bridge aforesaid (so as
aforesaid being in decay) ought to repair and amend when and
so often as it shall be necessary.

[Or, and that A. O. late of ——— in the said county, gentle-
man, by reason of his tenure of certain lands lying in the parish
of ——— aforesaid, ought to make, repair, and amend the said
common bridge, as often as and when it shall be necessary.]

III. How a Nuisance may be removed.

It seemeth to be certain that any one may pull down or other-
wise destroy a common nuisance, as a new gate, or even a new
house erected in a highway, or the like; for if one whose estate
is or may be prejudiced by a *private* nuisance actually erected, as
a house hanging over his ground, or stopping his lights, may justify
the entering into another's ground and pulling down and destroy-
ing such a nuisance, whether it were erected before or since he
came to the estate, it cannot but follow *à fortiori* that any one may
lawfully destroy a *common* nuisance: And as the law is now holden,
it seems, that in a plea justifying the removal of the nuisance, a
man need not shew that he did as little damage as might be.

1 Haw. c. 75. § 12.

Any person
may remove
a common
nuisance;

but not the materials.

In what manner.

But although he may remove the nuisance, yet he cannot remove the materials, or convert them to his own use. *Dall. c. 50.*

But so much of the thing only as causes the nuisance ought to be removed: As, if a house be built too high, only so much of it as is too high should be pulled down. *9 Rep. 53. God. 221. 2 Str. 686.*

And in the case of a *glass-house*, the judgment was to abate the nuisance; but not by pulling the house down, but only to prevent its being again used as such. *Co. Ent. 92.*

IV. *How punished.*

Punishment of scold by cucking stool.

It is said that a common scold is punishable (after conviction upon indictment) by being placed in a certain engine of correction called the trebucket or cucking stool. *1 Haw. c. 75. § 14.*

Note, *cuck* or *guck* in the *Saxon* tongue (according to *Ld. Coke*), signifieth to scold or brawl; taken from the bird *cuckoo* or *guckler*, and *ing* in that language signifieth water; because a scolding woman was for her punishment soused in the water. *3 Inst. 219.* The common people in the northern parts of *England*, amongst whom the greatest remains of the ancient *Saxon* are to be found, pronounce it *ducking stool*; which perhaps may have sprung from the *Belgic* or *Teutonic ducken*, to dive under water; from whence also probably we denominate our *duck* the water fowl: or rather it is more agreeable to the analogy and progression of languages to assert, that the substantive *duck* is the original, and the verb made from thence; as much as to say, that to *duck* is to do as that fowl does.

Particulars need not be set out.

And she may be convicted without setting forth the particulars in the indictment. *2 Haw. c. 25. § 59.*

Nevertheless, the offence must be set forth with convenient certainty; and the indictment must conclude not only *against the peace*, but to the common nuisance of divers of *H. M.'s liege subjects*. And in the case of *R. v. Margaret Cooper*, *2 Str. 1246*, the defendant was convicted on an indictment for being a common and turbulent brawler, and sower of discord amongst her quiet and honest neighbours, so that she hath stirred, moved, and incited divers strifes, controversies, quarrels, and disputes, amongst *H. M.'s liege people*, against the peace, &c. It was moved in arrest of judgment that the charge was too general, and did not amount to being either a barrator or common scold, which are the only instances in which a general charge will be sufficient. It was likewise objected, that if the words did amount to a description of a scold, yet it should be laid to be to the common nuisance of her neighbours; for every degree of scolding is not indictable. And the court was of opinion, that the judgment ought to be arrested on both exceptions; for none of the words here used are the technical words; and it must be laid to be to the common nuisance. (a)

(a) It seemeth to savour not much of gallantry, that our ancestors supposed none but women could be guilty of this offence: for the technical words denoting the same, whilst the proceedings were in Latin, were all of the feminine gender; as, *rixatrix, calumniatrix, communis pugnatrice, communis pacis perturbatrix*. and the like.

There is no doubt but that whoever is convicted of nuisance may be fined and imprisoned; and it is said that one convicted of a nuisance done to the king's highway may be commanded by the judgment to remove the nuisance at his own costs; and it seems to be reasonable that those who are convicted of any other common nuisance should also have the like judgment. 1 *Haw. c. 75. § 14. 2 Str. 686.*

Punishment by fine and imprisonment, and to remove the nuisance if it be continuing.

But unless the nuisance be stated to be continuing, there need not be judgment to abate it; for every judgment should be adapted to the nature of the case; so that where the nuisance exists at the time of the judgment, there ought to be a demolition; but not otherwise. *R. v. Stead, 8 T. R. 142. vide per Lawrence J.*

If the party who has been indicted for a nuisance continue the same, he may be again indicted for such continuance of the nuisance. So; though for a private nuisance two actions for the erection cannot be had, yet a second action for the continuance thereof may be sustained. 1 *Ld. Raym. 370.*

The defendant shall not be allowed to make any objections against the indictment, until he hath pleaded to it. *Dalt. c. 66.*

And the court never admits a person convicted of a nuisance to a small fine, until proof is made of the nuisance being removed. *Dalt. c. 66.*

All common nuisances are indictable not only at the sessions, but also in the torn and leet. 2 *Haw. c. 10. § 59.*

An act of general pardon only discharges the fine, but not the abatement of the nuisance. 2 *Salk. 458.*

There are many offences by particular statutes declared to be common nuisances, which are treated of under their respective titles.

By stat. 1 & 2 G. 4. c. 41. intituled "An Act for giving greater facility in the prosecution and abatement of nuisances arising from furnaces used; and in the working of steam engines;"

1 & 2 G. 4. c. 41.

§ 1., after reciting that, *whereas great inconvenience has arisen, and a great degree of injury has been and is now sustained by H. M.'s subjects, in various parts of the United Empire, from the improper construction as well as from the negligent use of furnaces employed in the working of engines by steam: and whereas by law every such nuisance, being of a public nature, is abateable as such by indictment; but the expence attending the prosecution thereof has deterred parties suffering thereby from seeking the remedy given by law: it is enacted, "That it shall and may be lawful for the court by which judgment ought to be pronounced in case of conviction on any such indictment, to award such costs as shall be deemed proper and reasonable to the prosecutor or prosecutors, to be paid by the party or parties so convicted as aforesaid, such award to be made either before or at the time of pronouncing final judgment, as to the court may seem fit."*

Recital of nuisances from steam engines.

Court may award costs.

§ 2. "That if it shall appear to the court by which judgment ought to be pronounced in case of conviction on any such indictment, that the grievance may be remedied by altering the construction of the furnace so employed in the working of engines by steam, it shall be lawful to the court, without the consent of the prosecutor, to make such order touching the premises, as shall be by the said court thought expedient for preventing the nuisance

Court may make order for preventing the nuisance.

1 & 2 G. 4. c. 41. in future, before passing final sentence upon the defendant or defendants so convicted.

Not to extend to owners of furnaces erected solely for working of mines.

§ 3. provides and enacts, "That the provisions of this act, as far as they relate to the payment of costs and the alteration of furnaces, shall not extend or be construed to extend to the owners or proprietors or occupiers of any furnaces of steam engines erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in the manufacturing of the produce of such ores or minerals on or immediately adjoining the premises where they are raised."

Commencement of act.

§ 4. This act shall commence from the first day of September, 1821.

General Indictment for a Nuisance.

County of } *THE jurors for our lord the king upon their oath*
 to wit. } *present, that A. O., late of _____, in the county*
 of _____, yeoman, on the _____ day of _____ in
 the _____ year of the reign of _____, and on divers other days
 and times, as well before as afterwards, with force and arms at
 _____, in the said county, [here set forth the nuisance]; and the
 same (a) (nuisance) so as aforesaid done doth yet continue and
 suffer to remain, to the common nuisance of all the lieges and sub-
 jects of our said lord the king, to the evil example of all others in
 the like case offending, and against the peace of our said lord the
 king, his crown and dignity.

Oaths.

Administering or taking unlawful Oaths.

[37 G. 3. c. 123.—52 G. 3. c. 104.—57 G. 3. c. 19.]

37 G. 3. c. 123.
Preamble.

BY stat. 37 G. 3. c. 123., intituled "An act for more effectually preventing the administering or taking of unlawful oaths," after reciting that "whereas divers wicked and evil-disposed persons have of late attempted to seduce persons serving in H. M.'s forces by sea and land, and others of H. M.'s subjects, from their duty and allegiance to H. M., and to incite them to acts of mutiny and sedition, and have endeavoured to give effect to their wicked and traitorous proceedings, by imposing upon the persons whom they have attempted to seduce the pretended obligation of oaths unlawfully administered;" it is enacted, "that any person or persons who shall, in any manner or form whatsoever, administer or cause to be administered, or be aiding or assisting at, or present at and consenting to, the administering or taking of any oath or engagement, purporting or intended to bind the person taking the same to engage in any mutinous or seditious purpose; or to disturb the public peace; or to be of any association, society, or confederacy, formed for any such purpose; or to obey the orders or commands of any committee or body of men not lawfully constituted; or of any leader or commander, or other person not

Administering, &c. oath or engagement of the nature there specified,

(a) If the nuisance do not continue, this paragraph must be omitted.

having authority by law for that purpose; or not to inform or give evidence against any associate, confederate, or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done or to be done; or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, shall, on conviction hereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years, not exceeding seven years; and every person who shall take any such oath or engagement, not being compelled thereto, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and may be transported for any term of years not exceeding seven years."

In *Rex v. Marks and others*, 3 East, 157., a question was made, whether the unlawful administering of an oath by an associated body of men to a person, purporting to bind him not to reveal or discover an unlawful combination or conspiracy of persons, nor any illegal act done by them, was within this statute; the object of the association being a conspiracy to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition. The oath was "*You shall be true to every journeyman hearman, and not to hurt any of them, and you shall not divulge any of their secrets. So help you God.*" It was contended, that the words of the statute, however large in themselves, must be confined to the objects stated in the preamble, and could not have been intended to reach a case where it was plain that the fact arose entirely out of a private dispute between persons engaged in the same trade, and was confined in its object to that alone; and that the general words, therefore, must be construed with relation to the antecedent offences, which are confined in their objects to mutiny and sedition. But the court, though they did not upon the particular circumstances feel themselves called upon to give an express decision, appear to have entertained no doubt that the case was within the statute. *Lawrence J.* said, "It is true, that the preamble and the first part of the enacting clause, are confined in their objects to cases of mutiny and sedition; but it is nothing unusual in acts of parliament for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law."

By stat. 52 G. 3. c. 104. § 1., to render the foregoing statute more effectual, it is enacted, that every person who shall in any manner perform whatsoever, administer or cause to be administered, or be aiding or assisting at the administering of any oath or engagement, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall, on conviction thereof by due course of law, be adjudged guilty of felony, and suffer death as a felon without benefit of clergy; and every person who shall take any such oath or engagement, not being compelled thereto, shall, on conviction hereof by due course of law, be adjudged guilty of felony, and shall be transported as a felon for the term of his natural life, or for such term of years as the court before which the said offender or offenders shall be tried, shall adjudge.

37 G. 3. c. 123.

felony; transportable for seven years.

So, voluntarily taking such oath.

This statute is not confined to oaths administered for seditious purposes.

Enacting part of a statute may go beyond the preamble.

52 G. 3. c. 104. Punishing the administering and taking of unlawful oaths.

Administering, &c. oath or engagement for committing treason, murder, or capital felony, capital; voluntarily taking such oath, transportable.

37 G. 3. c. 123.
Persons com-
pelled to take
such oath, not
justified, unless
they declare the
same within
four days.

Stat. 37 G. 3. c. 123. § 2. provides and enacts, that compulsion shall not justify or excuse any person taking such oath or engagement, unless he or she shall, within four days after the taking thereof, if not prevented by actual force or sickness, and then within four days after the hinderance produced by such force or sickness shall cease, declare the same, together with the whole of what he or she shall know touching the same, and the person or persons by whom, and in whose presence, and when and where such oath or engagement was administered or taken, by information on oath before one of H. M.'s justices of the peace, or one of H. M.'s principal secretaries of state, or H. M.'s privy council; or, in case the person taking such oath or engagement shall be in actual service in H. M.'s forces by sea or land, then by such information on oath as aforesaid, or by information to his commanding officer.

52 G. 3. c. 104.
Within four-
teen days.

Stat. 52 G. 3. c. 104. § 2. contains a similar enactment as to the oaths or engagements within that act, except that the words, "*fourteen days*" are substituted for "*four days*."

37 G. 3. c. 123.
Persons aiding,
&c. at taking
such oaths, or
causing them to
be adminis-
tered, though not
present, to be
deemed princi-
pals.

Stat. 37 G. 3. c. 123. § 3. enacts, "that persons aiding and assisting at, or present at and consenting to, the administering or taking of any such oath or engagement as aforesaid, and persons causing any such oath or engagement to be administered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and shall be tried as such, although the persons or person who actually administered such oath or engagement, if any such there shall be, shall not have been tried or convicted."

52 G. 3. c. 104.
Acc.

A similar enactment is contained in stat. 52 G. 3. c. 104. § 4. with respect to persons aiding and assisting at the administering of any oath or engagement mentioned in that act; and persons causing any such oath or engagement to be administered, though not present at the administering thereof, are to be deemed principal offenders, and, on conviction, to be adjudged guilty of felony, and to suffer death without benefit of clergy, although the person or persons who actually administered the oath or engagement, if any such there shall be, shall not have been tried or convicted.

37 G. 3. c. 123.
52 G. 3. c. 104.
Engagement or
obligation in
the nature of an
oath.

By 37 G. 3. c. 123. § 5., any engagement or obligation whatsoever in the nature of an oath, and by stat. 52 G. 3. c. 104. § 6. any engagement or obligation whatsoever in the nature of an oath, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall be deemed an oath within the intent and meaning of those acts respectively, in whatever form or manner the same shall be administered or taken; and whether the same shall be actually administered by any person or persons to any other person or persons, or taken by any person or persons without any administration thereof by any other person or persons.

In indictments
it shall be suffi-
cient to set
forth the pur-
port of such
oaths.

Both statutes, 37 G. 3. c. 123. § 4. and 52 G. 3. c. 104. § 5. provide that it shall not be necessary in the indictment to set forth the words of such oath or engagement; and that it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof.

Upon an indictment on stat. 37 G. 3. the fourth count charged, that the defendants administered to J. H. an oath, "intended to bind him not to inform or give evidence against any member of a certain society formed to disturb the public peace, for any act or

expression of his or theirs done or made collectively or individually in or out of that or other similar societies, in pursuance of the spirit of that obligation;" and the eighth count stated the oath to be "intended to bind the said J. H. not to give evidence against any associate in certain associations and societies of persons formed for seditious purposes;" and the other counts stated the objects of the oath administered, and the objects of the society, differently, and more generally, adapted to the several prohibitory parts of the statute. Upon objection taken at the trial to the generality of the statements in the indictment, Lord *Alvanley* C. J. was of opinion, that the act intended that it should be sufficient to allege and prove what the object of the oath and engagement was, without stating any words at all; and that the offence being described in the words of the act, was well described; but that supposing the objection made to the generality of the counts was good, which he did not admit, yet that in the fourth and eighth a material part of the oath or engagement was set forth according to the clause of the act. The point was submitted to the judges, who, without giving any opinion against the other counts, all agreed that at any rate the fourth and eighth counts were good. *Rex v. Moors and others*, MS. C. C. R. 6 East, 119. note (6).

Sufficient to set out the object of the oath, &c. describing it in the words of the act.

Where the party administering the oath held a paper from which the witness supposed he read the oath, parol evidence was admitted without notice to produce the paper. Where the oath was not seditious on the face of it, parol evidence was admitted to shew that "*the brotherhood*" referred to, was a seditious society. S. C.

Evidence.

Stats. 37 G. 3. c. 123. § 6., and 52 G. 3. c. 104. § 7., provide, that offences committed on the high seas, or out of the realm, or in England, shall be tried before any court of oyer and terminer or gaol delivery for any county in England, in such manner and form as if such offence had been therein committed; and that offences committed in Scotland shall be tried either before the justiciary court at Edinburgh, or in any of the circuit courts in that part of the U. K.

Place of trial.

It is also provided by stats. 37 G. 3. c. 123. § 7., and 52 G. 3. c. 104. § 8., that any person who shall be tried and acquitted, or convicted of any offence against the acts, shall not be liable to be prosecuted again for the same offence or fact as high treason, or misprision of high treason. And further, that nothing in the acts contained shall be construed to extend to prevent any person guilty of any offence against the acts, and who shall not be tried for the same as an offence against the acts, from being tried for the same as high treason, or misprision of high treason, in such manner as if those acts had not been made.

Persons tried not liable to be tried for the same fact as high treason. But persons offending against these acts may be tried for high treason, if not tried under the acts.

Stat. 52 G. 3. c. 104. § 3. provides, that every person who, before he shall be charged with any offence under the said recited act, or this act, in taking any oath or engagement described in the said recited act or this act, shall, within three months after the passing of this act, appear before some justice of the peace or magistrate, and declare the same, and the oath or engagement so taken, and when and where the same was taken, and in what manner, and who shall at the same time take before such justice of the peace or magistrate, the oath of allegiance to H. M.,

52 G. 3. c. 104. Persons confessing, before being charged, indemnified.

52 G. 3. c. 104. shall be and is hereby indemnified against any prosecution for any offence under the said recited act or this act; and no confession so made by any such person shall be given in evidence against the person making the same in any court, or in any case whatever.

57 G. 3. c. 19.
Societies taking
unlawful oaths,
&c.

By stat. 57 G. 3. c. 19. § 25. it is enacted, that all societies or clubs, the members whereof shall be required or admitted to take any oath or engagement which shall be an unlawful engagement within the meaning of stat. 37 G. 3. c. 123., or stat. 52 G. 3. c. 104., or to take any oath not required or authorised by law; and every society or club, the members whereof or any of them shall take or in any manner bind themselves by any such oath or engagement, on becoming, or in order to become, or in consequence of being a member or members of such society or club; and every society or club, the members or any member whereof shall be required or admitted to take, subscribe, or assent to, or shall take, subscribe, or assent to any test or declaration not required or authorised by law, in whatever manner or form such taking or assenting shall be performed, whether by words, signs, or otherwise; either on becoming or in order to become, or in consequence of being a member or members of any such society or club; shall be deemed and taken to be *unlawful combinations and confederacies*, within the meaning of stat. 39 G. 3. c. 79., and may be prosecuted, proceeded against, and punished according to the provisions of the said act.

Members
guilty of un-
lawful com-
bination.

§ 26. This statute is not to extend to freemasons' lodges, nor to any declaration approved by two justices, nor to *Quaker meetings*, nor to meetings or societies for charitable purposes.

With respect to the administering or taking unlawful oaths in Ireland, see stat. 50 G. 3. c. 102.

And concerning the offences of profane cursing and swearing, see title *Swearing*.

Office.

Of buying and selling Offices.

[12 R. 2. c. 2. — 4 H. 4. c. 5. — 5 & 6 Ed. 6. c. 16. — 49 G. 3. c. 126. — 53 G. 3. c. 54.]

THE buying and selling of offices of a public nature has been considered as an offence *malum in se*, and indictable at common law. 1 Russ. 227.

Conspiracy to
obtain money
for procuring
a place in the
customs.

In *Rex v. Pollman and others*, 2 Campb. 229., on an indictment for a conspiracy to obtain money, by procuring from the lords of the treasury the appointment of a person to an office in the customs, it was proposed to argue on behalf of one of the defendants, that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or to purchase an office like that of coast waiter. But Lord *Ellenborough* C. J. said, that if that were to be made a question, it must be debated on a motion in arrest of judgment, or on a writ of error; but that, after reading the case of *Rex v. Vaughan* (4 Burr. 2494.) it would be very difficult to argue that the offence charged in the indictment was not a

misdeemeanor. And *Grose J.*, in passing sentence, said that there could be no doubt but that the offence charged was clearly a misdemeanor at common law.

In *Rex v. Vaughan*, 4 Burr. 2494., a criminal information was granted for offering the duke of *Grafton*, then first lord of the treasury, the sum of 5000*l.* as a bribe to procure the reversion of the office of clerk of the supreme court of the island of *Jamaica*. *Vide per Ld. Kenyon C. J.*, 2 East, 17.

It has been endeavoured to prevent this offence by the enactments of several statutes.

By stat. 12 R. 2. c. 2. it is enacted, That the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and of the other, barons of the exchequer, and all others who shall be called to ordain, name, or make justices of the peace, sheriffs, escheators, customers, comptrollers, or any other officer or minister of the king, shall be firmly sworn, that they shall not ordain, name, nor make any of the above-mentioned officers for any manner of gift or brokerage, favour, or affection; nor that none who pursueth by himself, or by other, privily or openly, to be in any manner of office, shall be put into the same office, or into any other; but that they shall make all such officers and ministers of the best and most lawful men, and sufficient in their knowledge and conscience. See the *Earl of Macclesfield's Trial*, 16 *Howell's St. Tri.* 767.

By stat. 4 Hen. 4. c. 5. it is enacted, That no sheriff shall let his bailiwick to farm to any man, for the time that he occupieth such office.

But the principal stat. relating to this matter is the 5 & 6 E. 6. c. 16. § 2., which enacts, That if any person or persons at any time hereafter bargain or sell any office or offices, or deputation of any office or offices, or any part or parcel of any of them, or receive, have, or take any money, fee, reward, or any other profit, directly or indirectly, or take any promise, agreement, covenant, bond or any assurance to receive or have any money, fee, reward, or other profit, directly or indirectly, for any office or offices, or for the deputation of any office or offices, or any part of any of them; or to the intent that any person should have, exercise, or enjoy any office or offices, or the deputation of any office or offices, or any part of any of them; which office or offices, or any part or parcel of them, shall in anywise touch or concern the administration or execution of justice, or the receipt, controlment, or payment of any of the king's highness' treasure, money, rent, revenue, account, aulnage, auditorship or surveying of any of the king's majesty's honours, castles, manors, lands, tenements, woods, or hereditaments; or any the king's majesty's customs, or any other administration or necessary attendance to be had, done, or executed in any of the king's majesty's custom house or houses; or the keeping of any of the king's majesty's towns, castles, or fortresses, being used, occupied, or appointed for a place of strength and defence; or which shall concern or touch any clerkship to be occupied in any manner of court of record, wherein justice is to be administered; then all and every such person and persons that shall so bargain or sell any of the said office or offices, deputation or deputations; or that shall take any money, fee, re-

Money offered for procuring the reversion of a situation in the colonies.

12 R. 2. c. 2. The chancellor, treasurer, &c. not to appoint to offices for gift, favour, &c.

4 H. 4. c. 5.

5 & 6 Ed. 6. c. 16.

Persons bargaining or selling offices, &c. concerning the administration of justice, the king's revenue, &c. to lose their right and interest in the office, and to be disabled to have the office.

5 & 6 Ed. 6.
c. 16.

ward, or profit, for any of the said office or offices, deputation, or deputations of any of the said offices, or any part of any of them; or that shall take any promise, covenant, bond, or assurance for any money, reward, or profit to be given for any of the said office or offices, deputation or deputations of any of the said offices, or any part of any of them, shall not only lose and forfeit all his and their right, interest, and estate which such person or persons shall then have of, in, or to any of the said office or offices, &c. &c., but shall also be adjudged disabled persons in the law, to all intents and purposes, to have, occupy, or enjoy the said office or offices, &c.

Such bargains
void.

§ 3. All such bargains, promises, bonds, &c. shall be void.

Not to extend
to estates of
inheritance;
nor to offices
heretofore
granted by chief
justices of
K. B. and C. P.
or justices of
assize.

§ 4. Provided that the act shall not extend to any office whereof any person is seised of any estate of inheritance. (a)

Offices of the
ecclesiastical
courts are with-
in the statute.

§ 5. Provided also, that it shall not be prejudicial to the chief justices of the king's bench or the common pleas, or to any of the justices of assize: but that they may do in that behalf touching any office to be given or granted by them as they might have done before.

Office or Offices.] The offices of chancellor, registrar, and commissary in the ecclesiastical courts are within the meaning of the statute; inasmuch as those courts not only determine matters that are brought before them *pro salute animæ*, but also have the decision of disputes concerning the lawfulness of matrimony and legitimation of children, which touch the inheritance of the subject, and also hold plea of legacies and tithes, and grant probates of wills and letters of administration, &c. in which respect they are courts of justice. 12 Rep. 78. Cro. Jac. 269. 3 Inst. 148. 1 Salk. 468. 3 Lev. 289. 2 Vent. 187. 267. Willes, 571.

So cofferer.

So also is the place of cofferer; and the king is bound by this statute. Co. Lit. 234. a.

So, surveyor of
customs.

So also is that of the surveyor of the customs. 2 And. 55. 107.

So, clerk of the
crown, and of
the peace.

So also are the offices of clerk of the crown and clerk of the peace, *Macarty v. Wickeford*, Tr. 9 G. 2., B. R. in error from *Ireland*, though it was also ruled there that the statute did not extend to that case; *Ireland* not being within the statute. (b)

So, purser of
a ship.

So also (it should seem) is the place of purser of a ship. For though the contrary was decided in 2 Vern. 308., the authority of that case was doubted by Ld. Loughborough in 1 H. Bl. 326., and in *Purdy v. Stacey*, 5 Burr. 2700. Ld. Mansfield, in delivering the opinion of the court, said, "If the commissioners of the admiralty were to take money for their warrant to appoint a person to be purser, it would be criminal in the corrupter and corrupted."

So, customer of
a port.

So also is the place of "Customer of a port." 1 H. Blac. 38.

So, collector,
&c. of excise.

So also are the offices of collector and supervisor of the excise. Cas. Temp. Talb. 140. & 3 P. Wm. 391.

Alien, of a
bailiwick of a
hundred.

But the sale of a bailiwick of a hundred is *not* within the statute: such an office not concerning the administration of justice, nor being an office of trust. 4 Leon. 93.

Or, place in six
clerks' office.

Nor is a seat in the six clerks' office, that being a ministerial office only. *Sparrow v. Reynold*, P. 26 Car. 2. C. B.

Or, commis-
sions in the
army.

Nor are commissions in the army, *Pre. Ch.* 199. But the reason why the sale of these commissions is allowed, is, that it

(a) See *infra*, next page.

(b) But see 49 G. 3. c. 126. *post*, 648.

takes place under the authority and with the consent of those who have the power of appointment. 1 *H. Blac.* 327. and 8 *T. R.* 94.

And with regard to offices under government, it has been decided that they cannot be sold, though they be not such offices as are mentioned in the statute. 8 *T. R.* 94.

Offices under government.

But offices not within the statute may be sold, provided the sale takes place with the consent of those who have the power of appointment. 8 *T. R.* 94.

Offices not within the statute.

One *Colskill*, being surveyor of the customs, agreed with *Smyth* that the latter should be his deputy, and that in consideration hereof *Smyth* should pay *Colskill* 600*l.*, and 100*l.* annually; it was also agreed that *Colskill* should surrender his patent, and procure a new one in the joint names of himself and *Smyth*, and *Smyth* gave the other a bond for the performance of the whole agreement: it was decided that the bond was void, as being within the statute; for though that part of it which respected the procuring of a new patent might not be within the act, yet that the other part of the agreement was, and that vitiated the whole. 2 *And.* 55.

Money paid for being appointed deputy.

A bond, given by an officer mentioned in the statute 5 & 6 *Ed.* 6. for securing all the profits of the office to the person appointing, is void by the statute. *Layng v. Paine, Willes*, 571.

Bond for securing profits to person appointing, void.

So is a bond given by such an officer to surrender whenever the person appointing chooses. *S. C.*

So, for resigning when called on.

Where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a less sum out of the salary, it is good.

Principal appointing deputy, and reserving part of salary, good.

So, if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a certain sum out of the fees and profits of the office, it is good; for in these cases the deputy is not to pay unless the profits amount to so much; and though a deputy is, by his constitution, in the place of his principal, yet he has no right to the fees; they still continue to belong to the principal; so that, as to the principal, it is only reserving a part of his own, and giving away the rest to the deputy. But where the agreement is not to pay out of the profits, but to pay generally such a sum, it must be paid at all events, and a bond for such an agreement is void by the statute. 2 *Salk.* 466. 468. 6 *Mod.* 234. *Comb.* 356.

Though in the case of *Bellamy v. Burrow, Cas. Temp. Talb.* 97. it was adjudged that a trust may be created of an office within the statute, yet that doctrine has since been questioned, if not overruled. 3 *Bro.* 579. 1 *H. Blac.* 322. and 327. *Willes*, 575.

Semb. that a trust cannot be of an office.

The proviso in the statute, that the act shall not extend to any office of which any person is seised of any estate of inheritance, means only offices of which subjects are seised of estates of inheritance, and does not extend to those of which the king is so seised. *Huggins v. Bambridge, Willes*, 241.

Proviso as to estates of inheritance does not extend to the king.

And therefore it was decided that a contract with the warden of the Fleet (who held only for life under the crown) that for a sum of money he should surrender the office to the king, to the intent that he should procure from the king a grant of the office to the purchaser, was void by this statute; though that office has been and may be granted to a subject in fee; and that a bond given to secure the payment of such consideration could not be enforced in a court of law. *S. C.*

Person contracting for an office is disabled for life.

In the construction of this statute, it has been holden, that a person who makes a contract for an office, contrary to the provision of the act, is so far disabled to hold the same, that he cannot at any time during his life be restored to a capacity of holding it by any grant or dispensation whatsoever. *Hob. 75. Co. Lit. 234. Cro. Car. 61. Cro. Jac. 386.*

In similar cases not strictly within the stat., courts of equity will interfere.

As the provisions of this statute do not extend to all cases within the mischief which it was intended to prevent, it has become necessary for courts of equity, in many cases, to interpose; for though it be true that penal laws are not to be extended as to penalties and punishments, yet if there be a public mischief, and a court of equity see private contracts made to elude laws enacted for the public good, it ought to interpose, and that upon the public policy of the law.

Commission in marines got for a livery servant.

Upon this principle it was that the court of chancery interfered in the case of *Morris v. M'Culloch*, *Amb. 432.* where a person, by means of a lady connected with one of the lords of the admiralty, procured a commission in the marines for a livery servant for 200*l.*

Procurement of place in excise.

So also in *Law v. Law*, *Cas. Temp. Talb. 140.* and 3 *P. Wms. 391.*, where a bond was given to a person to influence a commissioner of the excise to appoint to an office under him.

Of page of the presence.

So in *Hancington v. Du Chatel*, 1 *Bro. 124.* where *Ld. Rochford*, groom of the stole to *H. M.*, in consideration of two annuities, recommended a page of the presence.

Courts of law will not enforce such contracts.

Nor is this relief confined to courts of equity. When cases of a similar nature are brought before the courts of law, they also refuse to give their assistance to enforce the contract, considering the transaction as contrary to public policy.

For procurement of superannuation pension.

In the case of *Parsons v. Thomson*, 1 *H. Blac. 322.*, where the defendant, in consideration that the plaintiff, an officer in the dockyard at *Chatham*, would procure himself to be superannuated and retire on the usual pension, agreed (without the knowledge of the navy board, to whom the appointment belonged) that in case he, the defendant, should succeed the plaintiff, to allow him a certain share of the annual profits of the office, it was ruled, that no action could be supported in a court of law on such an agreement.

Of place of customer.

So in *Garforth v. Fearon*, 1 *H. Blac. 327.*, where the defendant, by the interest and on the application of the plaintiff, was appointed customer of *Carlisle*, having previously signed an agreement, declaring, that his name was only used in the application in trust for the plaintiff, that he would appoint such deputies as the plaintiff should nominate, and would empower the plaintiff to receive the profits of the office to his own use, it was decided, not only that the agreement was void by the stat. 12 *R. 2.*, but also that the common law would not support an assumption on such an agreement.

Of command of ship in East India service.

Again, in the case of *Blackford v. Preston*, 8 *T. R. 89.*, it was holden, that a sale (by the owner) of the command of a ship employed in the *East India* company's service, without the knowledge of the company, was illegal; and that the contract of sale could not be the foundation of an action at law.

49 G. 3. c. 126. Provisions of

By stat. 49 *G. 3. c. 126* § 1., reciting stat. 5 & 6 *Ed. 6. c. 16.* it is declared and enacted, that the said act and all the provisions

herein contained shall extend to *Scotland* and *Ireland*, and to all offices in the gift of the crown, or of any office appointed by the crown; and all commissioners, civil, naval, or military, and to all places and employments, and to all deputations to any such offices, commissions, places, or employments, in the respective departments or offices, or under the appointment or superintendence and control of the lord high treasurer or commissioners of the treasury, the secretary of state, the lords commissioners for executing the office of lord high admiral, the master-general and principal officers of his majesty's ordnance, the commander-in-chief, the secretary at war, the paymaster-general of H. M.'s forces, the commissioners for the affairs of *India*, the commissioners of the excise, the treasurer of the navy, the commissioners of the navy, the commissioners for victualling, the commissioners of transports, the commissary general, the storekeeper general, and also the principal officers of any other public department or office of H. M.'s government; and also to all offices, commissions, places, and employments belonging to or under the appointment or control of the *East India* company: and the said act, and this act, and all the clauses and provisions therein respectively contained, shall be construed as one act, as if the same had been herein repeated and re-enacted.

§ 2. Provides, that where the right, &c. of any person shall be forfeited under the said act or this act, the right of such appointment shall immediately vest in H. M.

§ 3. If any person shall sell or bargain for the sale of, or receive, have, or take any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond, or assurance, or shall by any way, device, or means, contract or agree to receive or have any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly; and also if any person or persons shall purchase or bargain for the purchase of, or give or pay any money, fee, gratuity, loan of money, reward, or profit, or make or enter into any promise, agreement, covenant, contract, bond, or assurance to give or pay any money, fee, gratuity, loan of money, reward, or profit, or shall by any way, means, or device, contract or agree to give or pay any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, for any office, commission, place or employment specified or described in the said act or this act, or within the meaning of the said act or this act, or for any deputation thereto, or for any part or participation of the profits thereof, or for any appointment thereto or resignation thereof, or for the consent or voice of any person to any such appointment, then every such person, and also he who shall wilfully and knowingly aid, abet, or assist such person therein, shall be adjudged guilty of a misdemeanor.

§ 4. If any person shall receive, have, or take any money, fee, reward, or profit, directly or indirectly, or take any promise, agreement, covenant, contract, bond, or assurance, or by any way, means, or device, contract or agree to receive or have any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, for any interest, solicitation, petition, request, recommendation, or negotiation whatever, made or to be made, or pretended to be made, or under any pretence of making or caus-

5 & 6 Ed. 6.
c. 16. extended to other offices in public departments, and to *Scotland* and *Ireland*.

When right of appointment forfeited, to go to H. M.

Persons buying or selling offices, or receiving or paying money or rewards for offices, guilty of a misdemeanor.

Persons receiving or paying money for soliciting offices, and any negotiations or pretended negotiations relating thereto, guilty of a misdemeanor.

49 G. 3. c. 126.

ing or procuring to be made any interest, &c. in or about or in anywise touching any nomination, appointment, or deputation to or resignation of any such office, &c. as aforesaid, or under any pretence for using or having used any interest, &c. in or about any such nomination, &c. or for the obtaining or having obtained the consent or voice of any person as aforesaid to such nomination, &c.; and also if any person shall give or pay or cause or procure to be given or paid any money, fee, gratuity, loan of money, reward, or profit, or make or cause or procure to be made any promise, agreement, covenant, contract, bond, or assurance, or by any way or device contract or agree, or give or pay or cause or procure to be given or paid any money, &c. for any solicitation, &c. whatever, that shall in anywise touch any nomination, &c. of any such office, &c. as aforesaid, or for the obtaining or having obtained, directly or indirectly, the consent or voice of any person as aforesaid to any such nomination, &c.; and also if any person shall, for or in expectation of gain, fee, &c. solicit, recommend, or negotiate in any manner for any person in any matter that shall in anywise touch any such nomination, &c., or for the obtaining, directly or indirectly, the consent or voice of any person to any such nomination, &c., every such person, and also every person who shall wilfully and knowingly aid, abet, or assist therein, shall be adjudged guilty of a misdemeanor.

Persons opening or advertising houses for transacting business relating to the sale of offices, guilty of a misdemeanor.

§ 5. Whereas on the pretence of negotiating or soliciting the sale, transfer, or appointment of any office which under the exception of this act or otherwise it may be lawful to sell, offices for negotiating the same, and advertisements may be published, under the colour of which illegal transactions intended to be prohibited by this act may be carried on; it is further enacted, that if any person shall open or keep any place for the soliciting, transacting, or negotiating in any manner whatever any business relating to vacancies in, or the sale or purchase of, or appointment, nomination, or deputation to, or resignation, transfer, or exchange of any offices, commissions, places, or employments whatever in or under any public department, every such person, and every person wilfully and knowingly aiding, abetting, or assisting therein, shall be adjudged guilty of a misdemeanor.

Inflicting a penalty on persons advertising or publishing the names of brokers or agents.

§ 6. If any person shall advertise or publish, or cause or procure to be advertised or in any manner published any place to have been or to be opened, set up, or kept for any of the purposes aforesaid, or advertise or publish, or cause or procure, &c. the name of any person as broker or agent or solicitor for any of the purposes aforesaid, or print or cause or procure or permit to be printed or advertised any advertisement or proposal for any of the purposes aforesaid, then such person shall forfeit for every such offence the sum of 50*l.*, to be recovered at *Westminster*; and the whole penalty shall go to the person who shall sue for the same, with full costs of suit.

Sale of commissions in the army excepted.

§ 7. Act not to extend to purchase or sale of commissions for the regulated prices, or authorised regimental agents acting in such cases according to regulation, without fee or reward. (a)

(a) Stat. 53 G. 3. c. 54. excepts purchases, &c. of any commissions or appointments in the battle-axe guards in *Ireland*.

§ 8. Officers in army giving more than regulated prices, or paying agents for negotiating, to forfeit their commissions, and be cashiered; their commissions to be sold, and half of the produce, when not exceeding a certain sum, to go to the informer.

§ 9. Nothing in this act shall extend to any office excepted from the provisions of the said act of *Ed. 6.*, or to any office which was legally saleable before this act, and in the gift of any person by virtue of any office possessed under any patent or appointment for his life, or to render invalid, or in any manner to affect any promise, &c. entered into before this act, and which before the passing thereof was a valid promise, &c., or to any money paid, or to any act done in pursuance of any such promise, &c.

By § 10. act not to extend to lawful deputations where payment of principal or deputy is out of the fees.

§ 11. This act not to extend to any annual reservation, charge, or payment made or required to be made out of the fees, perquisites, or profits of any office to any person who shall have held such office, in any commission or appointment of any person succeeding to such office, or to any agreement, &c. made for securing such reservation, &c.: Provided always, that the amount of such reservation, &c. and the circumstances under which the same shall have been permitted, shall be stated in the commission, &c. of the person so holding such office, and paying or securing such money.

§ 12. relates to certain offices in *Ireland*.

And § 13. to the manner of punishing offenders in *Scotland*.

By § 14. all offences committed against the provisions of the said act and this act, by any governor, lieutenant-governors or person having the chief command, civil or military, in any of H. M.'s dominions, &c. or their secretaries, shall be inquired of and heard in the court of K. B. at *Westminster*, as under stat. 42 G. 3. c. 85.

See also stat. 49 G. 3. c. 118. § 3.

Orchards. See **Larceny**.

Ordnance Stores. See **Stores**.

Outlawry. See **Process**.

49 G. 3. c. 126.

Unless more than the regulated prices are given.

Act not to extend to offices excepted in former act, nor to securities or transactions under legal securities.

Nor to lawful deputations.

Nor to annual payments out of the fees of any office, to any person formerly holding such office.

Offences committed abroad shall be tried in K. B.

Pardon.

[27 Ed. 3. c. 2.—13 R. 2. st. 2. c. 1.—5 W. 3. c. 13.—12 & 13 W. 3. c. 2.—20 G. 2. c. 52.—37 G. 3. c. 140.—58 G. 3. c. 29.—7 & 8 G. 4. c. 28, 29, 30, 32.]

A PARDON is a work of mercy, whereby the king, either before the attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical. 3 *Inst.* 233.

The power of pardoning offences is inseparably incident to, and is the most amiable prerogative of, the crown: and this high prerogative the king is entrusted with upon a special confidence, that he will spare those only whose case (could it have been foreseen) the law itself may be presumed willing to have been

Pardon, what.

excepted out of its general rules; which the wisdom of man cannot possibly make so perfect as to suit every particular case, 1 *Show.* 284.

General pardon.

Pardons are either *general* or *special*:—*General*, are by act of parliament; of which, if they are without exceptions, the court must take notice *ex officio*; but if there are exceptions therein, the party must aver that he is none of the persons excepted. 3 *Inst.* 233. *Hale's Sum.* 252.

20 G. 2. c. 52.

By stat. 20 G. 2. c. 52. for the king's general pardon, all persons are pardoned and discharged from certain crimes committed prior to June 15. 1747; with certain exemptions in the said act mentioned.

And the like for the most part hath been enacted by former statutes of general pardon; together also with the exceptions of several persons by name.

Special pardon.

Special pardons, are either *of course*, as to persons convicted of manslaughter, or *se defendendo*, and by divers statutes to those who shall discover their accomplices in several felonies; or of *grace*, which are by the king's charter, of which the court cannot take notice *ex officio*, but they must be pleaded. 3 *Inst.* 233.

27 Ed. 3. c. 2.
Pardon to contain the suggestion.

By stat. 27 Ed. 3. c. 2., in every charter of the pardon of felony, the suggestion and the name of him that maketh the suggestion shall be comprised; and if it be found untrue, the charter shall be disallowed.

If false, will vitiate pardon.

For wherever it may reasonably be presumed that the king was deceived, the pardon is void. Therefore, any suppression of truth or suggestion of falsehood in a charter of pardon will vitiate the whole. 2 *Haw. c.* 37. § 12. 3 *Inst.* 238.

13 R. 2. st. 2. c. 1.
Pardon to specify the offence, if murder, treason, or rape.

And by stat. 13 R. 2. st. 2. c. 1., no charter of pardon shall be allowed for murder, treason, or rape, unless the offence be specified therein.

Lord Coke says, the intention of this act was not, that the king should grant a pardon of murder by express name in the charter, but because the whole parliament conceived that he would never pardon murder by special name. And he says, he hath never seen any pardon of murder by any king of *England*, by express name. 2 *Inst.* 233—236.

It was however determined in the court of K. B. that the king may pardon on an indictment for murder, as well as a subject may discharge an appeal. 1 *Salk.* 499.

The king cannot pardon an offence before it is committed.
Cannot pardon a nuisance.

The king cannot pardon an offence before it be committed; but such pardon is void. 2 *Haw. c.* 37. § 28.

And in some cases, even where the king is sole party, some things there are which he cannot pardon; as for example, for all common nuisances, as for not repairing bridges or highways, the suit (for avoiding multiplicity of suits) is given to the king only for redress and reformation thereof; but the king cannot pardon or discharge either the nuisance, or the suit for the same; because such pardon would take away the only means of compelling a redress of it. But it hath been holden by some, that a pardon of such offence will save the party from any fine for the time precedent to the pardon. 3 *Inst.* 237. 2 *Haw. c.* 37. § 33.

But may remit the fine.

And surely, a fine being a mulct to the king, and not a forfeiture to the party grieved, may be by the king remitted.

By the act of settlement, 12 & 13 W. 3. c. 2., no pardon, under the great seal of *England*, shall be pleadable to an impeachment by the commons in parliament. But it seems, after the impeachment solemnly heard and determined, the royal grace is not farther strained or abridged; for that to pardon delinquents convicted in an impeachment is as ancient as the constitution. 4 *Blac. Com.* 400. n. 2.

In the case of an impeachment, after the lords have delivered their sentence of guilty, the commons can pardon the party by declining to demand judgment against him; for no judgment can be pronounced by the lords, till it be demanded by the commons. 4 *Blac. Com.* 400. n. 2.

Thus also, if one be bound by recognizance to the king to keep the peace against another by name, and generally all other lieges to the king; in this case, before the peace be broken, the king cannot pardon or release the recognizance, although it may be made only to him, because it is for the benefit and safety of his subjects. 1 *Inst.* 238.

Likewise, after an action popular is brought *as well for the king for the informer*, according to any statute, the king can but discharge his own part, and cannot discharge the informer's part; because by bringing the action the informer hath an interest therein: but before the action brought, the king may discharge the whole (unless it be provided to the contrary by the act), because the informer cannot bring an action or information originally for his part only, but must pursue the statute. And if the action be given to the *party grieved*, the king cannot discharge the same. 1 *Inst.* 231.

By 7 & 8 G. 4. c. 29. § 69., it shall be lawful for the king's majesty to extend his royal mercy to any person imprisoned by virtue of this act, although he shall be imprisoned for nonpayment of money to some party other than the crown.

And by 7 & 8 G. 4. c. 30. § 35., a similar enactment is provided on the same terms in regard to all persons imprisoned by virtue of this act.

It seems to have been always agreed that the king's pardon will discharge any suit in the spiritual court *ex officio*. Also it seems to be settled at this day, that it will discharge any suit in such court at the instance of the party, for the reformation of manners, or welfare of the soul, as for defamation, or laying violent hands on a clerk, and such like; for such suits are in truth the suits of the king, though prosecuted by the party. Also it seems to be agreed that if the time to which such pardon hath relation be prior to the award of costs to the party, it shall discharge them. And it seems to be the general tenor of the books, though it be subsequent to the award of the costs, yet if it be prior to the taxation of them, it shall discharge them; because nothing appears in certain cases to be due for costs before they are taxed. 1 *Haw. c.* 37. § 41.

But it seems agreed that a pardon shall not discharge a suit in the spiritual court any more than in the temporal, for a matter of interest or property in the plaintiff; as for tithes, legacies, matrimonial contracts, and such like. *Id.* § 42.

If the king release to a man all debts, this shall not discharge a co-debtor; but otherwise it is in case of a subject, for in that case the release to one discharges both. 3 *Inst.* 239.

12 & 13 W. 3. c. 2.

In case of an impeachment, pardon cannot be pleaded.

But it may be pardoned after sentence.

If commons do not demand judgment.

Cannot discharge a recognizance of the peace.

Cannot release an information *qui tam*.

7 & 8 G. 4. c. 29. Pardon for nonpayment of money.

7 & 8 G. 4. c. 30. Acc.

May discharge suit in the spiritual court, *ex officio*, or for delinquency.

Aliter, if for matter of private interest.

Doth not by releasing a man release his partner.

5 W. 3. c. 13.
Person pardoned may be bound to good behaviour.

Pardon doth not restore lands or goods forfeited.

Doth not restore the corruption of blood.

Doth restore the credit.

Felon sentenced to transportation, and undergoing imprisonment at the hulks for the term, is thereby rendered competent, though he twice escaped and was brought back.

9 G. 4. c. 32.
Every punishment for felony, after it has been endured, shall have the effect of a pardon under the great seal.

Not to prevent punishment on subsequent conviction.

How in cases of perjury.

At common law or by statute;

By stat. 5 W. 3. c. 13., when a pardon is pleaded by any one for felony, the justices may at their discretion remand him to prison till he enter into recognizance, with two sureties, for his good behaviour, for any time not exceeding seven years.

It seems to be a settled rule that no pardon by the king, without express words of restitution, shall divest either from the king or subject an interest either in lands or goods vested in them by an attainder or conviction precedent: yet it seems agreed, that a pardon prior to a conviction shall prevent any forfeiture either of lands or goods. 2 Haw. c. 35. § 54.

A pardon after the attainder doth not restore the corruption of blood; for this cannot be restored but by act of parliament. 3 Inst. 233.

But as to issue born after the pardon, it hath the effect of the restitution of blood. 1 Hale, 358.

It seems to be settled at this day that the pardon of treason or felony, even after a conviction or attainder, doth so far clear the party from the infamy and all other consequences of his crime, that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness, notwithstanding the attainder or conviction; because the pardon makes him, as it were, a new man, and gives him a new capacity and credit. 2 Haw. c. 37. § 48.

On a trial for forgery, a question arose on the competency of a witness for the prosecution: it appeared that he had been convicted of larceny, and sentenced to transportation for seven years, but was confined in the hulks, and discharged at the expiration of that term: twice, however, during his confinement, he made his escape, but was brought back very shortly. The point having been reserved for the opinion of the judges, they held that he was a competent witness; and that suffering seven years on board the hulks, in execution of his sentence, operated as a statute pardon, and that the two escapes, on which he was so immediately brought back, did not destroy the effect of it. *R. v. Badcocks and others*, C. C. R. 248.

By 9 G. 4. c. 32. § 3., reciting that it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged; where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted: Provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony.

It seems to be the better opinion that the pardon of a conviction of perjury doth not so restore the party to his credit as to make him a good witness; because it would be an injury to the people in general to make them subject to such a person's testimony. 1 Vent. 349.

Touching a pardon for perjury, this difference is to be taken: that where a party is convict upon the statute, it is part of the

judgment to be disabled; but at common law, it is only a consequential disability; therefore in the latter case the king may pardon, and that restores the party to his testimony; otherwise in the former, for in that case he must reverse the judgment, or cannot be restored. *R. v. Greepe*, 2 Salk. 574.

A pardon must be under the great seal. *Lord Warwick's case*, 3 Howell's St. Tri. 1015. A warrant under the privy seal, or sign manual, though it may be a sufficient authority to admit the party to bail, in order to plead the king's pardon when obtained in proper form, yet it is not of itself a complete irrevocable pardon. *Jully's case*, 1 Leach, 98.

By 7 & 8 G. 4. c. 28. § 13. it is declared and enacted, that where the king's majesty shall be pleased to extend his royal mercy to any offender convicted of any felony punishable with death or otherwise, and by warrant under his royal sign manual, counter-signed by one of his principal secretaries of state, shall grant to such offender either a free or a conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony for which such pardon shall be so granted: Provided always, that no free pardon, nor any such discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof, in any of the cases aforesaid, shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any felony committed after the granting of any such pardon.

By stat. 58 G. 3. c. 29. (for regulating the payment of fees for pardons under the great seal) it is enacted, that no fee, gratuity, or other dues, paid or payable for or in respect of any grant of a pardon by H. M., his heirs and successors, or for or in respect of any letters patent, charter, warrant, bill, docket, or other instrument appertaining thereto, or the transcript of any such instrument, shall be paid or payable by or on behalf of the person or persons in whose favour or to whom such pardon shall be granted; but that all fees which are now paid and payable for the granting and passing of any such pardon or pardons, shall be paid by the lords commissioners of H. M.'s treasury of the U. K. of G. B. and Ireland, in the same manner and by the same persons as other law expenses on behalf of H. M. are paid.

§ 2. Enacts, that from and after the passing of this act, no such letters patent, charter, warrant, bill, docket, instrument, or transcript as aforesaid, shall be subject to or liable to be charged with any stamp duty or duties whatever.

By stat. 37 G. 3. c. 140. § 1., if H. M. shall be pleased to extend his mercy to any offender, liable to the punishment of death, by the sentence of a naval court-martial, upon condition of transportation, or of transporting himself beyond seas, or on condition of being imprisoned within any gaol in G. B., or on condition of being kept to hard labour in any gaol, or house of correction, or penitentiary house, or on any river; it shall be lawful for any justice of K. B., C. P., or baron of the exchequer, of the degree of the chief, upon such intention of mercy as aforesaid, being notified in writing by one of H. M.'s principal secretaries of state, to allow

distinction.

Pardon should be under great seal.

7 & 8 G. 4. c. 28. Effect of a free or conditional pardon to a convict; though under sign manual only.

Proviso.

Not to affect punishment of a felony subsequently committed.

58 G. 3. c. 29. Fees for pardons to be paid by the treasury,

and the instrument to be exempt from stamp duties.

37 G. 3. c. 140. Of pardon to persons sentenced to death by a naval court-martial.

37 G. 3. c. 140. to such offender the benefit of such conditional pardon as shall be expressed in such notification, in the same manner as if a conditional pardon had passed for that purpose under the great seal. And if the condition be of transportation, or of transporting himself, such justice or baron shall make order, as he might in cases under stat. 24 G. 3. st. 2. c. 56. If the condition be of imprisonment, or being kept to hard labour, the pardon shall be allowed as aforesaid, and such justice or baron shall order imprisonment or hard labour, according to the notification of pardon from such secretary, as he might do by the 19 G. 3. c. 74.

The pardon,
&c. to be filed
in K. B.

By § 2. the justice or baron who shall allow such pardon, and make such order under such notification, shall direct the notification and his own order to be filed in the office of the clerk of the crown of the court of K. B.

A certificate
from the clerk
of the crown
office, K. B., to
be proof of the
pardon, &c.

By § 4. the said clerk of the crown shall, upon the application of any such offender who shall accept H. M.'s pardon, or of any other person applying on his behalf, or on application of any person on the behalf of H. M., deliver a certificate in writing under his hand, containing an account of the christian name and surname of such offender, of his offence, of the place where the court was held before whom he was convicted, and of the terms and conditions on which pardon was given him, which certificate shall be sufficient proof of the conviction and sentence of such offender, and also of the terms on which such pardon was granted, in any court, and in any proceeding in which it may be necessary to inquire into the same.

Perjury and Subornation.

- I. *Of Perjury and Subornation by the Common Law.*
- II. *Of Perjury and Subornation by Stat. 5 El. c. 9.*
- III. *Of Matters common to them both.*

[7 & 8 W. 3. c. 34. — 8 G. 1. c. 6. — 2 G. 2. c. 25. — 9 G. 2. c. 18. — 22 G. 2. c. 46. — 23 G. 2. c. 11. — 56 G. 3. c. 138. — 9 G. 4. c. 32. — 3 & 4 W. 4. c. 49. c. 82.]

I. Of Perjury and Subornation by the Common Law.

Perjury at the
common law.

PERJURY by the common law seemeth to be a wilful false oath, by one who, being lawfully required to depose the truth in any judicial proceeding, swears absolutely in a matter material to the point in question, whether he be believed or not. 1 Haw. c. 69. § 1. 3 Inst. 164.

Must be wilful.

The false oath must be wilful, and proved to be taken with some degree of deliberation; for if upon the whole circumstances of the case it shall appear probable that it was owing rather to the weakness than perverseness of the party; as where it was occasioned by surprise or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever the most infamous and detestable. 1 Haw. c. 69. § 2.

It is said not to be material, whether the fact which is sworn be in itself true or false; for however the thing sworn may happen to prove agreeable to the truth, yet if it were not known to be so by him who swears to it, his offence is altogether as great as if it had been false; inasmuch as he wilfully swears that he knows a thing to be true, which at the same time he knows nothing of, and impudently endeavours to induce those before whom he swears to proceed upon the credit of a deposition, which any stranger might make as well as he. 1 *Haw. c. 69. § 6. 2 Russ. 518.* [But it is otherwise on stat. 5 *El. c. 9.*]

So in *Pedley's case*, 1 *Leach*, 327., it was holden by *Ld. Mansfield C. J.*, that a man may be indicted for perjury in swearing that he believes a fact to be true, which he must know to be false.

It is further said, that upon this question being agitated in the court of *C. P.*, all the judges were unanimous, that *belief* was to be considered as an absolute term, and that an indictment might be supported upon such a statement. 1 *Haw. c. 69. p. 88. note (a), edit. f 1795., and 2 Russ. 518.*

It seemeth clear, that no oaths whatsoever, taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature without legal authority, or before those who are legally authorised to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarranted and merely void, — can amount to perjuries, but are altogether idle and of no force. 1 *Haw. c. 69. § 4. See also 4 Bl. Com. 137., and tit. Oaths, ante.*

Though an oath be given by him that hath lawful authority, and be same broken, yet if it be not in a judicial proceeding, it is not perjury, because such oaths are general and extrajudicial, but it serves for aggravation of the offence. Such are, general oaths given to officers or ministers of justice, the oath of fealty and allegiance, and such like. Thus, if an officer commit extortion, it is against his general oath, but yet not perjury, because not in a judicial proceeding: but when he is charged with extortion, the breach of his oath may serve for aggravation. 3 *Inst. 166.*

But it is not material whether the court in which the false oath is taken be a court of record or not, or a court of common law, or of equity, or of civil law, or whether it be taken in face of the court, or out of it before persons authorised to examine a matter depending on it. 2 *Russ. 519.*

To found an indictment for perjury, the requisite circumstances are these: the oath must be taken in a judicial proceeding, before competent jurisdiction; and it must be material to the question depending, and false. *Per Ld. Mansfield C. J. in Rex v. Aylett, T. R. 69.*

Therefore, where an oath is administered by a person that hath lawful authority to tender the same, and it is afterwards broken, yet, if it be not in a judicial proceeding, it is no perjury, nor punishable by the common law. 3 *Inst. 166.*

The deposition must be direct and absolute; and not, as he thinks, or remembereth, or believeth, or the like. 3 *Inst. 166.* but see *Pedley's case*, 1 *Leach*, 325. *supra.*

Swearing the truth not knowing it to be so, is perjury.

Swearing to belief sufficient.

Oaths administered by improper persons or without legal authority, not perjury.

Must be taken in a judicial proceeding to make it perjury.

It is sufficient where the proceeding is in any court.

It must be material in the proceeding.

Swearing absolutely.

Must be material to the point in question.

Sufficient, if in any degree material.

Not material whether believed or not.

False oath, indictable in some cases, though not assignable as perjury.

False oath to get a marriage licence, no perjury; but a misdemeanor.

Oath before incompetent court.

Voluntary affidavit.

Oath before commission determined by demise of king.

Party must be sworn to depose the truth.

Subornation at common law.

Punishment of perjury and

If it be not material, then, though it be false, yet it is no perjury; because it concerneth not the point in issue, and therefore in effect it is extrajudicial. 3 *Inst.* 167.

But it is not necessary that it appear to what degree the point in which a man is perjured was material to the issue; for if it be but circumstantially material, it will be perjury. 1 *Ld. Raym.* 258.

Much less is it necessary that the evidence be sufficient for the plaintiff to recover upon; for in the nature of the thing an evidence may be very material, and yet it may not be full enough to prove directly the point in question. 2 *Ld. Raym.* 889.

It hath been holden not to be material upon an indictment of perjury at common law, whether the false oath were at all credited, or whether the party in whose prejudice it was intended were in the event any way aggrieved by it or not; inasmuch as this is not a prosecution grounded on the damage of the party, but on the abuse of public justice. 1 *Haw. c.* 69. § 9.

In some cases, where a false oath has been taken, the party may be prosecuted by indictment at common law, though the offence may not amount to perjury. Thus it appears to have been holden, that any person making or knowingly using any false affidavit taken abroad (though a perjury could not be assigned on it here), in order to mislead our courts of justice, is punishable by indictment as for a misdemeanor: and *Ld. Ellenborough C.J.* said, "that he had not the least doubt, that any person making use of a false instrument in order to prevent the course of justice, was guilty of an offence punishable by indictment." *O'Meara v. Newell*, 8 *East*, 364. 2 *Russ.* 523.

A false oath, taken before a surrogate, in order to procure a marriage licence, will not support a prosecution for perjury. *R. v. Forster*, C. C. R. 459. 2 *Russ.* 520.

But, if the purpose of such oath is to obtain a licence, and the licence is obtained and marriage had, the party may be indicted as for a misdemeanor. 2 *Russ.* 520.

An oath taken in a court which has not jurisdiction over the particular matter, will not be indictable for perjury; as in a suit concerning lands in a court of requests. 2 *Russ.* 520.

Nor a voluntary affidavit, in an extrajudicial matter, taken before a magistrate. 2 *Russ.* 521. n. (u).

But a false oath before commissioners will be perjury, though the commission be determined by the demise of the king, provided the commissioners had no notice of the demise. 2 *Russ.* 521.

To constitute perjury, the oath must be taken by a person sworn to depose the truth, and it is not therefore perjury in jurors to give a false verdict. 2 *Russ.* 522.

Subornation of perjury, by the common law, seems to be an offence, in procuring a man to take a false oath, amounting to perjury, who actually taketh such oath. 2 *Haw. c.* 69. § 9.

But it seemeth clear, that if the person incited to take such an oath do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury; yet it is certain, that he is liable to be punished, not only by fine, but also by infamous corporal punishment. 2 *Haw. c.* 69. § 3.

The punishment of perjury and subornation of perjury by the common law, is restrained by stat. 5 *Ed.* hereafter following; that

it shall not be less than is inflicted by that statute. See 4 *Blac. Com.* 198.

Mr. *Hawkins* says, it hath been of late settled, that justices of the peace have no jurisdiction over perjury at the common law; the principal reason of which resolution, he says, as he apprehended, was, that inasmuch as the chief end of the institution of the office of these justices was for the preservation of the peace against personal wrongs and open violence, and the word *trespass* in the commission), in its most proper and natural sense, is taken for such kind of injuries, it shall be understood in that sense only, or, at most, to extend to such other offences only as have a direct and immediate tendency to cause such breaches of the peace; as libels and such like, which on this account have been adjudged indictable before justices of the peace. 2 *Haw. c. 8.* § 38.

And in the case of *Rex v. Bainton*, 2 *Str.* 1088., an indictment at the quarter sessions for perjury at the common law was quashed for want of jurisdiction; and was said to have been done so about three years before, in the case of *Rex v. Westiness*. *Et vide Reg. v. Yarrington*, 1 *Salk.* 406.

subornation by the common law.

Justices of the peace have no jurisdiction in perjury at common law.

Indictment at sessions quashed.

I. Of Perjury and Subornation by Stat. 5 *Eliz. c. 9.*

As to subornation of perjury, in the first place, by stat. 5 *Eliz. c. 9.* [made perpetual by stats. 29 *Eliz. c. 5.* § 2., and 21 *Jac. 1.* 28. § 8.], it is enacted (§ 3.) "that all and every such person and persons which shall unlawfully and corruptly procure any witness or witnesses by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause whatsoever now depending, or which hereafter shall depend in suit and variance, by any writ, action, bill, complaint, or information, in anywise touching or concerning any lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, in any of the courts, or the king's courts of chancery, the star chamber, the Whitehall, or elsewhere, within any of the king's dominions of *England*, *Wales*, or the marches of the same, where any person or persons have, or from thenceforth should have, authority, by virtue of the king's commission, patent, or writ, to hold plea of land, or examine, hear, or determine any title of lands, or any matter or matters concerning the title, right, or interest of any lands, tenements, or hereditaments, or in any of the queen's majesty's courts of record, or in any leet, view of frank-pledge, or law day, or hundred court, hundred court, court-baron, or in the court of the stannary in the counties of *Devon* and *Cornwall*; shall likewise unlawfully and corruptly procure or suborn any witness or witnesses, which shall be sworn to testify in *perpetuum in memoriam*, that then every such offender or offenders shall for ever, her, or their said offence, being thereof lawfully convicted or attainted, lose and forfeit the sum of forty pounds."

§ 4. And "if it happen any such offender or offenders, so being convicted or attainted as aforesaid, not to have any goods or chattels, lands or tenements, to the value of forty pounds, that then every such person so being convicted or attainted of any of the offences aforesaid, shall for his or their said offence suffer imprisonment

5 *El. c. 9.*
Procuring any witness to commit perjury in any matter in suit, by writ, &c. concerning any lands, goods, &c. or when sworn in *perpetuum rei memoriam*, punishable by forfeiture of 40*l.*

Such offender not having goods, &c. to the value of 40*l.* to suffer imprisonment

5 El. c. 9.

and stand in the pillory.

Persons convicted not to be received as witnesses until judgment reversed.

Persons committing perjury to forfeit 20*l*. and to be imprisoned for six months; and their oath not to be received in any court of record until judgment reversed.

And if such offenders have not goods to the value of 20*l*., they are to be set in the pillory and have their ears nailed, and be disabled from being witnesses until judgment reversed.

ment by the space of one half year (*a*), without bail or mainprize, and to stand upon the pillory (*b*) the space of one whole hour, in some market town, next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed."

§ 5. And, "that no person or persons, being so convicted or attainted, be from thenceforth received as a witness to be deposed and sworn in any court of record (within *England, Wales*, or the marches of the same), until such time as the judgment given against the said person or persons shall be reversed by attain or otherwise; and that upon every such reversal, the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed to be first given against them, or any of them, by action or actions, to be sued upon his or their case or cases, according to the course of the common laws of this realm."

§ 6. enacts, "That if any person or persons, either by the subornation, unlawful procurement, sinister persuasion, or means of any others, or by their own act, consent, or agreement, wilfully and corruptly commit any manner of wilful perjury, by his or their deposition in any of the courts before mentioned, or being examined *ad perpetuam rei memoriam*, that then every person or persons so offending, and being thereof duly convict or attainted by the laws of this realm, shall for his or their said offence lose and forfeit twenty pounds, and to have imprisonment by the space of six months without bail or mainprize; and the oath of such person or persons so offending from thenceforth not to be received in any court of record within this realm of *England or Wales*, or the marches of the same, until such time as the judgment given against the said person or persons shall be reversed by attain or otherwise: and that upon every such reversal the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed to be given against them or any of them, by action or actions, to be sued upon his or their case or cases, according to the course of the common laws of this realm."

§ 7. And "if it happen the said offender or offenders so offending not to have any goods or chattels to the value of twenty pounds, that then he or they to be set on the pillory (*c*), in some market place within the shire, city, or borough where the said offence shall be committed, by the sheriff or his ministers, if it shall fortune to be without any city or town corporate; and if it happen to be within any such city or town corporate, then by the said head officer or officers of such city or town corporate, or by his or their ministers, and there to have both his ears nailed, and from thenceforth to be discredited and disabled for ever to be sworn in any of the courts of record aforesaid, until such time as the judgment shall be reversed, and thereupon to recover his damages in manner and form before mentioned."

(a) See stat. 3 G. 4. c. 114. tit. Judgment, ante.

(b) See stat. 56 G. 3. c. 138. tit. Pillory, &c.

(c) See stat. 56 G. 3. c. 138. tit. Pillory, &c. and stat. 3 G. 4. c. 114. tit. Judgment.

§ 8. One moiety of the said forfeitures shall be to the queen, and the other moiety to such person as shall be grieved, hindered, or molested by reason of any of the offences before mentioned, but will sue for the same, &c.

5 El. c. 9.

Disposal of forfeitures.

§ 9. enacts, That, as well the judge and judges of every such of the said courts where any such suit shall be, and whereupon any such perjury shall be committed, as also the justices of assize and gaol delivery, and justices of peace at their quarter sessions, both within the liberties and without, may inquire of, hear, and determine all offences against the said act.

Trial of offences.

§ 11. provides, That this act shall no way extend to any spiritual or ecclesiastical court, but that every such offender as shall offend in form as aforesaid, shall be punished by such usual and ordinary laws as are used in the said court.

The act is not to extend to spiritual courts.

And § 13. also provides, that this statute shall not restrain the authority of any judge having absolute power to punish perjury before the making thereof; but that every such judge may proceed in the punishment of all offences punishable before the making of the said statute, in such wise as they might have done and used to do to all purposes, so that they set not on the offender as punishment than is contained in this act.

Nor to restrain other punishment of perjury.

If the defendant perjureth himself in his answer, in the chancery, exchequer chamber, or the like, he is not punishable by this statute; for it extendeth but to witnesses. 3 Inst. 166.

Statute extends to witnesses only.

But he is punishable for the same by indictment at the common law. *Rex v. Morris*, 3 Burr. 1189.

By any writ, action, bill, complaint, or information.] It hath been resolved that these words are to be extended to the latter cause concerning perjury, as well as to this concerning subornation; because it cannot well be intended, that the makers of the act, who inflict a greater penalty on subornation of perjury than on the perjury itself, should mean to extend the purview of the law in relation to what they esteemed the lesser crime, farther than in relation to that which they esteemed the greater. 1 Haw. 69. § 19. 5 Rep. 99 a.

Same limitation under the statute to perjury and subornation.

But it is to be observed, that perjury or subornation in an action depending by indictment or criminal information, is not within this statute; but only in an action depending by writ, action, bill, complaint, or information. 3 Inst. 164.

Indictment or criminal information not within statute.

Half to the party grieved.] It hath been collected from this clause, that no false oath is within the meaning of this statute, which doth not give some person a just cause of complaint: And upon this ground it hath been said, that he who swears a thing which is true, but not known by him to be so, is not within this statute; because, howsoever heinous his offence may be in its own nature, yet when it proves in the event to be in maintenance of the truth, it cannot be said to give him a just cause of complaint, who would take advantage against another from his want of legal evidence to make out the justice of his cause. Also from the same ground it seemeth clearly to follow, that no false oath can be within the statute, unless the party against whom it was sworn suffered some kind of disadvantage by it; for otherwise it cannot be said, that any one was grieved by it; and therefore, in every prosecution upon this statute, it must appear upon the trial that there was such a suit depending, wherein the party might

Party must be grieved to bring the case within the statute.

It need not be averred, whether party be suborned or not.

"Wilfully and corruptly" essential averment.

Not assignable on the construction of a deed.

One justice may bind over.

Prosecution at common law the better mode.

Punishment of pillory on indictment at common law. See *post*, p. 668.

be prejudiced in the manner supposed. 1 *Haw. c. 69. § 23. 2 Russ. 534.*

It is not necessary to set forth in the indictment, whether the party took the false oath through the subornation of another, or without any such subornation, these words being only superfluous. 1 *Haw. c. 69. § 18.*

Wilfully and corruptly.] These words are necessary in an indictment or action on this statute, and cannot be supplied by adding *against the form of the statute*, or by concluding *and so wilful and corrupt perjury did commit*. 1 *Haw. c. 69. § 17.*

An indictment for perjury cannot be maintained, where the supposed perjury depends on the construction of a deed; but the remedy is by a civil action, if the defendant acted inconsistently with the obligation entered into. *Rex v. Crespien*, 1 *Esp. 280.*

One justice (Mr. Dalton says) may bind the offender over to the sessions. *Dalt. c. 70.*

But because the prosecution upon this statute is more difficult than by indictment at the common law, offenders are seldom prosecuted upon this statute, especially at the sessions; and it seems generally the safer way to proceed by indictment at the common law at the assizes, or in the court of king's bench. *Vide 2 Russ. 533.*

It seemeth undoubtedly to follow, that the court of king's bench, &c. proceeding upon an indictment or information of perjury or subornation of perjury at the common law, may not only set a discretionary fine on the offender, but also condemn him to the pillory, without making any inquiry concerning the value of his lands or goods. 1 *Haw. c. 69. § 16.*

III. Of Matters common to them both.

23 G. 2. c. 11. Judges may direct prosecution for perjury, and assign counsel, &c.

On prosecution for perjury, it shall be sufficient to set forth the substance of the offence.

23 G. 2. c. 11. Likewise on a

By stat. 23 G. 2. c. 11. § 3., the judge of assize (sitting the court, or within 24 hours after) may direct any witness, if there shall appear to him a reasonable cause, to be prosecuted for perjury; and may assign the party injured, or other person undertaking such prosecution, counsel, who are to do their duty *gratis*: and such prosecution so directed shall be carried on without any duty or fees whatsoever. And the clerk of assize, or other proper officer of the court, shall give *gratis* to the party injured, or prosecutor, a certificate of the same being directed, together with the names of the counsel assigned him; which certificate shall be sufficient proof of such prosecution being directed; provided that no such direction or certificate shall be given in evidence on the trial.

§ 1. And in every information or indictment for wilful and corrupt perjury, it shall be sufficient to set forth the *substance* of the offence, and by what court, or before whom, the oath was taken (averring such court or person to have a competent authority to administer the same), together with the proper averment or averments to falsify the matter wherein the perjury is assigned, without setting forth any part of the record or proceedings either in law or equity (other than as aforesaid), or the authority of the court or person before whom the perjury was committed.

§ 2. And in every information or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to

commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence, without setting forth any part of the record or proceedings, or the commission or authority of the court or person before whom the perjury was committed, or was agreed or promised to be committed.

prosecution for subornation.

In *Rex v. Dowlin*, 5 T. R. 317., *Ld. Kenyon* C. J. said, we have occasion to lament, in almost all the trials for perjury, that the prosecutor does not avail himself of this excellent law, which was passed to obviate difficulties in drawing indictments for this offence. In the case referred to, the commission at the admiralty session had been unnecessarily set forth in the indictment, and it was admitted, that where a prosecutor undertakes to set out in the indictment more of the proceedings than he need under this statute, he must set them forth correctly; but it was holden that the commission at the admiralty session being set forth as directed to *A. B.* and *C.*, and others not named, of which *A.*, *B.*, and *C.*, amongst others, should always be one, the court must take it to mean, that if either of the persons named of the quorum were present, it would be sufficient. 2 Russ. 536.

The provisions of this statute should be attended to in drawing indictments.

Admiralty court commission.

It has been held in motion on arrest of judgment, that several persons cannot be indicted jointly for perjury, the crime being several; but *aliter* as to subornation of perjury. 2 Russ. 536.

No joint indictment for perjury; *aliter* for subornation.

Where a statement by way of inducement is necessary for the purpose of explaining the assignment for perjury, such statement must in general be made with accuracy. 2 Russ. 537.

Necessary inducement must be set out truly.

Thus, where the oath is averred to have been taken at the assizes before two judges assigned to take the said assizes, before one of the judges at the said assizes, and the proof was that the judge was sitting under the commission of oyer and terminer and gaol delivery, it was held a fatal variance. *R. v. Lincoln*, C. C. R. 421. 2 Russ. 538.

Under what commission the judge sits.

It must appear, or be alleged in the indictment, that the person by whom the oath was administered had competent power to administer it. 2 Russ. 540.

Averment by whom the oath was administered.

But where the averment was that the defendant came before *A. B.*, and took his corporal oath (*A. B.* having power to administer an oath), this was held sufficient, without setting out the nature of *A. B.*'s authority, it being all that was required under 23 G. 2. c. 11. *R. v. Callanan*, 6 B. & C. 102.

Sufficient to satisfy 23 G. 2.

In the same case it was decided, that there being assignments of perjury upon several parts of the affidavit, such parts might be set out as continuous, though they were in fact separated by other intervening matter; and *per Abbott* C. J., in libel the tenor must be set out, but in perjury it is sufficient to state the substance and effect of the false oath. *S. P. R. v. Solomon*, 1 Ry. & M. N. P. 252. *Ibid.*

Setting out of the affidavit.

Substance and effect sufficient.

It is sufficient if the indictment states correctly the substance of the oath. Thus, where the indictment charged defendant with falsely swearing before a magistrate "that *A. B.* was one of the persons who assaulted his wife;" and it appeared that the wife first deposed to the facts, and then the defendant swore that "he was sure that *A. B.* was one of the persons;" this was held to be no material variance. *R. v. Grindall*, 2 C. & P. 563.

Statement of the deposition.

The indictment must charge the act of perjury to have been committed wilfully and corruptly; and where a count stated that a witness falsely and maliciously gave evidence that was not true,

Act of perjury must be stated to have been

done wilfully and corruptly.

omitting the words wilfully and corruptly, the court of K. B. held it was not sufficient, and arrested the judgment. *R. v. Stevens*, 5 B. & C. 246.

Materiality of the oath.

It must appear by the indictment that the oath taken was material to the question depending, but it will be sufficient to allege generally that the particular question became material, without setting out so much of the proceedings as would shew in what manner it was so. 2 *Russ.* 541.

Matter of the oath must be specially negatived.

It is necessary that the indictment should expressly contradict the matter which the defendant is charged with having sworn falsely, and this must be done by negating that which is false by particular assignments of perjury; and a general averment that the defendant swore falsely, &c. will not be sufficient. 2 *Russ.* 542.

The oath set out continuously must be proved *in toto*.

The indictment set out continuously in substance and effect the evidence given by defendant before a committee, and there were distinct assignments of perjury on the several parts of such evidence: it was held by Ld. *Ellenborough*, that it was necessary to prove substantially the whole of what was stated; that where a man swears falsely to several material questions, these may be charged in distinct counts; and that having professed to set out the substance and effect, the prosecutor was not bound to the precise words, but that it is essential that the words set out on the record should be proved either literally or substantially; and the evidence having failed as to a part, the indictment was held not maintainable. *R. v. Leeke*, 2 *Campb.* 194.

Aliter if in separate counts.

The court generally will not quash an indictment for a crime of so enormous a nature as perjury, for insufficiency in the caption or body of it, but will oblige the defendant either to plead or demur to it. 2 *Haw. c.* 25. § 146.

Insufficient indictment not quashed without pleading or demurrer.

Plea of *autrefois acquit* not available unless prisoner might have been convicted on first indictment.

With respect to the plea of *autrefois acquit* by a defendant who has been acquitted of an indictment for perjury, but not on the merits, it may be generally observed of such plea, that it is an established principle, that unless the first indictment were such as the defendant (or if for a felony the prisoner) might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. *Rex v. Vandercom and Abbott*, O. B. Jan. 1796, 2 *East's P. C.* 519.

Evidence; witnesses for prosecution; number.

To convict a man of perjury, a probable evidence is not enough; but it must be a strong and clear evidence, and the witnesses must be more numerous than those on the side of the defendant; for otherwise it is only oath against oath. *Reg. v. Muscot*, 10 *Mod.* 194. *Rex v. Broughton*, 2 *Str.* 1229. 1 *Phill. Ev.* 140.

Distinction as to perjury.

For there is this difference between a prosecution for perjury and a bare contest about property; that in the latter case the matter stands indifferent, and, therefore, a credible and probable witness shall turn the scale in favour of either party; but in the former, presumption is ever to be made in favour of innocence, and the oath of the party will have a regard paid to it, until disproved. *Reg. v. Muscot*, 10 *Mod.* 194.

One witness not sufficient to negative the oath; except there are circumstances to confirm;

The evidence of one witness alone is not sufficient to convict on an indictment for perjury, as in such case there would be only one oath against another. 2 *Russ.* 544.

But it is not to be understood that it is necessary to produce two witnesses to disprove the fact sworn to by defendant; for if other witnesses prove material circumstances in confirmation of

the witness who gives direct evidence of the perjury, it will be sufficient to warrant a conviction. 2 Russ. 545.

So the rule does not apply where evidence is given of the party himself having taken a contradictory oath, and having sworn contrariwise respecting the same fact on different occasions, for in such case there is no need to prove the perjury by two witnesses. 2 Russ. 545.

Where several persons are separately indicted for perjury in swearing to the same fact, either of them before conviction may be a witness on the trial of the other. 2 Russ. 546.

It is *prima facie* evidence of the competence of a person to administer an oath, that he is acting in a public capacity which authorises him to do so. 2 Russ. 548.

But this may be negatived by shewing that he was not duly nominated, and that his appointment was a nullity. *Ibid.*

A variance as to the place of taking the oath on which perjury is assigned will not be material, provided it be taken in the county where the party is indicted. Upon an indictment in *Middlesex* it may be shewn that the oath was in fact taken in *Middlesex*, though the jurat state it to have been sworn in *London*. *R. v. Smden*, 9 East, 437. 2 Russ. 548.

In a prosecution for suborning *A.* to commit perjury, it was held that it was not sufficient to produce the record of *A.*'s conviction, but that the actual fact of *A.*'s taking the false oath must be proved *de novo*. *R. v. Reilly*, cit. 2 Russ. 550.

Though the contrary doctrine appears at one time to have prevailed, it is now well established that the party prejudiced by the perjury is a competent witness to prove the offence. And, though at one time it was considered necessary to shew that such party had satisfied the judgment in the suit in which the perjury was committed before he could be admitted as a witness, on the ground that he might possibly make use of a conviction for the purpose of obtaining relief in equity against the judgment; yet, as it is now an established rule, that a court of equity will not grant relief on a conviction which proceeds on the evidence of the prosecutor, there can be no objection to his being admitted a witness. And even if the indictment proceed upon the stat. *Eliz. c. 9.*, which gives the prosecutor half the forfeiture incurred, it is conceived that, as in an action to recover his moiety he would be precluded from giving the conviction in evidence, there would be no objection to his competency. 2 Russ. 546., and the authorities there cited. See also 1 *Phill. Ev.* 140.

For the further punishment of perjury, or subornation of perjury, it is enacted by stat. 2 G. 2. c. 25. (made perpetual by stat. 3 G. 2. c. 18.), "that besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge, before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county, for a time not exceeding seven years, there to be kept to hard labour (a) during all the said time, or otherwise to be transported to some of H. M.'s plantations beyond the seas, for a term not exceeding seven years, as the court shall think most proper."

or where the party has himself sworn contrary.

Persons indicted for the same perjury, may be witnesses on the others' trials. Competence of person to administer oath.

Place of taking the oath.

In subornation, proof of false oath.

Party prejudiced by the perjury, may be a witness.

2 G. 2. c. 25. Further punishment of perjury or subornation.

Hard labour. Transportation.

(a) See also stat. 3 G. 4. c. 114. see tit. Judgment.

Pillory retained for perjury, and subornation.

By 56 G. 3. c. 138., the punishment of the pillory is abolished, except for taking any false oath, or for committing any manner of wilful and corrupt perjury, or for procuring or suborning any other person so to do, or for wilfully, falsely, and corruptly affirming or declaring, or procuring or suborning any other person so to affirm and declare in any matter or thing which, if the same had been deposed in the usual form, would have amounted to wilful and corrupt perjury.

Certiorari

It seems that the court will not ordinarily at the prayer of the defendant grant a *certiorari* for the removal of an indictment of perjury; for such crime deserves all possible discountenance, and the *certiorari* might delay, if not wholly discourage the prosecution. 2 *Haw. c. 27. § 28.*

Perjured person not to be a juror or witness.

A person convicted of perjury is disabled from being a juror. 2 *Haw. c. 43. § 25.* Or a witness. 2 *Haw. c. 46. § 19.* 2 *Russ. 1798.*

But a pardon will restore his competency; except in the case of a conviction for perjury, or subornation of perjury, on stat. 5 *Eliz. c. 9. § 5.*, which provides that the offender shall never be admitted to give evidence in courts of justice until the judgment be reversed; and therefore the king's pardon will not in such case make him a competent witness. 1 *Phill. Ev. 140.* 2 *Russ. 1798.*

Perjury excepted from the restoration to competence of those who have suffered their sentence.

By 9 G. 4. c. 32. § 4., in relation to misdemeanors which render persons convicted thereof incompetent witnesses, it is enacted that offenders convicted of such misdemeanors (except perjury or subornation of perjury) and having endured the punishment to which they were sentenced, shall not afterwards be deemed incompetent witnesses in any court or proceeding, civil or criminal.

False affirmations of quakers.

The false affirmation or declaration of any of the people called quakers, made instead of an oath, will subject the party to the penalties of perjury, by stats. 7 & 8 W. 3. c. 34., 8 G. 1. c. 6., and 22 G. 2. c. 46. The latter statute (by § 36.) enacts, "if any person making such affirmation or declaration shall be lawfully convicted of having wilfully, falsely, and corruptly affirmed and declared any matter or thing, which, if the same had been deposed in the usual form, would have amounted to wilful and corrupt perjury, every person so offending shall incur and suffer the like pains, penalties, and forfeitures, as by the laws and statutes of this realm are to be inflicted on persons convicted of wilful and corrupt perjury." But (by § 37.) it is provided, "that no quaker shall by virtue of this act be qualified or permitted to give evidence in criminal cases (a), or to serve on juries (a), or to bear any office or place of profit in the government."

Quakers not to give evidence in criminal cases.

Quakers and Moravians competent to affirm or declare in criminal or civil cases.

False affirmation, &c. perjury.

By 9 G. 4. c. 32. § 1., every Quaker and Moravian who shall be required to give evidence in any case, criminal or civil, shall be permitted to make his solemn affirmation or declaration (in the form there given) which shall be of the same force and effect in all courts of justice and other places where an oath is required, as if he had taken an oath in the usual form; and if convicted of having wilfully, falsely, and corruptly affirmed or declared any matter or thing which would have been perjury if sworn in the usual form, such offender shall be subject to the same pains, penalties, and forfeitures, as if convicted of perjury.

3 & 4 W. 4. c. 49. Quakers and Moravians.

By 3 & 4 W. 4. c. 49. § 1., Quakers and Moravians are permitted to make an affirmation or declaration instead of an oath, in all

places and for all purposes where an oath is required by law; and if lawfully convicted wilfully, falsely, and corruptly to have affirmed or declared any matter or thing which would have amounted to wilful and corrupt perjury, they shall incur the same penalties and forfeitures as are enacted against wilful and corrupt perjury.

By 3 & 4 W. 4. c. 82. § 2., a similar enactment is made in regard to a wilful, false, and corrupt affirmation or declaration of Separatists.

Among the provisions of various statutes, whereby the punishment of perjury is annexed to the taking a false oath in particular cases, are the following enactments:

By 46 G. 3. c. 112. § 3., persons taking a false oath in any case where the laws relating to excise duties require an oath to be taken, are liable to the pains and penalties of wilful and corrupt perjury.

So, by 46 G. 3. c. 106. § 31., where any person shall take a false oath in matters relative to the customs, upon examination and inquiry made by the surveyor general, the inspector general, the collector and comptroller, &c.

So, by 43 G. 3. c. 56., if any person takes a false oath, or suborns another to do so, as required by that act, regulating the carrying of passengers to settlements abroad, or to foreign parts.

So, by 55 G. 3. c. 184. § 53., the taking a false oath in matters relating to the stamp duties.

So, by 39 & 40 G. 3. c. 89. § 36., the taking a false oath, in matters required by that act for the prevention of the embezzlement of naval, ordnance, and victualling stores.

So, by 55 G. 3. c. 157. § 8., the taking a false oath before commissions, granted pursuant to that act, by courts of law and equity in Ireland.

So, by 55 G. 3. c. 60. § 19., taking a false oath relating to the execution of letters of attorney and wills of petty officers, seamen, and marines in the navy; and by 57 G. 3. c. 127., if any person takes a false oath in order to obtain probate of a will, &c. in order to obtain prize money, &c. for service in the navy, he shall be guilty of felony without benefit of clergy.

So, by 1 & 2 G. 4. c. 61. § 6., the taking a false oath, in matters within that act, for the appropriation of unclaimed prize money belonging to the *East India* service, is made perjury.

So, by the mutiny acts, the taking a false oath where an oath is required under such acts.

So, by 22 G. 2. c. 33. § 17., as to oaths taken in naval courts martial.

So, by 6 G. 4. c. 78. § 29., in matters relative to quarantine.

So, by 48 G. 3. c. 104. § 70., as to oaths required by that act for the better regulation of pilotage.

So, by 4 G. 4. c. 41. § 47., as to oaths required to be taken in the registering of ships.

So, by 5 G. 4. c. 113. §§ 41. 58., (the slave trade act) as to all matters required by that act to be stated on oath.

So, by 50 G. 3. c. 65. § 11., where a false oath shall be taken in any verification or examination mentioned in that act relating to the land revenues of the crown.

So, by 41 G. 3. c. 100. § 43., (the general inclosure act,) as to

False affirm-
ation.

Punished as
perjury.

So, as to Separ-
atists.

Perjuries by
statute.

Excise duties.

Customs.

Carrying of
passengers.

Stamp duties.

Government
stores.

Irish commis-
sion.

Seamen's wills.

Probates, &c.
for obtaining
prize money.

In East India
service.

Under the
mutiny acts.

In naval courts
martial.

Quarantine.
Pilotage.

Ships' registry.

Slave trade act.

Crown land
revenues.

General inclo-
sure act.

examinations, affidavits, depositions, or affirmations, taken or made in pursuance thereof.

Yorkshire and
Middlesex
registry acts.

So, by the several registry acts for *Yorkshire* and *Middlesex*, as to the oaths which are to be taken in pursuance of their enactments.

Trial of contro-
verted elections.

So, by 10 G. 3. c. 16. § 29., as to oaths taken before select committees, for the trial of controverted elections, or before the house, under that act.

Under bank-
rupt act.

So, by 6 G. 4. c. 16. § 99., as to oaths taken by bankrupts or other persons before the commissioners, or other persons empowered to administer them.

Insolvent act.

So, by 7 G. 4. c. 57. § 71., as to false oaths by any prisoner or other person under the provisions of that act; viz. the General Insolvent Act.

Pickpockets. See **Larceny.**

Pigeons. See **Game.**

Pillory and Tumbrel.

[56 G. 3. c. 138.]

Pillory, what.

PILLORY (in Latin, *collistrigium*, from the person's neck being put between two boards) is a very ancient punishment in this kingdom, and was used heretofore by the Saxons. 3 *Inst.* 219.

Tumbrel, what.

The *tumbrel* seemeth to have been anciently the same with the *ducking stool*; an engine for the punishment of scolding women, by ducking them over head and ears in water, and especially in muddy or stinking water, according to the etymology of *Ld. Coke*, who tells us that the word *tumbrel* signifieth a dung cart. *Lamb.* 61. 3 *Inst.* 219.

Who shall find
them.

Every one that hath a leet or market ought to have a pillory and tumbrel to punish offenders; and it seems that a leet may be forfeited for not taking care to have a pillory and tumbrel. 3 *Inst.* 219. 2 *Haw. c.* 11. § 5.

Infamy of the
punishment.

They that have been adjudged to the pillory or tumbrel are so infamous that they shall not be received to be jurors or witnesses. 3 *Inst.* 219.

Jurors must be *probi et legales homines*.

By 28 *Ed.* 1. c. 9., the sheriff shall put in juries such as be next neighbours, the most sufficient and least suspicious. *Com. Dig. Challenge. A.* 3.

56 G. 3. c. 138.
Judgment of
pillory to be
awarded for
certain offences
only.

By stat. 56 G. 3. c. 138., after reciting that whereas the punishment of the pillory has in many cases been found inexpedient, and not fully to answer the purpose for which it was intended; it is enacted, "That from and after the passing of this act, judgment shall not be given and awarded against any person or persons convicted of any offence, that such person or persons do stand in or upon the pillory, except for the offences herein-after mentioned, any law, statute, or usage to the contrary notwithstanding: Provided that all laws now in force whereby any person is subject to punishment for the taking any false oath, or for committing any manner of wilful and corrupt perjury, or for the

procuring or suborning any other person so to do, or for wilfully, falsely, and corruptly affirming or declaring, or procuring or suborning any other person so to affirm and declare, in any matter or thing which, if the same had been deposed in the usual form, would have amounted to wilful and corrupt perjury, shall continue and be in full force and effect; and that all persons guilty of any of the said several offences shall incur and suffer the same punishment, penalties, and forfeitures as such persons were subject to by the laws and statutes of this realm, or any of them, before the passing of this act, and as if this act had not been made."

§ 2. enacts, "That in all cases where the punishment of the pillory has hitherto formed the whole or a part of the judgment to be pronounced, it shall and may be lawful for the court before whom such offence is tried, to pass such sentence of fine or imprisonment, or of both, in lieu of the sentence of pillory, as to the said court shall seem most proper: Provided that nothing herein contained shall extend or be construed to extend in any manner to change, alter, or affect any punishment whatsoever which may now be by law inflicted in respect of any offence, except only the punishment of pillory, in manner as herein above enacted."

Court may fine or imprison offenders.

Not to change any punishment for offences, except the pillory.

Plate.

28 Ed. 1. c. 20.—12 & 13 W. 3. c. 4.—1 Ann. st. 1. c. 9.—6 G. 1. c. 11.—12 G. 2. c. 26.—13 G. 3. c. 52.—24 G. 3. c. 53.—52 G. 3. c. 143.—55 G. 3. c. 185.]

TO prevent frauds in the true making of plate, it is enacted by stats. 12 & 13 W. 3. c. 4., the 1 Ann. st. 1. c. 9., and 13 G. 3. c. 52., that (besides the city of London) York, Exeter, Bristol, Chester, Norwich, Newcastle-upon Tyne, Sheffield, and Birmingham, shall be appointed for the assaying and marking of plate.

And the goldsmiths, silversmiths, and plateworkers in the said places shall be incorporated into a company, and choose wardens yearly.

An assayer shall be elected by the company in each of the said places, who shall take an oath of office.

By the said acts, every goldsmith, silversmith, and plateworker, within the said places and elsewhere, shall, before he takes upon him to exercise the said trade, enter his name, and mark, and place of abode, with the wardens of the company where an assayer is; and if he shall not make such entry, or shall strike any other mark but what is so entered, he shall forfeit double value, half to the king, and half to him that shall sue in any court of record in the county or place where the offence shall be committed.

Every goldsmith, silversmith, and plateworker, inhabiting where there is not an assayer, shall first fix his mark, and then send it to an assayer; and if it be found by the assayer to be of the fineness of the standard, then he shall mark it: and if any such person shall make any plate (less in fineness than the standard), or put any to sale (except what by reason of its smallness is not capable of the touch) before it shall be assayed and marked, he shall forfeit the same, or the value thereof.

12 & 13 W. 3. c. 4.
1 Ann. st. 1. c. 9.
13 G. 3. c. 52.
Assayers.

Maker to be entered with the wardens of the company.

Assaying.

24 G. 3. c. 53.
Plate to be sent
to assay office.

And by stat. 24 G. 3. c. 53. § 4., "Every working gold or silver-smith shall send to the assay office all plate made by him, to be touched or assayed, and with every parcel shall send a written note, containing the day of the month and year, the name of the maker, and place of his abode, and also the species in such parcel, and number of each species, with the total weight of each parcel, and the duty payable for the same.

6 G. 1. c. 11.
Fineness by the
standard.

As to the fineness thereof by the standard, it is enacted by stat. 6 G. 1. c. 11. § 41. that plate may be made, either according to the old standard (of 11 ounces and 2 pennyweights fine silver, in every pound troy,) or according to the new standard (of 11 ounces and 10 pennyweights); but differently marked. That is to say, plate of 11 ounces and 2 pennyweights shall be marked with the maker's mark, viz. the first letters of his Christian and surname, the mark of the goldsmiths' company in London, viz. the leopard's head, lion passant, and a distinct variable mark to denote the year (or, with the mark of the worker or maker, and with the mark appointed to be used by the assayers at the several respective places).

Mark.

Old standard.

12 G. 2. c. 26.

New standard.

And by stat. 12 G. 2. c. 26. § 5., plate of 11 ounces and 10 pennyweights shall be marked with the maker's mark, viz. the first letters of his Christian and surname; and the mark of the said company, viz. a lion's head erased, the figure of a woman, called *Britannia*, and the said mark or letter to denote the year (or, with the mark of the worker or maker, and the mark of one of the said cities or towns respectively).

6 G. 1. c. 11.
Illegal to make
plate of coarser
alloy.

§ 41. "And it shall not be lawful to make any vessels of silver plate or manufactures of silver of a coarser alloy than what is herein specified, under the penalties and forfeitures prescribed by any of the laws now in being concerning wrought plate."

52 G. 3. c. 143.
Forging stamps
on wrought
plate of gold or
silver, &c.

By stat. 52 G. 3. c. 143. § 8., if any person shall transpose or remove, or cause, &c. from one piece of wrought gold or silver to another, or to any vessel or ware of base metal, any impression provided, made, or used under the direction of the committee of stamps, or persons authorised in that behalf, for denoting the duties or payment of duties on plate; or shall stamp or mark, or cause, &c. any such with any mark, stamp, or die, forged or counterfeited, to resemble any mark, &c. so provided; or shall sell, exchange, or expose to sale, or export out of G. B. any wrought plate of gold or silver, or any vessel or ware of base metal, having thereon the impression of any forged or counterfeited mark, stamp, or die so provided, &c. as aforesaid, or any impression of any such mark, &c. so transposed or removed as aforesaid, knowing the same to be so forged or transposed; or shall wilfully and without lawful excuse (proof to be on the accused) have or be possessed of any such forged or counterfeited mark, &c., every such offender shall on conviction be adjudged guilty of felony without clergy.

28 Ed. 1. not
repealed.

R. v. Jackson, 1 Cowp. 297, 298. The defendant had been convicted upon stat. 28 Edw. 1. c. 20. (the punishment of which is imprisonment and ransom at the king's pleasure) for making silver plate of worse alloy than the standard alloy of the realm. The indictment also contained a count upon stat. 6 G. 1. c. 11., and the third for an offence at common law. He was found guilty upon all the counts. In *Mich. 1774*, motion was made in arrest of judgment, upon the ground of stat. 28 Ed. 1. c. 20. being repealed,

when the court of K. B. took time to consider and look into the acts of parliament. Lord *Mansfield* declared the unanimous opinion of the court, that it "*is in full force, and not repealed or abrogated by any of the subsequent statutes since enacted.*" His lordship observed, that the preamble of stat. 12 G. 2. c. 26. recites stat. 28 Edw. 1. c. 20., and some other acts, as *subsisting laws*; but says not one word as to a repeal of any of the former laws. He farther instanced two similar cases decided by him, where sentence of fine and imprisonment was pronounced, and no objection was made in either case. Therefore, said he, I suppose it was taken for granted, as it is at this time by the goldsmiths' company, that the statute was still in force. We are all of opinion that it is in force, and, consequently, that the indictment is good. The rule for arresting judgment was discharged.

And moreover, by stat. 24 G. 3. c. 53. §§ 1. 5., all plate shall be marked with a new mark of the *king's head*, beside the old marks, and the duties shall be paid previous to the marking thereof.

And by § 8., no gold or silver plate shall be sold or exchanged until marked, on pain of 50*l.*

But by §§ 7. 10., the duties shall be returned for all plate defaced or being coarser than the standard (if no fraud appear). And an allowance of one fifth part shall be made for goods sent to be assayed in a rough state.

And by § 9., the said duties shall not extend to any jeweller's work other than mourning rings, nor to any jointed night ear-rings of gold, or gold springs of lockets, or to goods excepted by stat. 2 G. 2. c. 26. § 6.

By stat. 55 G. 3. c. 185. all former duties upon plate (except repairs) are repealed, and the following substituted in lieu thereof:—

Plate of gold made or wrought in *G. B.*, and which shall or ought to be touched, assayed, and marked in *G. B.*, for every ounce thereof, and so in proportion for any greater or less quantity, 7*s.* per ounce.

Exemption. — Gold watch-cases.

Plate of silver made or wrought in *G. B.*, and which shall or ought to be touched, assayed, or marked in *G. B.*, for every ounce thereof, and so in proportion for any greater or less quantity, 5*6d.* per ounce.

Exemptions. — All watch-cases, chains, necklace-beads, lockets, ligree work, shirt buckles or brooches, stamped medals, and pounts to china, stone, or earthenware tea-pots, of silver, of any weight whatsoever:

Tippings, swages, or mounts, not weighing ten pennyweights of silver each, and not being necks or collars for castors, cruetts, or glasses appertaining to any sorts of stands or frames, wares of silver not weighing five pennyweights of silver each; but this exemption not to include necks, collars, and tops for castors, cruetts, or glasses, appertaining to any sort of stands or frames; buttons to be affixed to or set on any wearing apparel, solid silver buttons and solid studs, not having a bezelled edge soldered on, wrought seals, blank seals, bottle tickets, shoe clasps, patch boxes, salt spoons, salt ladles, tea spoons, tea strainers, caddy ladles, buckles, and pieces of garnish, cabinets, or knife cases, or tea chests, or bridles, or stands, or frames.

R. v. Jackson.

24 G. 3. c. 53.
Additional
mark.

Allowance to
be made.

Goods ex-
cepted.

55 G. 3. c. 185.
Duties.

Exemptions
continued.

55 G. S. c. 185.
Forgery of gold
and silver plate
duty marks, &c.
to be capital
felony.

§ 7. "If any person shall forge or counterfeit, or cause or procure to be forged or counterfeited, any mark, stamp, or die, which shall have been provided, made, or used in pursuance of this or any former act, relating to any duties on gold or silver plate made or wrought in *G. B.*, for the purpose of marking or stamping any such gold or silver plate, in the manner directed by any such act, or shall forge, counterfeit, or resemble, or cause or procure to be forged, counterfeited, or resembled, the impression of any such mark, stamp, or die, upon any such gold or silver plate, with intent to defraud *H. M.*, his heirs or successors; or if any person shall mark or stamp, or cause or procure to be marked or stamped, any such gold or silver plate, or any vessel or ware of base metal, with any such forged or counterfeited mark, stamp, or die as aforesaid, or shall transpose or remove, or cause or procure to be transposed or removed, from one piece of gold or silver plate to another, or to any vessel or ware of base metal, any impression made with any mark, stamp, or die, which shall have been provided, made, or used, in pursuance of this or any former act, for the purpose of marking or stamping of any such gold or silver plate as aforesaid; or if any person shall sell, exchange, or expose to sale, or export out of *G. B.* any such gold or silver plate, or any vessel or ware of base metal, having thereupon the impression of any such forged or counterfeited mark, stamp, or die as aforesaid, or any forged, counterfeited, or resembled impression of any mark, stamp, or die, so provided, made, or used as aforesaid, or any impression of any such mark, stamp, or die, which shall have been transposed or removed from any other piece of plate as aforesaid, knowing the same respectively to be forged or counterfeited, or transposed or removed as aforesaid; or if any person shall wilfully and without lawful excuse (the proof whereof shall lie on the person accused) have or be possessed of any such forged or counterfeited mark, stamp, or die as aforesaid, or shall privately and secretly use any mark, stamp, or die, so provided, made, or used as aforesaid, with intent to defraud *H. M.*, his heirs or successors; then every person so offending, and every person knowingly and wilfully aiding, abetting, or assisting any person or persons in committing any such offence as aforesaid, and being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy."

Licences for
dealing in plate.

By 6 *G. 4. c. 118.*, licences for dealing in plate were transferred from the commissioners of excise to those of stamps; and by 9 *G. 4. c. 49. § 12.*, the commencement and termination of them are fixed.

General mitigation of
punishment of
forgery.

By 1 *W. 4. c. 66.*, "where by any acts now in force any person falsely making, forging, counterfeiting, &c. any matter whatsoever, or uttering, publishing, offering, &c. any matter knowing it to be forged, &c. would be liable to suffer death as a felon, such person shall be liable, at the discretion of the court, to be transported for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two, unless the offence be made punishable with death by that act." See *tit. Forgery*, and the case of *R. v. Hope*, *ibid.* p. 286.

Polygamy. (a)

See tit. Marriage, ante.

[9 G. 4. c. 31.]

BIGAMY is, where a man has two wives successively; Polygamy, where he hath several wives at the same time: but they are commonly confounded one with the other. Bigamy and polygamy.

The statutes 1 J. 1. c. 11. and 35 G. 3. c. 67., which defined and made provision for the trial and punishment of this offence, are now repealed.

By 9 G. 4. c. 31. (the stat. repealing them) § 22., "if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in *England* or elsewhere, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall be liable to be transported beyond the seas for the term of seven years, or to be 9 G. 4. c. 31.

Description of offence.

(a) In the appendix to Sir Samuel Romilly's "*Observations on the Criminal Law of England*," published in 1813, note (M.) page 105., are the following very judicious remarks on this offence: —

"The crime of bigamy (which is made felony by stat. 1 Jac. 1. c. 11., and which by stat. 35 G. 3. c. 67. is punishable with transportation for seven years or imprisonment) comprehends two species of offences, differing greatly from each other in their character and effects, and in their degree of moral guilt; and the circumstances which mark the distinctions between these different offences are clear and unequivocal. If the atrocity of a crime is to be measured by the extent of the wrong done to the person who is the victim of it, few crimes can be more atrocious than that of a married man, who, by representing himself to be a bachelor, prevails on a modest woman to become his wife: he possesses himself by fraud of her person, knowing that he may at any moment dismiss her as a prostitute from his bed; and nothing can exceed the horror she must feel, whenever, the secret of his first marriage being divulged, she shall be awakened to her real situation, and shall find herself despoiled of her honour, and that the children she has borne are bastards and outcasts. The real nature of this crime is that of a fraudulent and most aggravated seduction, effected under colour of law, with all the solemnities of religion, and under such circumstances that no prudence or caution could effectually guard against it. But he who before his second marriage apprises the woman that he is already a husband, does her no wrong: his offence is one to the state alone, and consists in nothing but the public scandal it affords. The bigamist who had concealed his first marriage from his victim, is equally guilty of this outrage on public decency, and has besides done one of the greatest possible injuries to an individual.

"It results from these considerations, that in a woman the crime of bigamy can never be so heinous as in a man, and that in a man the heinousness of the crime consists altogether in the concealment of the former marriage. Mr. Justice Blackstone, however, not adverting to those distinctions, tells us that bigamy 'has been made felony by reason of its being so great a violation of the public economy, and decency of a well-ordered state.' 'It is that,' he says, 'which never can be endured under any rational civil establishment; and in northern countries,' he observes, 'the very nature of the climate seems to recoil against it.' (4 Blac. Com. 163.) But he does not even glance at the injury done to the woman who suffers from the crime; and even the more philosophical author of the *Principles of Penal Law* (page 105.), defines polygamy only to be a gross species of adultery, aggravated by the profanation of a religious rite."

Although, as has been already observed, this is, in women, a crime of much less magnitude than in men, yet, until the stat. of 3 & 4 W. & M. (which extended the benefit of clergy to women) passed, it was punishable in female offenders with death, but in males only with burning in the hand and a year's imprisonment. See also 20 *Howell's State Trials*, p. 362.

Punishment. imprisoned, with or without hard labour, in the common gaol or house of correction, for any term not exceeding two years; and any such offence may be dealt with, inquired of, tried, determined, and punished, in the county where the offender shall be apprehended, or be in custody, as if the offence had been actually committed in that county: Provided always, that nothing herein contained shall extend to any *second* marriage contracted out of England, by any other than a *subject of his majesty*, or to any person marrying a second time, whose husband or wife shall have been continually *absent* from such person for the space of *seven* years then last past, and shall *not have been known* by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been *divorced* from the bond of the first marriage, or to any person whose former marriage shall have been declared *void* by the sentence of any court of competent jurisdiction."

Where either marriage is out of England.

If the first marriage were beyond sea, and the latter in *England* or *Wales*, the party may be indicted here, because the latter marriage makes the offence; but if the first marriage were in *England*, and the second abroad, though in *Ireland*, the general opinion seems to be that it is not within the act; for the second marriage, which alone constitutes the offence, is a fact done within another jurisdiction; and though inquirable here for some purposes, like all transitory acts, is not cognisable as a crime by the rule of the common law. *Kel.* 79, 80. 1 *East's P.C.* 463. 1 *Russ.* 188.

See, however, the enactment of 9 G. 4. c. 31. § 22., in relation to cases where the second marriage shall have taken place out of *England*. *Supra*.

Or voidable.

This extends to a marriage *de facto*, or voidable by reason of consanguinity, affinity, or such like; for it is a marriage in judgment of law until it be avoided; and, therefore, though neither marriage be *de jure*, yet they are within this statute. 3 *Inst.* 88.

But *aliter*, if simply void.

A. married B. in *Holland*, and afterwards in the same country married C. in B.'s lifetime; B. died, and then living C., A. married D. in *England*. This was holden not to be within the act: because the marriage with C. was simply void. But if B. had been living, it would have been felony to have married D. in *England*. *Lady Madison's case*, O. B. 1648, 1 *Hale*, 693.

Sufficient to shew the marriage ceremony duly performed.

R. v. William Allison, alias *William Wilkinson*, *York Sp. Ass.* 1806. C. C. R. 109. The prisoner was tried before *Chambre J.* at *York Spring* assizes, 1806, upon an indictment for bigamy, in marrying *Ann Epton* on the 23d May, 1804, *Jane* his former wife being then living. *Thomas Pape*, to whom the prisoner was then a servant, proved that he was present at the celebration of the marriage between the prisoner and *Jane Chaplin*, at the parish church of *Ulroome*, on the 27th February 1798. They were married by the curate of the parish.—The prisoner quitted his service at *May-day*, and he had not known much of the parties since: but *Jane* was living on the 8th of *October* last, on which day he saw her. *Robert Wilson* proved that he was present at the prisoner's second marriage with *Ann Epton*; they were married at the parish church of *Otringham*, by the curate of the parish, on *Whit-Wednesday*, 1804; the prisoner then going by the name of *Wilkinson*; the witness was there merely from curiosity. They lived together afterwards as man and wife. The death of *Jane*, the first wife, on the 1st of *December*

last, was also proved. The jury found the prisoner guilty, but judgment was respited upon a doubt whether this evidence, without any proof of the registration of either marriage or of any licence or publication of banns, was sufficient to support a conviction. The judges held the conviction right, and the prisoner was sentenced to be imprisoned twelve calendar months in the house of correction at *Beverley*.

In respect to the manner of proving the two marriages, the first must be duly established to be valid, according to the rites and customs of the country in which it was celebrated. 1 *East's P.C.* 469. *Per Bayley J., Smith v. Huson, Deleg. T.* 1811, citing a case reserved for the opinion of the judges K. B., *M.* 1803

Where the first marriage, which was with a Roman Catholic woman, was by a *Romish* priest in *England*, not according to the ritual of the church of *England*, and the ceremony was performed in Latin, but the witnesses not understanding that language could not swear that the ceremony of marriage according to the church of *Rome* was read, the defendant was acquitted. (a) But *Ld. Ch. J. Willes*, who tried him, seemed to be of opinion that a marriage by a priest of the church of *Rome* was a good marriage if the ceremony according to that church could be proved, namely, the words of the contracting part of it. But this was before the marriage act. *Lyon's case, O.B. Dec.* 1738, 1 *East's P.C.* 469. See *Fielding's case, post*, p. 679.

How far the acknowledgment of the defendant upon the subject of his marriage is sufficient evidence of the fact, may admit of some doubt. In *Trueman's case* it was held, that proof of the prisoner's cohabiting with and acknowledging himself married to a former wife then living, such assertion being backed by his producing to the witness a copy of the proceeding in a *Scotch* court against him and his wife for having contracted the marriage improperly, (the marriage, however, being still good according to the law) was sufficient evidence of the first marriage; and upon such evidence, together with due proof of the second marriage, the prisoner was convicted. The point being reserved for the opinion of the judges, all of them (with the exception of *Perry* and *Buller J.* who were absent) held the conviction proper. Two of them observed that this did not rest upon cohabitation and bare acknowledgment; for the defendant had backed the assertion by the production of the copy of the proceeding: but some of the judges thought that the acknowledgment alone would have been sufficient, and that the paper produced in evidence was only a confirmation of such acknowledgment. *Truman's case, Nottingham Spring Ass.* 1795, 1 *East's P.C.* 470. 1 *Russ.* 207.

With respect to the admission of a bare acknowledgment in cases of this nature, *Mr. East* says, (1 *P.C.* 471.) it may be difficult to say that it is not evidence to go to the jury, like the acknowledgment of any other matter *in pais* where it is made by a party to his own prejudice at the time. But it must be admitted that it may under circumstances be entitled to little or no weight; for such acknowledgments made without consideration of the consequences, and palpably for other purposes at the time, are scarcely deserving of that name in the sense in which acknowledgments

No need to prove banns, licence, or registration.

But according to the custom of the country.

Marriage by Roman Catholic Priest.

Before Marriage Act.

How far the acknowledgment of the defendant is evidence.

(a) The second marriage was by a clergyman of the Established Church.

are received as evidence; more especially if made before the second marriage, or upon occasions when in truth they cannot be said to be to the party's own prejudice, nor so conceived by him at the time.

Validity of
first marriage
impugned;

on account of
the parish
church being
unserviceable.

R. v. John Hind, otherwise *John Ashmead Hind*, *Durham Sum. Ass.* 1813, *C. C. R.* 253. The prisoner was tried before *Chambre J.* at *Durham Summer Assizes*, 1813, upon an indictment for bigamy. The first marriage was in *Yorkshire*, and took place in *April* 1812. The second was at the *parish of Houghton-le-Spring*, in the county of *Durham*, in *December* last, the first wife being still living. A doubt arose upon the validity of the first marriage under the following circumstances:—The parties resided in the parish of *Marrick* in the county of *York*. The parish church of *Marrick*, at the times of publishing the banns and celebrating the marriage, was under repair, and wholly, or in a great measure unroofed, and no service was performed there. The banns were therefore published at the church of *Grinton*, the parish adjoining to *Marrick*, and the marriage also was celebrated at *Grinton*. The proofs in all other respects were full, and the prisoner was convicted and received sentence; but as the statute makes no express provision for the publication of banns and the celebration of marriages under such publication, elsewhere than in the parishes where the parties reside, (except when such residence is in extra-parochial places,) the case was submitted for the opinion of the judges upon the question of the validity of the first marriage. See stat. 26 G. 2. c. 33. § 1. 5 & 8. On the 13th *November* 1813, eleven judges assembled all agreed that the 10th section of this act, which had not been adverted to, put an end to the doubt. Conviction right. See stats. 4 G. 4. c. 76. § 13. and 5 G. 4. c. 32., tit. *Marriage*.

Where the first
marriage takes
place under a
wrong name.

Where a person has taken a false name, and is known only by such assumed name in the place where he resides, it will be sufficient if the banns are published in such name. 1 *Russ.* 200.

A man whose real name was *Abraham Langley* was married by banns as *George Smith*, which name he had borne ever since he had been in the parish, which was about three years, and where he was known by no other name: it was held to be a valid marriage. *R. v. Billingham*, 3 *M. & S.* 250. 1 *Russ.* *ib.*

S. P.

The same was decided where a man had deserted and changed his name, and was married by licence in such false name in a place where he had been about 16 weeks, and where he was known by no other: *Ld. Ellenborough* stating that it would have been different if the name had been assumed for the purpose of fraud in order to enable the party to contract the marriage; but that where a name has been previously assumed, so as to have become the name which the party has acquired by reputation, that is, within the meaning of the marriage act, the party's true name. *R. v. Barton* upon *Trent*, 3 *M. & S.* 537. 1 *Russ.* *ib.*

Under publica-
tion of banns.

In *R. v. Tibshelf*, 1 *B. & Ad.* 190., the principles are accurately laid down, pursuant to which the publication of banns by wrong names will or will not render a marriage void, under 26 G. 2. c. 33. § 8. But in *R. v. Wroston*, 4 *B. & Ad.* 640., it was decided, that since the passing of 4 G. 4. c. 76., under the provisions of § 22, a marriage will not be invalidated by the undue publication of banns, unless such undue publication be known to both parties. See tit. *Marriage*.

Aliter if taken
for the purpose
of fraud as to
the marriage.

In another case the prisoner was indicted for marrying *Anna Timson* while he had a wife living. It appeared that he had so written down her name for the banns, and that she was married in such name, but that her real name was *Susannah*. On case reserved, he judges were unanimous that the prisoner, having given her name as *Anna Timson* for the banns, should not be permitted to say that such was not her name, either as it regarded the validity of the marriage, or the averment in the indictment. *R. v. Edwards*, *Russ.* 201. *C. C. R.* 283.

Where prisoner was indicted for marrying *E. C.* widow, having wife living, and it appeared that *E. C.* was, both in fact and by reputation, a single woman, it was held that the variance in the description was fatal, though it was unnecessary to have stated more than the name of the party. *E. T.* 1831, *R. v. Deeley*, *M.* 303.

The second marriage is merely void. 3 *Inst.* 88.

The first and true wife is not to be allowed as a witness against the husband, [nor *vice versa* ;] but it seemeth clear that the second wife may be admitted to prove the second marriage, being of so much as his wife *de facto*. 1 *Hale*, 693. 4 *Blac. Com.* 164. *Phil. Ev.* 78. See 2 *Chitt. Crim. L.* 719. (n.)

[In the county where he or she was apprehended.] This, according to the resolution in Lord *Digby's* case, may be in the place where the party is taken, which is the place where he is imprisoned. And it is only *cumulative* ; for he may be indicted where the second marriage was, though he be never apprehended; and so may be outlawed. 1 *Hale*, 694. 1 *Russ.* 191. *Hutt.* 131.

R. v. James Jordan, otherwise *James Weaver*, *C. C. R.* 48. The prisoner was tried before *Lawrence J.* at *Worcester* Summer assizes, 1802, on an indictment charging him with felony, in marrying, on the 10th of June, 1802, one *Elizabeth Lane*, at the parish of *St. Clement*, in the county of the city of *Worcester*, *Mary Taylor* his former wife being then living, and that he was apprehended for the felony foresaid at the parish of *Astley* in the county of *Worcester*. The facts of both marriages were proved; and that the prisoner was apprehended in the county of *Worcester* on a charge of stealing two hammers of one *William Collins*, and that being in the house of correction on that charge, a bill of indictment was found against him for this bigamy at the quarter sessions, and on the bill being found, he was detained by an order of that court. It was objected on behalf of the prisoner, that an indictment could be preferred against him for this offence only in the county where the second marriage was, or in some other county where he was apprehended for that offence, whereas the defendant was apprehended in the county of the city of *Worcester*, not for this bigamy, but for a larceny. And if that were otherwise, the prisoner could not be convicted on this indictment, as it charged he was apprehended in the county for this felony, which was not proved, as his apprehension was for larceny.—The jury found the prisoner guilty; and on case reserved, the judges, in *H. T.* 1803, determined the conviction to be right. The prisoner was sentenced to six months' imprisonment in the house of correction.

By the terms of 9 *G. 4. c.* 31. § 22, the offender may be tried in any county where he shall be apprehended or be in custody. See *supra*.

Misstatement of the woman's name in the second marriage.

False description of second wife in indictment, a fatal variance.

Second marriage void.

First wife cannot be a witness.

Venue. Where apprehended.

Prisoner apprehended for another offence, and charged with bigamy while in custody.

9 *G. 4. c.* 31. where apprehended or in custody.

In *Forsyth's case* at the *O.B.* in *July Sessions*, 1798, the court is reported to have held, (upon an objection taken by the prisoner's counsel,) that as the *warrant* for the prisoner's apprehension had not been produced, and as it had not been proved that the prisoner was apprehended in the county of *Middlesex*, they had no jurisdiction to try him. 2 *Leach*, 826. See 1 *Russ.* 191. n. (t).

A marriage contracted in England cannot be dissolved by a sentence of divorce in Scotland,

In the case of *William Martin Lolly*, at *Lancaster Assizes*, September 1812, cor. *Wood B.* a question arose, whether a decree of the commissary or consistorial court of *Scotland* would operate so as to excuse a person, who had been married in *England*, from the penalties of bigamy. On the part of the prosecution, it was proved, that the prisoner was an *Englishman*, that both the marriages were solemnised at *Liverpool*, and that the first wife was living at the time of his second marriage: the prisoner's defence was, that before the time of the second marriage, a divorce had been sued for and obtained in *Scotland* by his first wife, on the ground of adultery. The jury, under his lordship's direction, found the prisoner guilty; but the question was reserved for the opinion of the twelve judges, and was argued before them in the *Mich.* term following. And at the *Spring Assizes*, 1813, *Thompson B.* stated the opinion of the judges to be, 1. That a marriage lawfully contracted in *England* cannot be dissolved in a different country by any authority whatever; and 2d, That the proviso relates only to the sentences of courts in *England.* (a) *R. v. Lolly*, *C. C. R.* 237. 1 *Russ.* 190. See also *Tovey v. Lindsay*, 1 *Dow's Rep.* 117. 5 *Evans's Coll. Stat.* 216. note (4).

Sentence in the ecclesiastical court.

By 1 *Jac. 1. c. 11.* (now repealed) it was provided, that the act shall not extend "to any person or persons where the former marriage shall be, by sentence in the ecclesiastical court, declared to be void and of no effect." But it was resolved by all the judges, that a sentence of the spiritual court against a marriage in a suit of jactitation of marriage, is not conclusive evidence, so as to stop the counsel for the crown from proving the marriage; the sentence having decided on the invalidity of the marriage only collaterally, and not directly. And further, admitting such sentence to be conclusive, yet that the counsel for the crown may avoid the effect of such sentence, by proving it to have been obtained by fraud or collusion. *The Duchess of Kingston's case*, *Dom. Proc.*, 20 *Howell's St. Tri.* 355. 1 *Leach*, 146. But see 9 *G. 4. c. 31. § 22*, *supra*.

Either of the parties being within the age of consent,

So, 1 *Jac. 1. c. 11.* does not apply if either party be within the age of consent, at the time of the former marriage, which in the man is 14 and in the woman 12, for the power of dissent to the marriage must be reciprocal. And yet in a civil light a promise of marriage by an adult to one under age, will subject the adult to an action for a breach of such promise. *Holt v. Ward*, *T.* 5 *G. 2. Stra.* 850. 937. But if both are above those respective ages at the time of the first marriage, though under twenty-one (b), a second marriage would be felony. And though either were under the age of consent when the first marriage was contracted, if they agreed to it when both had attained such age, by which the marriage is completed, it seems

(a) The prisoner was sentenced to be transported for seven years, and he was sent on board the *Portland* hulk at *Langston* harbour, where he continued some time; but it is understood he received a pardon before any considerable portion of his sentence was expired.

(b) See *post*, p. 681.

that a second marriage would be within the reason and penalties of the act. 3 *Inst.* 89. 1 *Hale*, 17. 694. 1 *Haw. c.* 43. § 6. 4 *Blac. Com.* 165. 1 *East's P. C.* 468.

For the general law for regulating marriages, see tit. *Marriage*.

By 4 G. 4. c. 76. § 21. (the Marriage Act), "If any person shall on and after the said first day of *November*, solemnise matrimony in any other place than a church or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon, unless by special licence from the archbishop of *Canterbury*, or shall solemnise matrimony without due publication of banns, unless licence of marriage be first had and obtained from some person or persons having authority to grant the same; or if any person, falsely pretending to be in holy orders, shall solemnise matrimony according to the rites of the church of *England*, every person knowingly and wilfully offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be transported for the space of fourteen years, according to the laws in force for transportation of felons: Provided that all prosecutions for such felony shall be commenced within the space of three years after the offence committed."

§ 22. "If any person shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by special licence, as aforesaid, or shall knowingly and wilfully intermarry without due publication of the banns, or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to, or acquiesce in, the solemnisation of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever."

§ 23. makes provision, that if any valid marriage shall be solemnised between parties, one or both of whom shall be under twenty-one, contrary to this act, by false swearing or fraud, the guilty party shall forfeit all property accruing from the marriage. See the section, tit. *Marriage*.

In a prosecution for bigamy, a marriage in fact must be proved, *Forris v. Miller*, 1 *Bla. R.* 63. 24 *Burr.* 2057., and *Denison J.* there said to have ruled, that though a lawful canonical marriage need not be proved, yet a marriage in fact, whether regular or not, must be shewn; but *semble* this must be understood where there is *prima facie* evidence of a lawful marriage. 10 *East*, 287.n. (c).

Before the Marriage Act (26 G. 2. c. 33.) (a), a marriage in the prisoner's own lodgings, by a Romish priest in the suite of the imperial envoy, was held good on evidence of words of present contract spoken in *English*, so as to convict the prisoner of polygamy in a second marriage. *Fielding's case*, 14 *Howell's St. Tr.* 328. 5th vol. fol. edit. 610., and see per *Ld. Ellenb.*, 10 *East*, 288.

Lautour v. Teesdale, 2 *Marsh.* 243. 8 *Taunt.* 830. S. C. E. 1820. British subjects resident in a British settlement abroad are governed with respect to marriage by the law which existed here before the marriage act; viz. the canon law. Therefore, where two British subjects, being protestants, were married at *Madras*

4 G. 4. c. 76. Persons solemnising marriages in any other place than a church or chapel, or without banns or licence, or under pretence of being in holy orders, shall be transported.

Prosecution to be commenced within three years.

Marriages to be void where persons wilfully marry in any other place than a church, &c. or without banns or licence.

Marriage obtained by false swearing or fraud.

Proof of first marriage in fact.

Before marriage act.

British subjects married abroad in a British settlement.

by a *Portuguese* Roman Catholic priest, according to the catholic form, in the *Portuguese* language, in a private room, and the ceremony was followed by cohabitation; this was held to be a valid marriage, though without a licence from the governor, which it is the custom at *Madras* to obtain.

Marriage in the British army abroad.

Where a soldier in the *British* army at *St. Domingo* married the widow of another soldier in a chapel there, the service being performed in *French* by a person who appeared to be a priest; it was held by Lord *Ellenborough*, that it was to be presumed to be a valid marriage, either by the law of *England* in a place where the marriage act did not extend, or, on the other hand, that there was evidence of a good marriage according to the law of the country, on the supposition that the law of *England* had not been carried there by the king's forces. *R. v. Brampton*, 10 *East*, 282. 1 *Rus.* 205.

Question on the validity of a marriage in Ireland.

R. v. Reilly, *Lanc. Sum. Ass.* 1823. Indictment for bigamy. The first marriage was proved to have been solemnised by a clergyman in a *private house* in *Ireland*, under authority of a licence authorising the marriage to take place at a canonical time and place. Evidence was given by two *Irish* clergymen, speaking to their own practice only, in the same parish, that they had solemnised marriages in houses, but that that practice had formerly been much more general than of late; and for the last five or six years the usage had been to marry in the church. They could not swear that marriages in private houses had taken place under licences, like that on which the marriage in question had been solemnised.—*Bayley J.* charged the jury that he could not judiciously take notice what the law in *Ireland* was, but that that law must be proved as a fact, as other foreign laws are. That it was incumbent on the prosecutor to shew what the *Irish* law of marriage was, so far at least as to leave the validity of the marriage in question free from reasonable doubt. That he thought the evidence of the two clergymen in this respect was deficient, and if he was to collect from the licence what the law was, he thought that shewed that the marriage was to be solemnised in a canonical place; which canonical place was proved to be the church. That this question as to the sufficiency of the evidence in the criminal case would decide nothing conclusively as to the validity of the marriage, but would leave that point open to the decision of the proper tribunal, viz. the ecclesiastical court. Prisoner acquitted. It was afterwards understood to be the opinion of the learned judge, on advertent to the case of *Lautour v. Teesdale*, ante, that he had laid a greater stress on the effect of the deviation from the term of the licence than he should have done; and that, had that case been cited at the trial, he probably might have referred a question for the opinion of the twelve judges, "Whether the evidence before him was sufficient to establish the legality of the first marriage?" He still doubted whether it was sufficient, but thought the deviation from the licence was only a ground for ecclesiastical censure on the clergyman who solemnised the marriage. Reported in 2 *Burn's Eccles. Law*, 8th edit. by *Tyrwhitt*, 491. n. (7), cited by Lord *Eldon C.* in *re Saumarez*, *Canc.* 8 *Apr.* 1824.

Where the marriage was not conformable to the licence; but see next case.

A marriage in Ireland, performed by a clergyman of the church of

Smith v. Maxwell, May 8. 1824. *Guildhall*, 1 *Ry. & M.* 80. Action on a bill of exchange; Defence, coverture.—It was proved that the defendant was married at her father's house in *Ireland* in the year 1799, in the presence of the friends of both families.

The ceremony was performed by a clergyman of the church of England, who was then, and had been for a long time previous, curate of the parish. The parish church was at that time standing, but persons of respectability were usually married at their own houses. The parties lived together for several years following as man and wife. On its being objected, that this marriage was not valid without the protection of a special licence, — *Best C. J.* said, I know of no law which says, that celebration in a church is essential to the validity of a marriage performed in Ireland. The English marriage act does not apply, and I am aware of no Irish law which takes marriages performed in that country out of the rules which prevailed in this, before the passing of that act; and which, as it is said in the case of *Dalrymple v. Dalrymple*, 2 Hagg. R. 54., are common to the greater part of Europe. That case has placed it beyond a doubt, that a marriage so celebrated as this has been would have been held valid in this country before the existence of that statute: and when I find that this marriage was performed by a gentleman who had officiated as curate of the parish for eighteen years, I must presume it to have been correctly performed according to the laws of that country, and I shall not put the defendant to the production of a licence, or to any further proof. It is true, that in a case for bigamy tried before Mr. Justice Bayley, on the northern circuit, (*viz. R. v. Reilly*, *supra*.) an acquittal was directed because the first marriage, which took place in Ireland, was performed in a private house; but I have reason to know that the learned judge altered his opinion afterwards, and was satisfied of the validity of the first marriage. Nonsuit.

It is said to have been ruled on a trial for bigamy at the *O. B.*, that the marriage of a dissenter in Ireland, performed by a dissenting minister in a private room, was valid. 1 Russ. 205.

Where, in a prosecution for bigamy, it appeared that at the time of the first marriage the prisoner was under age, and his father was living, and no evidence was given to shew consent, the prisoner was found guilty; but on case reserved, the conviction was held wrong, the prisoner being under age, and there being no circumstances from which consent could be presumed. *R. v. Butler*, C. C. R. 61. 1 Russ. 202.; but see *R. v. Birmingham*, *infra*.

In a case where the first marriage took place in Ireland, and it was proved that the prisoner was not seventeen years of age when he so married, and that his father did not give his consent; after conviction and case reserved, the judges held, that as there was no statute in Ireland making the marriage void under such circumstances, such marriage was to be considered binding, and the conviction proper. *E. T.* 1826, *R. v. Jacobs*, 1 R. & M. 140.

In a settlement case, where the question turned upon the validity of a marriage, the court held, after consideration, that under 4 G. 4. c. 75. the marriage of a female minor by licence, whose father was living, and who did not give his consent, was nevertheless good, the section which requires such consent being directory only. *R. v. Birmingham*, 8 B. & C. 29.

The law of France as to marriage was proved by production of a book purporting to contain the code of France, and proved by oral testimony to contain the law of France; the book purporting to have been published at the Royal Printing Office, which was

England in a private house, held valid, although no evidence was given that any licence had been granted to the parties.

Marriage of dissenter in Ireland in a private house. Prisoner under age at time of the first marriage; Consent must appear.

Marriage of minor in Ireland without consent of father, good.

Marriage of minor by licence without consent, valid under 4 G. 4. c. 75.

French law of marriage, how proved.

(according to the statement of the witness) authorised to print the laws of *France* by the government. *Per Abbott C. J. Dec. 10. 1822. Lacon v. Higgins, 3 Stark. R. 178.*

Indictment.

Necessary averments.

The indictment must state the two marriages, and aver that the former consort was alive at the time of the second marriage. In the *Duchess of Kingston's* case, (*ante*, p. 678.) the first count stated generally that the defendant on such a day, &c. being then married and then the wife of *A. J. H.*, with force and arms at, &c. did feloniously marry *E. P.*, &c. the said *A. J. H.* being then alive, &c. The second count stated the time and place of the first as well as the second marriage. When the trial is in the county where the party was apprehended, there is an additional averment of that fact. 1 *East's P. C.* 469.

Warrant of Commitment for Polygamy.

County of } To the keeper of his majesty's gaol at —, in the said county.
to wit. }

[*Toone's M. M. 94. 4 Chitt. Crim. L. 85.*]

RECEIVE into your custody in the said gaol, and there safely keep until he shall be discharged by due course of law, the body of *A. O.* herewith sent you, and charged before me, *W. S. Esq.* one of his majesty's justices of the peace in and for the said county, on the oaths of *C. D.*, *E. F.*, and others, for that he the said *A. O.*, on the — day of —, in the year of our Lord 18—, at the parish of —, in the county of —, did marry one *G. H.* spinster, and her the said *G. H.* then and there had for his wife; and that the said *A. O.* afterwards, to wit, on the — day of —, in the year aforesaid, in the parish aforesaid, feloniously did marry and take to wife one *L. S.* spinster, the said *G. H.* his former wife being then living, against the form of the statute in that case made and provided; the said *C. D.* having also made oath before me the said justice, that the said *A. O.* was apprehended and taken for the said felony in the parish of —, in the said county of —. Given under my hand and seal this — day of —, one thousand eight hundred and —

Bigamy.

[7 R. 2. c. 12.—12 R. 2. c. 15.—13 R. 2. st. 2. c. 2.—7 H. 4. c. 8.—3 H. 5. st. 2. c. 4.—5 El. c. 1.—13 El. c. 2.—23 El. c. 1.—27 El. c. 2.—1 J. 1. c. 4.—3 J. 1. c. 4. c. 5.—1 W. & M. c. 18.—1 G. 1. st. 2. c. 13.—11 G. 2. c. 17.—10 G. 4. c. 7.]

THE law relating to persons professing the Roman Catholic religion will be treated of in this place so far only as it falls within the criminal department.

The numerous enactments, many of them highly penal, affecting this class of the subjects of *England*, which were formerly found in our statute book, have now happily disappeared: the following statutes, however, remain, it is believed, unrepealed, though they may be considered as being, for the most part, pretty well obsolete:—

By the stat. of 5 *El. c. 1. § 2, 3, 4. 10, 11.*, if any person shall maintain the authority of the see of *Rome* in this realm, he shall incur a *præmunire* (for which see title *Præmunire*) for the first offence, and for the second shall be guilty of high treason. Prosecution to be within a year. And the justices in sessions may inquire thereof, and shall certify the same into the king's bench.

Maintaining the authority of the see of *Rome*.

And by stat. 3 *J. 1. c. 4. § 22, 23. 25.*, if any person shall put in practice to absolve or withdraw any subjects from their allegiance, or if any person shall be willingly so absolved or withdrawn; he, his aids and maintainers, shall be guilty of high treason. The trial to be at the assizes, or in the K. B.

Absolving or withdrawing subjects.

By stat. 13 *R. stat. 2. c. 2.*, none shall take any benefice of an alien, or convey money to him for the farm thereof; on pain of incurring a *præmunire*.

Taking a benefice from an alien.

No alien shall purchase or occupy a benefice in *England*; on pain of a *præmunire*. 7 *R. 2. c. 12.*

By stat. 12 *R. 2. c. 15.*, he that shall go out of the realm, to procure a benefice, shall be out of the king's protection; and the same shall be void.

Going out of the realm to procure a benefice.

By stat. 13 *R. 2. st. 2. c. 2.*, if any person shall accept a benefice from the pope, he shall be banished for ever, and his lands and goods forfeited.

Accepting a benefice from the pope.

By stat. 7 *H. 4. c. 8. 3 H. 5. § 2. c. 4.*, no provision of a benefice not vacant, made by the pope, and licensed by the king, shall be available: but persons endeavouring to exclude the incumbent thereby shall incur a *præmunire*.

By stat. 13 *Eliz. c. 2.*, if any person shall get or publish any bull or instrument from *Rome*, he shall be guilty of high treason. And his aids and comforters shall incur a *præmunire*. And concealing the same shall be misprision of high treason. And the justices of the peace may inquire thereof, within a year and a day. 23 *Eliz. c. 1. § 8.*

Bulls or other instruments from *Rome*.

By the Toleration act, (1 *W. & M. c. 18. § 12.*), if any person being required by a justice of the peace shall refuse to take the oaths of allegiance and supremacy, and to make and subscribe the declaration against popery of the 30 *C. 2.*, he shall be committed by the said justice to prison; and at the next sessions, if he shall again refuse to make and subscribe the said declaration, he shall be deemed and suffer as a popish recusant convict.

Papists refusing to take the oaths.

And by stat. 1 *G. 1. st. 2. c. 13. § 10, 11.*, two justices may summon any person whom they shall suspect to be disaffected, by writing under their hands and seals, to appear before them at a time prefixed, to take the oaths of allegiance, supremacy, and abjuration; which summons shall be served on such person, or left at his dwelling-house or usual place of abode, with one of the family there; and if such person shall neglect or refuse to appear, then on due proof made upon oath of serving the said summons, they shall certify the same to the next sessions, to be there recorded: And if such person shall neglect or refuse to appear and take the oaths at the said sessions, (his name being publicly read at the first meeting of the said sessions) he shall be taken and adjudged a popish recusant convict. And the same shall be from thence certified by the clerk of the peace into the chancery or K. B., to be there recorded.

Two justices may summons suspected persons.

Reconciling to
popery.

By stat. 3 *J. 1. c. 4. § 22, 23, 25.*, if any person shall put in practice to reconcile any subjects to popery, or if any person shall be willingly so reconciled, he, his aiders and maintainers, shall be guilty of high treason. The trial to be at the assizes, or in the K. B.

Jesuits and
papists being
in the realm.

By stat. 27 *Eliz. c. 2. § 2, 3, 10.*, no jesuit or popish priest shall come into or be in the realm, on pain of high treason; unless he conform.

Receiving or
relieving them.

§ 4. And if any person shall knowingly receive or relieve any such, he shall be guilty of felony without benefit of clergy.

Discovering
them.

By stat. 3 *J. 1. c. 5. § 1.*, and the person who shall first discover to any justice of the peace any person who shall entertain or relieve any jesuits, seminary or popish priest, within three days after the offence, so that by reason of such discovery any offender shall be taken and convicted, such person shall not only be freed from any penalty for such offence, if himself be an offender, therein, but shall also have the third part of the forfeitures if they do not exceed 150*l.*, and if they do exceed 150*l.*, then he shall have 50*l.*

Paying double
land tax.

The provision that papists and reputed papists, being of 18 years of age, who shall not have taken the oaths of allegiance and supremacy, should pay double land tax, being in the annual land tax acts, could not be repealed by any prospective act of the nature of stat. 31 *G. 3. c. 32.*; but after that act passed, the object was attained by omitting this clause in the annual land tax acts passed previous to stat. 38 *G. 3. c. 60.*, which made the tax perpetual, subject to redemption, but contains no such provision. See on this subject *Co. Litt.* 591 a. note 346. by *Butler, sub. fz.* Div. III.

Papists conforming,
discharged from
penalties, &c.

By stat. 1 *J. 1. c. 4. § 2.*, a recusant conforming shall be discharged of the penalties which he might otherwise sustain in respect of his recusancy.

And by stat. 11 *G. 2. c. 17. § 1, 2, 3, 4.*, papists conforming to the protestant religion, and taking the oaths, and subscribing the declaration of the 30 *C. 2.* in the chancery, king's bench, or quarter sessions (to be there recorded), shall have their estates freed of the disabilities incurred before such conforming.

Note. The oaths of allegiance and supremacy above mentioned and the declaration against popery of stat. 30. *C. 2.*, are inserted at length in the title *Oaths*, in another volume of this work.

By 10 *G. 4. c. 7.* (An Act for the Relief of His Majesty's Roman Catholic Subjects), the following provisions, involving several penal enactments, have been adopted in relation to religious orders and societies connected with the church of Rome.

10 *G. 4. c. 7.*
For the suppression of
jesuits, and
other religious
orders of the
church of
Rome.

§ 28. Whereas jesuits, and members of other religious orders, communities, or societies of the church of Rome, bound by monastic or religious vows, are resident within the United Kingdom; and it is expedient to make provision for the gradual suppression and final prohibition of the same therein; be it therefore enacted, that every jesuit, and every member of any other religious order, community, or society of the church of Rome, bound by monastic or religious vows, who at the time of the commencement of this act shall be within the United Kingdom, shall, within six calendar months after the commencement of this act, deliver to the clerk of the peace of the county or place where such person shall reside, or to his deputy, a notice or statement, in

the form and containing the particulars required to be set forth in the schedule to this act annexed ; which notice or statement such clerk of the peace, or his deputy, shall preserve and register amongst the records of such county or place, without any fee, and shall forthwith transmit a copy of such notice or statement to the chief secretary of the lord-lieutenant, or other chief governor or governors of *Ireland*, if such person shall reside in *Ireland*, or if in *Great Britain*, to one of his majesty's principal secretaries of state ; and in case any person shall offend in the premises, he shall forfeit and pay to his majesty, for every calendar month during which he shall remain in the United Kingdom, without having delivered such notice or statement as is hereinbefore required, the sum of 50*l*.

§ 29. If any jesuit, or member of any such religious order, community, or society as aforesaid, shall, after the commencement of this act, come into this realm, he shall be deemed and taken to be guilty of a misdemeanor, and being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life.

§ 30. In case any natural-born subject of this realm, being at the time of the commencement of this act a jesuit, or other member of any such religious order, community, or society as aforesaid, shall, at the time of the commencement of this act, be out of the realm, it shall be lawful for such person to return or to come into this realm ; and upon such his return or coming into his realm he is hereby required, within the space of six calendar months after his first returning or coming into the United Kingdom, to deliver such notice or statement to the clerk of the peace of the county or place where he shall reside, or his deputy, for the purpose of being so registered and transmitted, as herein-before directed ; and in case any such person shall neglect or refuse so to do, he shall for such offence forfeit and pay to his majesty, for every calendar month during which he shall remain in the United Kingdom, without having delivered such notice or statement, the sum of 50*l*.

§ 31. Notwithstanding any thing herein-before contained, it shall be lawful for any one of his majesty's principal secretaries of state, being a protestant, by a licence in writing signed by him, to grant permission to any jesuit, or member of any such religious order, community, or society as aforesaid, to come into the United Kingdom, and to remain therein for such period as the said secretary of state shall think proper, not exceeding in any case the space of six calendar months ; and it shall also be lawful for any of his majesty's principal secretaries of state to revoke any licence so granted before the expiration of the time mentioned herein, if he shall so think fit ; and if any such person to whom such licence shall have been granted shall not depart from the United Kingdom within twenty days after the expiration of the time mentioned in such licence, or if such licence shall have been revoked, then within twenty days after notice of such revocation shall have been given to him, every person so offending shall be deemed guilty of a misdemeanor, and being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life.

10 G. 4. c. 7.

Jesuits, &c. coming into the realm, to be banished.

Natural-born subjects, being jesuits, may return into the kingdom and be registered.

The principal secretaries of state may grant licences to jesuits, &c. to come into the kingdom ;

and may revoke the same.

10 G. 4. c. 7.

Accounts of
licences to be
laid before par-
liament.

Admitting per-
sons as mem-
bers of such
religious orders
deemed a mis-
demeanor.

Any person so
admitted a
member of a
religious order
to be banished.

The party of-
fending may
be banished by
his majesty ;

and if at large
after three
months, may
be transported
for life.

Not to extend
to female
societies.

§ 32. There shall annually be laid before both houses of parliament an account of all such licences as shall have been granted for the purpose herein-before mentioned within the twelve months then next preceding.

§ 33. In case any jesuit, or member of any such religious order, community, or society as aforesaid, shall, after the commencement of this act, within any part of the United Kingdom, admit any person to become a regular ecclesiastic, or brother, or member of any such religious order, community, or society, or be aiding or consenting thereto, or shall administer or cause to be administered, or be aiding or assisting in the administering or taking any oath, vow, or engagement purporting or intending to bind the person taking the same to the rules, ordinances, or ceremonies of such religious order, community, or society, every person offending in the premises in *England* or *Ireland* shall be deemed guilty of a misdemeanor, and in *Scotland* shall be punished by fine and imprisonment.

§ 34. In case any person shall, after the commencement of this act, within any part of this United Kingdom, be admitted or become a jesuit, or brother or member of any other such religious order, community, or society as aforesaid, such person shall be deemed and taken to be guilty of a misdemeanor, and being thereof lawfully convicted shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life.

§ 35. In case any person sentenced and ordered to be banished under the provisions of this act shall not depart from the United Kingdom within thirty days after the pronouncing of such sentence and order, it shall be lawful for his majesty to cause such person to be conveyed to such place out of the United Kingdom as his majesty, by the advice of his privy council, shall direct.

§ 36. If any offender, who shall be so sentenced and ordered to be banished in manner aforesaid, shall, after the end of three calendar months from the time such sentence and order hath been pronounced, be at large within any part of the United Kingdom, without some lawful cause, every such offender being so at large as aforesaid, on being thereof lawfully convicted, shall be transported to such place as shall be appointed by his majesty, for the term of his natural life.

§ 37. Nothing herein contained shall extend or be construed to extend in any manner to affect any religious order, community, or establishment consisting of females bound by religious or monastic vows.

Posse Comitatus. See Arrest.

Post-Office.

Offences relative to the Post-Office by Servants and others.

9 Ann. c. 10. — 5 G. 3. c. 25. — 7 G. 3. c. 50. — 42 G. 3. c. 81. — 52 G. 3. c. 143. — 5 G. 4. c. 20.]

By stat. 5 G. 3. c. 25. § 20. if any postboy shall quit the mail before his arrival at the next stage; or shall suffer any other person (except the person employed to guard the mail) to ride on the horse or carriage; or shall loiter on the road so as to retard the arrival of the mail; or shall not, in all possible cases, convey the mail after the rate of six miles an hour at least; he shall, on conviction by confession or oath of one witness, before one justice, be sent to the house of correction, to be there kept to hard labour, not exceeding one month, nor less than fourteen days.

And by § 21., if any post-boy shall by himself, or in combination with others, unlawfully collect any letters, or convey or cause them to be unlawfully conveyed, he shall, on conviction by confession or oath of one witness before one justice, forfeit for every letter or packet so collected, conveyed, or delivered, 10s. to the informer: if not forthwith paid on conviction, to be committed to the house of correction to hard labour, not exceeding two months or less than one.

§ 19. If any person appointed, authorised, and entrusted to take letters or packets and receive the postage thereof, shall embezzle or apply to his own use any money received by him with such letters, &c. for the postage thereof; or shall burn or otherwise destroy any letter or packet by him so taken in or received; or who, by virtue of his office, shall advance the rates upon letters or packets sent by the post, and not duly account for the money received by him for such advanced postage; he shall be deemed guilty of felony.

And by stat. 7 G. 3. c. 50. § 3., if any person employed in any business of the post-office, who shall take any letter or packet to be forwarded by the post, and receive any money therewith for the postage, shall burn or destroy any such letter or packet, or shall advance the rate of postage upon any letter or packet sent by the post, and not duly account for the money by him received for such advanced postage, he shall be deemed guilty of felony.

By § 1. (which re-enacts more at large the provisions of stat. 5 G. 3. c. 25. § 17.), it is enacted, that if any deputy, clerk, agent, letter-carrier, post-boy, or rider, or any other officer or person whatsoever, employed in receiving, stamping, sorting, charging, carrying, conveying, or delivering letters or packets, or in any other business relating to the post-office, shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters which such person might be entrusted with, or which shall have come to his hand or possession, containing any bank note, bank post bill, bill of exchange, exchequer bill, *South Sea* or *East India* bond, dividend warrant of the bank, *South Sea*, *East India*, or any other company, society, or corporation, navy, or victualling, or transport

5 G. 3. c. 25.
Post-boy loitering upon the road, &c.

Unlawfully collecting letters, or unlawfully conveying them.

Embezzling money for letters post paid, or destroying the letters, advancing rates of postage, &c.

7 G. 3. c. 50.
Destroying letters, &c. or advancing postage and not duly accounting, felony.

Secreting, embezzling, or destroying letters containing certain securities or instruments by one employed by the post-office, felony without clergy.

Stealing, or taking the same out of any letter or packet, felony without clergy.

Prisoner indicted as "sorter and charger," being sorter only.

As "employed in business relating to the post office."

Post bill or bill of exchange described as warrant for payment of money, no variance.

bill, ordnance debenture, seaman's ticket, state-lottery ticket or certificate, bank receipt for payment on any loan, note of assignment of stock in the funds, letter of attorney for receiving annuities or dividends, or for selling stock in the funds, or belonging to any company, society, or corporation, *American* provincial bill of credit, goldsmiths' or banker's letter of credit, or note for or relating to the payment of money; or other bond or warrant, draught, bill, or promissory note whatsoever for the payment of money; or shall steal or take the same out of any letter or packet that shall come to his hands or possession, such offender shall be guilty of felony without benefit of clergy.

Shaw was indicted on stat. 7 G. 3. c. 50. There were four counts in the indictment: 1st, That being a clerk employed in sorting and charging letters in the post-office, the prisoner feloniously secreted, embezzled, and destroyed a letter containing a bank note for 20*l*.; 2dly, That being a person employed in the business relating to the general post-office, he secreted, &c.; 3dly, That being a clerk employed in sorting and charging letters in the post-office, he feloniously stole and took out of a letter a bank note for 20*l*.; 4thly, That being a person employed in the business relating to the general post-office, he feloniously stole, &c. It appeared in evidence that the prisoner was only a *sorter*, and not a *charger* of letters: whereupon the recorder, who tried him, directed the jury (the proof of the fact being very plain) to convict him, which they did, on the second and fourth counts only. It was then moved in arrest of judgment that, as he had been acquitted on the counts which charged him as a sorter and charger, and did not appear to be a person employed by the post-office in any other business but that of *sorting*, which is one of the employments particularly specified in stat. 7 G. 3., which says, that "if any person employed in receiving, sorting, charging, &c., or in any *other* business relating to the post-office, shall, &c., he could not be convicted on the third and fourth counts. This, being adjourned to *Serjeant's-inn*, was argued before eleven of the judges (*abs. Blackstone J.*) who unanimously agreed that judgment should be arrested, but inclined to think, that the jury might have convicted the prisoner on the first and third counts, by a special finding that he was a sorter only. *Shaw's case*, O. B. May, 1771. *Blac. Rep.* 78*o*. 2 *East*, P. C. 580. See *R. v. Ellins*, C. C. R. 188. See *post*.

Benjamin Willoughby was indicted on stat. 7 G. 3. c. 50., for that he, being a clerk employed in the post-office at *Birmingham*, in stamping and charging letters, stole and took out of a letter there a certain warrant for the payment of money [setting it forth, by which it appeared to be a *Birmingham* post bill, or bill of exchange payable in *London*]. The fact of stealing having been proved, it was objected that this was not "a warrant for the payment of money" within the meaning of the act, but a post bill, or bill of exchange. The prisoner was found guilty, but judgment was respited to take the opinion of the judges. Though at first there was a difference of opinion among the judges, at length they all agreed that it was properly stated in the indictment; for though it was a bill of exchange, it was also a warrant for the payment of money; it was a voucher to the bankers or drawers, if genuine, for the payment, and it might also have been laid to be a draft. And they said it could not be distinguished from the

case of *R. v. Shepherd*, Mich. 1781, where in forgery the indictment was in the same form, and holden good. *Willoughby's case*, Warwick Lent Ass. 1783, 2 East's P. C. 581.

Where the prisoner was indicted, as a servant of the post-office, or embezzling a letter, it was objected, that not having taken the oath required by 9 Ann. c. 10. § 41., he could not be considered as a legal servant of the post-office; but the objection, on being referred to the judges, was overruled. *R. v. Clay*, E. T. 1784, 1 East's P. C. c. 16. § 21. p. 580. 2 Russ. 230.

Stealing money out of letters is not within these acts. *Timothy Skutt*, who was a sorter of letters, &c. stole two letters, each containing 5s. 3d. in gold coin; and being indicted on these statutes, and the fact being proved, it was objected, that as the letters contained money, and not any security relating to the payment of money mentioned in the acts, the case did not fall within them; and the court being of that opinion, he was acquitted on that indictment; but was again indicted and convicted of grand larceny for stealing the money, and was transported. *Skutt's case*, O. B. 1774, 2 East's P. C. 581.

In *Moore's case*, 2 East's P. C. 581., it was holden upon a conference by all the judges (except *Buller J.*, who was absent, and doubted), that a letter carrier secreting half a bank-note in one letter on one day, and the other half in another letter on another day, is a secreting within stat. 7 G. 3. c. 50.

Since this decision another act has passed, 42 G. 3. c. 81., which (§ 1.) after reciting stat. 7 G. 3. c. 50. § 1., and the expediency of extending its provisions so as to protect the conveyance by the post of all and every part or parts of such securities or instruments, enacts, that if any deputy, clerk, agent, &c. &c. (as in stat. 7 G. 3. c. 50. § 1. *ante*), in the post-office shall secrete, embezzle, or destroy any letter or packet, bag, or mail of letters with which he is entrusted, or which may come into his possession, containing any part or parts of any such security or instrument as in the said act are mentioned, or shall steal or take out of any letter or packet that shall come to his possession any part or parts of any such security or instrument, every such offender shall be guilty of felony without benefit of clergy.

And by § 2., if any person whatsoever, whether employed in any business relating to the post-office or not, shall counsel, command, hire, persuade, procure, aid, or abet any such deputy, &c. or other officer employed, &c. in the post-office to commit any offence in the said recited act or in this act before mentioned; or shall with a fraudulent intention buy or receive the whole or any part of such security, &c. which he shall know to have been contained in any such letter, &c. so by any such deputy, &c. secreted or embezzled, or stolen or taken out of any letter, &c. that shall come to his possession, or which he at the time of buying or receiving shall know to have been contained in and stolen or unlawfully taken out of any letter, &c. stolen and taken by any person whatsoever from or out of any mail, bag, &c., or from or out of any post-office, or house or place for the receipt or delivery of letters, &c.; each and every person so offending shall be deemed guilty of felony without benefit of clergy; and may be tried and convicted as well before as after the trial or conviction of the principal felon, and whether the

Clerk, &c. of post-office not having taken the oath, immaterial.

Money in a letter.

Parts of a note.

42 G. 3. c. 81. Clerk, &c. of post office embezzling, &c. any part of security, &c. felony without clergy.

Persons procuring, &c. to commit offences, or fraudulently receiving such securities or parts thereof, guilty of felony without clergy;

and may be tried before or after the principal.

principal felon shall have been apprehended or shall be answerable to justice or not.

7 G. 3. c. 50.
Robbing the
mail, or steal-
ing letters.

By stat. 7 G. 3. c. 50. § 2., if any person or persons shall rob any mail or mails, in which letters are sent or conveyed by the post, of any letter or letters, packet or packets, bag, or mail of letters; or shall steal and take from or out of any such mail or mails, or from or out of any bag or bags of letters sent or conveyed by the post, or from or out of any post-office or house or place for the receipt or delivery of letters or packets sent or to be sent by the post, any letter or letters, packet or packets; although such robbery, stealing, or taking shall not appear or be proved to be a taking from the person, or upon the king's highway, or to be a robbery committed in any dwelling-house or any coach-office, stable, barn, or any outhouse belonging to a dwelling-house; and although it should not appear that any person or persons were put in fear by such robbery, stealing, or taking; yet such offender or offenders being thereof convicted as aforesaid, shall be deemed guilty of felony, without benefit of clergy.

Capital.

Stealing by one
being a servant
of post-office.

This section does not extend to the servants of the post-office: and therefore a conviction of one of them for stealing out of the post-office a letter sent to be delivered by the post, was holden to be wrong. The opinion of the judges in this case was founded on a comparison of the second section of the act with the first and third sections, which were expressly intended to guard against the misconduct of the servants of the post-office. *Pooley's case*, O. B. 1801, C. C. R. 31. 1 *East's P. C. Add.* xvii. See also *Brown's case*, post, p. 694.

Obtaining deli-
very of mail
bags by fraud.

Noah Pearce, intending to steal the mail bags, went one night about the usual time to the post-office at *High Wycombe*, and pretending to be the mail-guard, obtained from the person at the office the bags of letters, which were let down to him from out of the window of the post-office by a string, from whence he took them, and immediately went away. Being indicted on this act, and found guilty, all the judges were of opinion, in *Hilary term* following, that the conviction was proper on a count in the indictment for stealing the letters out of the post-office. His artifice in obtaining the delivery of them in the bag out of the house was the same as if he had actually taken them out himself. *Noah Pearce's case*, *Buckingham Sum. Ass.* 1794, 2 *East's P. C.* 603.

Secreting a
letter in order
to embezzle the
postage.

The prisoner was indicted for secreting a letter containing a note, and the jury found that, being a servant of the post-office, he secreted the letter without opening it, and without knowing that a note was in it, in order to defraud the king of the postage, which had been paid. The determination of the judges was not made known, but it is said the prisoner continued in gaol. O. B. 1772. R. v. *Sloper*, 2 *East's P. C.* c. 16. § 23. p. 583. 2 *Russ.* 235. and n. (y) *ib.*

Letter carrier
taking letters
from office, in-
tending to de-
liver them to
the owners, but
to embezzle the
postage.

A letter carrier taking letters out of the office, intending to deliver them to the owners, but to embezzle the postage, cannot be indicted for stealing such letters under this act. *James Hewitt* was indicted on the second section of this act; 1st, for stealing out of the *London* bag, sent by the general post-office from *London* to *Manchester*, divers letters specified; 2dly, 3dly, and 4thly, for stealing the like letters out of the post-office in *Manchester*, and out of a certain house for the receipt and delivery of letters

ment by the post, and out of a certain place for the same. It appeared to be the duty of the clerks in the office to count the letters and deliver them out to the letter-carriers, of whom the prisoner was one. He contrived to obtain possession of some of the letters before they were so counted out to him, and was detected with them in his pocket in the letter-carriers' room, which was under the same roof as the office, separated from it only by a few steps. For some time previous there had been a great deficiency in the receipt of the postage, though there was no complaint of the miscarriage of any letters; and from circumstances appeared, and so the jury found when they convicted the prisoner, that he intended to have delivered the letters, and only to have embezzled the postage. But in the *Mich.* term following the judges (*ab. Holkam B.*) agreed that this was not a stealing within the act. *Howatt's case, Lancaster Sum. Ass. 1795, cor. Cooke J., 2 East's P. C. 604.*

Prisoner was indicted, under 52 G. 3. c. 143. § 2., as a person employed by the post-office, for secreting a letter containing a bill of exchange. The fact was proved against him, but the jury found that he had done it for the purpose of appropriating the postage. *In ca. res.* the judges held that, as the prisoner did not intend to misappropriate the bill, or to prevent the person to whom the letter was addressed from receiving it, the case was not within the spirit of the act, and a pardon was recommended. *H. T. 1826, R. v. Sharpe, R. & M. 126.*

Prisoner was indicted on 2 W. 4. c. 4. (a) as a person employed in the public service, and as such being guilty of embezzlement. It appeared that he was a letter-carrier, and had charged *treble* postage for a letter which was in fact a *double* one: the letter was directed to a *Mr. C.*, but it was *Mrs. C.* who had paid the postage, and to whom a return of the excess was refused. The court held this to be sufficient proof of the embezzlement; and further, that as prisoner had been acting as a letter-carrier, he was within the statute, and that there was no necessity for proving his appointment. *O. B. Sess. Dec. 1833, R. v. Borrett, 6 C. & P. 124.*

Where the prisoner was indicted, on 7 G. 3. c. 50. § 1., as a writer of letters, for secreting a letter containing a draft for payment of money, being in force at the time, and the money secured thereby being unsatisfied, it appeared that the draft, not being duly stamped, was totally unavailable. After argument, the judges held that the draft was of no value, and therefore not a bill or draft within the statute. *M. T. 1800, R. v. Pooley, C. C. R. 12. 3 B. & P. 11. 2 Russ. 231.*

But where the same prisoner was afterwards tried on § 2. of the same statute, for stealing a letter out of the post-office, it was ruled by the court, that an unstamped draft which was contained in it might be received in evidence for the collateral purpose of shewing that the prisoner stole the letter, though not for the purpose of recovering the money due on it. *R. v. Pooley (2d ca.), C. C. R. 31. Russ. 239.*

In an indictment on 7 G. 3. against prisoner, employed as post-boy and rider, for stealing a letter containing several bills, it was held by the judges, 1st, That a post-boy on horseback was a

Person employed by post-office secreting letter in order to get the postage.

Letter carrier, evidence of embezzlement.

Not necessary to prove his appointment.

Purloining draft not duly stamped.

Unstamped draft evidence for collateral purpose.

Description of servant of post-office.

Proof of one only of several notes alleged to be stolen.

No need to shew their execution.

Stealing country bank notes paid, but re-issuable.

Evidence.

Post-office marks.

Secreted letter found on prisoner.

rider; 2dly, That it was sufficient if the letter was shewn to contain any one of the bills, &c.; and 3dly, That it was not necessary, as against a wrongdoer, to prove the execution of the securities.

R. v. Ellins, C. C. R. 188. 2 Russ. 233.

Where a servant of the post-office secreted a letter containing the paid notes of a country bank, which were remitted for the purpose of being re-issued, it was held to fall within 7 G. 3. c. 50.

R. v. Ranson, C. C. R. 232.

Semb. that the post-office marks are sufficient evidence of the letter having been in the post-office as thereby is indicated; but the mark of a sum being paid, which was double postage, is not sufficient to prove that the letter contained an inclosure. The letter, being found on the prisoner, was allowed to be read in evidence, but not as proof of the facts stated therein. On trial of prisoner for secreting a letter containing a bill, it appeared that the letter and the bill were found on the prisoner; and it was marked that a sum had been paid, which amounted to double postage; but the clerk who had paid it, and put the letter into the post, was not called, and the prosecutor was dead. The judges held the conviction wrong, on the ground that there was not sufficient proof of a double letter having been put into the post. *R. v. Plumer, C. C. R. 264.*

Where prisoner was charged with secreting a letter containing bills "to be delivered to persons using the name and firm of Messrs. B. N. and H.," held no variance, though the parties themselves signed their names in matters of business without the Messrs. So, it was held sufficient to say the bills were *subscribed* by A. and B. without averring they were *made or drawn* by them. *H. T. 1501. R. v. Dawson, 2 East's P. C. c. 16. § 39. p. 605. 2 Russ. 234.*

Thomas Thomas was indicted on stats. 5 G. 3. c. 25. § 18. and 7 G. 3. c. 50. § 2., first, for robbing the mail in which letters were sent by the general post from *Bristol to London* of one letter, &c.; and secondly, for stealing and taking from out of a certain bag of letters, called the *Bristol bag*, for *London*, &c. one letter, &c. Both these offences were charged to have been committed in *Middlesex*, and the trial was had at the *Old Bailey*. The prisoner went on the outside of the mail from *Bristol to London*; part of the way on the coach-box, and part (through the counties of *Wilts* and *Berks*) on the guard's seat. There was no doubt of the fact of the prisoner's having taken the letters in question out of the mail during some part of the journey, and most probably while he was in the guard's seat. In answer to the objection on behalf of the prisoner, that there was no evidence to prove the offence in *Middlesex*, it was answered that the offence was not complete until the prisoner had quitted the coach, which was in *Middlesex*, or at any rate, that, having possession of the letters there, it was a new taking and offence in that county. The jury found the prisoner guilty, adding that the letters were not taken out of the bag in *Middlesex*, but in one of the other counties. Upon a reference to the judges in *Hilary* term 1795, they held the conviction wrong, the offence not having been proved where it was committed. *Thomas's case, O. B. Dec. 1794, 2 East's P. C. 605.*

But now this difficulty is removed by stat. 42 G. 3. c. 81. § 3. which, after reciting stat. 7 G. 3. c. 50. § 1., enacts, that the offences therein mentioned may be laid and tried (if committed in

Trial, where. On an indictment for robbing the mail, the robbery must be proved to have been committed in the county laid in the indictment. But now see stats. 42 G. 3. c. 81. § 3. *infra*, and 59 G. 3. c. 96. and 7 G. 4. c. 64. § 13.

42 G. 3. c. 81. Offences against 7 G. 3. c. 50. may be

England), either in the county where the offence is committed, or wherein the offender is apprehended; if in *Scotland*, either in the justiciary court of *Edinburgh*, or in the court of the circuit within which the felony is committed, or the offender apprehended.

By stat. 52 G. 3. c. 143. § 2, if any deputy, clerk, agent, letter-carrier, post-boy, or rider, or any other officer or person whatsoever employed by or under the post-office of *G. B.* in receiving, stamping, sorting, charging, carrying, conveying, or delivering letters or packets, or in any other business relating to the said office, shall, after the passing of this act, secrete, embezzle, or destroy any letter or packet, or bag or mail of letters with which he or she shall have been entrusted in consequence of such employment, or which shall in any other manner have come to his or her hands or possession, whilst so employed, containing the whole or any part or parts of any bank note, bank post bill, bill of exchange, exchequer bill, *South Sea* or *East India* bond, dividend warrant, either of the Bank, *South Sea*, *East India*, or any other company, society, or corporation, navy or victualling or transport bill, ordnance debenture, seaman's ticket, state lottery ticket or certificate, bank receipt for payment on any loan, note of assignment of stock in the funds, letter of attorney for receiving annuities or dividends, or for selling stock in the funds, or belonging to any company, society, or corporation, *American* provincial bill of credit, goldsmith's or banker's letter of credit, or note for or relating to the payment of money, or other bond or warrant, draught, bill, or promissory note whatsoever for the payment of money; or shall steal and take out of any letter or packet with which he or she shall have been so entrusted, or which shall have so come to his or her hands or possession, the whole or any part or parts of any such bank note, bank post bill, bill of exchange, exchequer bill, *South Sea* or *East India* bond, dividend warrant, either of the Bank, *South Sea*, *East India*, or any other company, society, or corporation, navy or victualling or transport bill, ordnance debenture, seaman's ticket, state lottery ticket or certificate, bank receipt for payment of any loan, note of assignment of stock in the funds, letter of attorney for receiving annuities or dividends, or for selling stock in the funds, or belonging to any company, society, or corporation, *American* provincial bill of credit, goldsmith's or banker's letter of credit or note for or relating to the payment of money, or other bond or warrant, draught, bill, or promissory note whatsoever for the payment of money; every person so offending, being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy.

By § 3, if any person shall, after the passing of this act, steal and take from any carriage, or from the possession of any person employed to convey letters sent by the post of *G. B.*, or from or out of any post-office or house or place for the receipt or delivery of letters or packets, or bags or mails of letters sent or to be sent by such post, any letter or packet, or bag or mail of letters sent or to be sent by such post, or shall steal and take any letter or packet out of any such bag or mail, every person so offending, and being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy; and

42 G. 3. c. 81.

tried where offender is apprehended.

52 G. 3. c. 143. Offences of persons employed by the post-office, how to be punished.

Capital.

Stealing letters, &c. from the post.

Capital.

Place of trial.

Prisoner charged as a sorter of letters, proof that he was employed to deliver them; variance fatal.

Conviction may take place under § 3, (*supra*) though prisoner was in service of the post-office.

The horse mail bags being left by the mail-rider, after he had taken possession of them, for a temporary

such offences shall and may be inquired of, tried, and determined either in the county where the offence shall be committed, or where the party shall or may be apprehended.

Thomas Cosham Brown was tried before *Dallas J.* and *Wood B.* at *O. B. April Sess. 1817*, on an indictment charging, that he being a person employed by and under the post-office, in certain business relating to the said office, that is to say, in sorting letters and packets brought to the general post-office in *London* (to wit), at *Saint Mary Woolnoth*, on the 21st *February*, a certain letter then lately before sent by the post from the town of *Kingston-upon-Hull* to the said general post-office, directed to *Sir James Shaw*, and containing therein one bill of exchange for payment of 19*£*. (and several other bills of exchange set out in the indictment,) came to his hands and possession while he was so employed as aforesaid. And that he being such person employed, feloniously did secrete the said letter containing the said bills of exchange, the property of *Robert Copeland Plase*, *Robert Harrison*, *James Kiere Watson*, *Henry Plase*, and *Thomas Bentley Locke*, against the statute, &c. 2d count charged him with stealing the bills out of a letter. 3d and 4th counts, for secreting a packet containing like bills, and for stealing like bills thereout. There were four other counts, the same as the first four, only stating the bills to be the property of *Sir Charles Price* baronet, *Sir William Kay* baronet, *Charles Price*, and *Israel Thomas Coleman*. A 9th count charged him with stealing out of a certain post-office in *London*, a certain other letter then lately sent by the post from the town of *Kingston-upon-Hull* to *London*, directed for, and to be delivered to, a certain person at *London* (to wit), the said *Sir James Shaw*, and one other letter, against the statute, &c. And a 10th count, the same as the 9th, only stating it to be a packet instead of a letter. The substance of the evidence in support of the 1st count was, that the prisoner was employed in the post-office to deliver letters, but not to sort them, the two employments being distinct, and the prisoner having assisted in sorting the letters from which the letter in question was taken, being voluntary and gratuitous on his part, and not in any manner connected with his duty or employment. And on this ground the prisoner was acquitted on the first count, but found guilty on the 9th. It was objected on behalf of the prisoner that *stat. 22 G. 3. c. 143. § 3.* on which the ninth count was framed, does not apply to persons being in the service of the post-office, and for this *Pooley's case (a)*, 1 *East's P. C. Add. xvii.* was cited. The objection was over-ruled, and the prisoner found guilty, but judgment was respited, and the point submitted for the consideration of the judges, who, on conference, determined that the conviction was right. *Rex v. Brown*, *O. B. April, 1817*, 2 *Russ. 237. C. C. L. 32. n. (a)*.

Rex v. Robinson, *Carlisle Spring Ass. 1819, cor. Wood & 2 Stark. N. P. 485.* The prisoner was indicted for stealing from the possession of one *Matthew Dobson*, he the said *M. D.* being a person employed to convey letters sent by the post of *G. B.*, to wit, by the post from *Wetherby* to and from *Harrogate* and

Knaresborough, four bags of letters sent by the post, &c. against the form of the statute, &c. The second count charged the prisoner with stealing one mail of letters, &c. It appeared on the evidence, that the person mentioned in the indictment (*Matthew Dobson*) was the mail-rider from *Wetherby*, *Harrowgate*, and *Knaresborough*, and that, on the morning of the 30th January, he had fixed the mail portmanteau on the saddle of his horse, containing the four bags of letters, and slung the bridle of his horse to a staple at the stable-door of the post-office, about thirty yards from the door of the house; he then went into the house to put on a great coat, and staid two minutes; in the interval the robbery took place. On the part of the prisoner it was contended, that the offence did not come within the meaning of the stat. 52 G. 3. c. 143. § 3., the words of which are, If any person shall, after the issuing of this act, steal and take from any carriage, or from the possession of any person employed to convey letters sent by the post of G. B.; or from or out of any post-office, or house or place for the receipt or delivery of letters, or packets, or bags, or mails of letters, sent, or to be sent, by such post, &c., since this was not stealing from the possession of *Matthew Dobson*. That by possession, as the word was used in this statute, was meant actual possession. The first part of the clause in question related to stealing from a carriage; but, in order to bring an offender within those words, there must be a taking actually from the carriage; if the taking was from the road by the side of the carriage, it would not be sufficient; and, therefore, by analogy, the taking from the possession, must mean the actual possession. If it were sufficient to be within thirty yards, why would not 300 or 3000 yards suffice? It is merely sufficient, that the person entrusted has the *animus vertendi*, where would be the limit? If he staid forty minutes in the house to dine, would that be sufficient? Penal statutes, and especially statutes so penal as this, have always been construed strictly. The stealing a purse from under the pillow of the owner, would be held not to be within the statute of *Anne* against stealing in a dwelling-house, because it was under the protection of the person and not of the house. A similar distinction was applicable in this case; the robbery was not from the person; the mail might rather be considered as under the protection of the house, than of the postmaster. The stealing must be from the presence of the person employed; it could not be said to be from his possession when he was not present, as if he went to the alehouse to drink, a mile upon business. *Topping*, *Raine*, and *Eden*, for the crown, submitted that it might be so, as had been contended, with respect to stealing from a carriage; but that, in the present instance, the mail was to be considered as in the possession of *Dobson*: the postmaster had parted with the possession, and they assimilated the case to that of a bailee or a waggoner.—*Williams* in reply. The case of the waggoner depends upon his liability over to the owner; that is a case of proprietorship, and, according to that argument, there would be no limit in respect of distance; the proper limit is that of personal presence; according to the argument, the mail would be equally in the possession of the postmaster.—*Good B.* I am of opinion, that there is no solid ground of objection; the charge is, that the prisoner stole the bags from the possession of *Matthew Dobson*. The facts are, that the mail-rider

R. v. Robinson.

purpose for two minutes, were stolen during his absence; the case is within the stat. 52 G. 3. c. 143. § 3.

R. v. Robinson. had actually taken possession of the bags, and had strapped them upon the horse; he then went into the house. The act seems to have made it unnecessary to steal from the person; it does not say from the person, but from the possession, and is therefore more general. The person employed had possession in the first instance, had he then abandoned that possession? If the bags were not in his possession when they were stolen, in whose possession were they? It might as well be contended, that if he got off his horse on the road for any occasional purpose, and the bags were then to be stolen, the stealing of them would not be within the act. The cases of stealing in a dwelling-house, and of stealing privately from the person, are very distinguishable. I have no doubt that he had the possession, and therefore the objection is overruled. The prisoner was convicted.

Servant at a receiving-house, who assisted in making up the bag, not a person employed by the post-office.

Taking from the shop of the house, the same as taking from the letter-box.

Carrier of letter-bag having weekly pay from the post-master, which was allowed in the quarterly account, held a person in the employ of the post-office.

Evidence of a separate felony is admissible, if necessary to prove the case.

52 G. 3. c. 143. Accessories to servants of post-office offending, &c.

The prisoner was charged in different ways, under 52 G. 3. c. 143., with secreting and embezzling and stealing a letter, and notes in it. It appeared that he was employed as a servant to clean boots, &c. for a person who kept a shop in *London*, which was also a receiving-house for the general post-office; and prisoner used also to assist in tying up and sealing the post-office bag. The letter stolen had been delivered there, but there was no precise evidence, whether it had been put in the letter-box, or left in the shop. The counts charging prisoner as a person employed by the post-office were abandoned; and *Littledale J.* held, that it was equally a stealing from a "place for the receipt of letters," whether the letter was taken from the box, or any part of the shop. *O. B.* 1831, *R. v. Pearson*, 4 C. & P. 572.

Indictment on 52 G. 3. c. 143., for stealing a letter from the post-office containing bank notes. The prisoner was employed by his sister-in-law, who kept the post-office at *Dursley*, at fourteen shillings a week, to carry the letter-bag from thence to *Berkeley*, but never sorted the letters or opened the bag; and the post-office allowed her in the quarterly account the weekly sums which she so paid the prisoner: on this, *Patteson J.* held that he was a person in the employ of the post-office. The evidence was, that the prisoner took notes out of the letter of one *C.*, and placed them in the letter of one *B.*, out of which he had taken other notes to a like amount; it was objected, that evidence ought not to be received which traced *B.*'s notes to the prisoner, as being a separate and distinct felony; but it was held admissible, as being part of the same transaction, and an essential circumstance in making out the case of stealing the letter containing *C.*'s notes. *Oxford Ass.*, August 1831, *R. v. Salisbury*, 5 C. & P. 155.

And by stat. 52 G. 3. c. 143. § 4., if any person shall, after the passing of this act, counsel, command, hire, persuade, procure, aid or abet any such deputy, clerk, agent, letter carrier, post-boy, or rider, or any officer or person whatsoever employed by or under the said office, in receiving, stamping, sorting, charging, carrying, conveying, or delivering letters or packets, or in any other business relating to the said office, to commit any of the offences herein-before mentioned, or shall, with a fraudulent intention, buy or receive the whole or any part or parts of any such security or instrument as herein-before described, which shall have been contained in, and which, at the time of buying or receiving thereof, he or she shall know to have been contained in any such letter or

packet so secreted, embezzled, stolen, or taken by any deputy, clerk, agent, letter carrier, post-boy, or rider, or any other officer or person so employed as aforesaid, or which such person, so buying or receiving as aforesaid, shall at the time of buying or receiving thereof know to have been contained in and stolen and taken out of any letter or packet stolen and taken from or out of any mail or bag of letters sent and conveyed by such post, or from or out of any post-office or house, or place for the receipt or delivery of letters or packets, or bags or mails of letters sent or to be sent by such post; every person so offending, and being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy, and shall and may be tried, convicted, and attainted of such felony, as well before as after the trial or conviction of the principal felon, and whether the said principal felon shall have been apprehended or shall be amenable to justice or not.

By stat. 42 G. 3. c. 81. § 4., it is enacted, that if any person shall wilfully secrete, keep, or detain, or being required to deliver up by any deputy, clerk, agent, letter carrier, post-boy, rider, driver, or guard of any mail coach, or any other officer or person whatsoever employed in any business relating to the post-office, shall refuse or wilfully neglect to deliver up any mail or bag of letters sent or conveyed, or made up in order to be sent or conveyed by the post, or any letter or packet sent by the post, or put for that purpose into any post-office, or house or place for the receipt or delivery of letters, &c., and which letter or packet, bag, or mail of letters, shall have been found or picked up by the same, or any other person, or shall by or through accident or mistake have been left with or at the house of the same, or any other person; each and every person so offending shall be deemed to be guilty of a misdemeanor, to be punished by fine and imprisonment.

And stat. 5 G. 4. c. 20. § 10., reciting, that serious loss, inconvenience, and injury may be sustained by the wilful embezzling or purloining of printed votes or proceedings in parliament, and printed newspapers sent or to be sent by the post, within the U. K., &c. enacts, that from and after the passing of this act, (*viz.* 12th April, 1824,) if any deputy, clerk, agent, letter carrier, letter sorter, post-boy, or rider, or any other officer or person whatsoever employed, or hereafter to be employed, in receiving, stamping, sorting, charging, conveying, or delivering letters or packets, or in any other business relating to the post-office in the said U. K., shall wilfully purloin, embezzle, secrete, or destroy, or shall wilfully permit or suffer any other person or persons to purloin, embezzle, secrete, or destroy any printed votes or proceedings in parliament, or printed newspapers, or any other printed paper whatsoever, sent or to be sent by the post without covers, or in covers open at the sides, each and every such person or persons so offending shall be deemed and taken to be guilty of a misdemeanor, and be punished by fine and imprisonment; and such offences shall and may be inquired of, tried, and determined, either in the county where the offence shall be committed, or where the party shall or may be apprehended.

By 2 W. 4. c. 15., authorising the postmaster-general (§ 10.) to contract for the conveyance of mails by *British* ships, it is pro-

52 G. 3. c. 143.

Punishment,
capital.

Trial.

42 G. 3. c. 81.
Persons secret-
ing or refusing
to deliver up
letters, which
shall be found
or picked up,
&c. guilty of a
misdemeanor.

5 G. 4. c. 20.
Persons em-
ployed in the
post-office
embezzling
votes, parlia-
mentary pro-
ceedings, or
newspapers, &c.

Misdemeanor.

Place of trial.

2 W. 4. c. 15.
Mails, letters,
&c. stolen from

vessels employed by post-office.

vided (§ 11.), that if any person shall steal or unlawfully take away any bag or mail sent by a ship so employed, or any letter or packet out of such bag or mail, or unlawfully open such bag or mail, it shall be felony, subject to transportation or imprisonment; and, if committed within the jurisdiction of the Admiralty, to be dealt with, &c. as other felonies so committed.

Præmunire.

[27 Ed. 3. c. 1. — 16 R. 2. c. 5. — 5 El. c. 1.]

What it is.

PRÆMUNIRE is so called from a word in the writ, *Præmunire facias præfatum A. B. quod tunc sit coram nobis, &c.* where *præmunire* is used for *præmonere*, to warn the person to appear, as is directed in stat. 27 Ed. 3. c. 1. hereafter following. 1 Inst. 129.

Power of justices of the peace.

Notwithstanding that *præmunire* is not within the letter of the commission of the peace, yet, inasmuch as it is against the peace of the king and of the realm, any justice of the peace may either on his own knowledge or the complaint of others cause any person to be apprehended for such offence, and may take the examination of the person so apprehended, and the information of all who can give material evidence against him, and put the same in writing, and bind over the witnesses to the K. B. or gaol delivery; and certify his proceedings to the same court to which he shall bind over such informers. 2 Haw. c. 8. § 34. *Hals' Sum.* 168.

27 Ed. 3. c. 1. Impleading any out of the realm, or impeaching judgments in king's courts.

By stat. 27 Ed. 3. c. 1., called the statute of provisors, they who shall draw any out of the realm in plea whereof the cognizance pertaineth to the king's court, or which do sue in any other court, to defeat or impeach the judgments given in the king's court, shall have a day, containing the space of two months, by warning to be made to them, by the sheriffs or other officers, to appear to answer in their proper persons for the contempt; and if they come not at the said day in their proper person to be at law, they, their procurators, attorneys, executors, notaries, and maintainers, shall from that day forth be put out of the king's protection, and their lands, goods, and chattels forfeit to the king, and their bodies wheresoever they may be found shall be taken and imprisoned, and ransomed at the king's will. And upon the same a writ shall be made, to take their bodies and to seize their lands, goods, and possessions, into the king's hands. And if it be returned that they be not found, they shall be put in exigent, and outlawed.

16 R. 2. c. 5. Suing out foreign process a præmunire.

And by stat. 16 R. 2. c. 5., commonly called the statute of *præmunire*, and to which the several subsequent statutes do refer, both those who pursue, or cause to be pursued, in the court of Rome, or elsewhere, any processes or instruments or other things whatsoever, which touch the king, against him, his crown and regality, or his realm, and also those who shall bring, receive, notify, or execute them, and their faulters and abettors, shall be *out of the king's protection*; and their *lands and tenements, goods and chattels, forfeit* to the king; and they shall be attached by their bodies, if they may be found, and brought before the king and his council, there to answer; or process shall be made against them by

præmunire facias, in manner as it is ordained in other statutes of provisors.

And in these two statutes, as above recited, are contained the pains and penalties of what is called the *præmunire*. They were intended chiefly to oppose the papal encroachments in this realm; but the penalties thereof, by several subsequent statutes, are extended to other cases which have no relation to popery.

So odious was this offence formerly, that a man who was attainted on the same might have been slain by any one without danger of law; because it was provided by law, that a man might do to him as to the king's enemy, and a man may lawfully kill an enemy; and therefore by stat. 5 *El. c. 1.* it is enacted that it shall not be lawful for any one to slay any person attainted in or upon a *præmunire*. 1 *Inst.* 130.

But he is so far out of the king's protection, that he is disabled to bring an action for any injury whatsoever. And no one knowing him guilty can with safety give him aid, comfort, or relief. *Inst.* 129, 130. 1 *Haw. c. 19. § 47.*

And Mr. *Hawkins* says it has been questioned, whether he hath a right to demand surety of the peace. But *Lambard* and *Dalton*, which are the authorities he cites for it, incline to think that he hath such right. *Lambard* alleges for it the statute of 5 *El.* above mentioned; and *Dalton* asserts it without doubting. *Lamb. 80. Dalt. 272. 1 Haw. c. 60. § 3.*

Tenant in tail shall only forfeit lands during life; for albeit the statute enacteth that lands and tenements shall be forfeited, that must be understood of such an estate as he may lawfully forfeit, and that is, during his own life. 1 *Inst.* 130.

Attainder in *præmunire* worketh no corruption of blood. *Inst.* 391.

Prosecutions, however, for a *præmunire* are unheard of in our courts. The only instance of one to be found is in the State Trials; where the penalties of a *præmunire* were inflicted on some persons for refusing to take the oath of allegiance in the reign of *Charles 2.* See 6 *Howell's St. Tr.* 201. & 210.

Directed against papal encroachments.

Persons guilty of a *præmunire*, might formerly have been killed. Altered by 5 *El. c. 1.*

Are disabled to bring an action.

Whether he may demand surety.

Tenant in tail.

No corruption of blood.

No modern prosecutions on it.

Presentment.

A PRESENTMENT is that which the grand jury find and present to the court, without any indictment delivered to them; which is afterwards reduced into the form of an indictment, and in nothing else differs from an indictment.

The presentment is drawn up in *English* by the jury, in a short note, for instructions to draw the indictment by; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it; and it differs from an indictment, in that an indictment is drawn up at large, and brought ingrossed to the grand jury to find. 2 *Lill. Abr.* 353. 2 *Inst.* 789.

There are other presentments of churchwardens, constables, surveyors of the highways, and justices of the peace; all which may be seen under their proper titles.

What it is.

Distinction from an indictment.

By churchwardens, &c.

Prison-breaking.

See tit. *Escape*, tit. *Gaols*, and tit. *Restue*.

[3 Ed. 1. c. 15. — 1 Ed. 2. st. 2. — 4 G. 4. c. 64.]

Prison-break-
ing at common
law.

IT seemeth that at the common law all prison breaches were felonies, if the party were lawfully in custody for any cause whatsoever. 2 *Haw. c. 18. § 1*.

By statute.

But by the following statute, which is called the statute *de fractigentibus prisonam*, the severity of the common law is moderated: in the explication of which statute will be contained the whole learning relating to this subject.

1 Ed. 2. st. 2.
In what cases
felony.

The statute is this: "Concerning prisoners which break prison, the king willeth and commandeth that none that breaketh prison shall have judgment of life or member for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convict thereupon, according to the law and custom of the realm."

Prison broken
by a stranger.

If the prison be broken by a stranger, and not by the prisoner, or by his procurement, this is not felony in the prisoner. *Hale's Sum.* 108.

What shall be
deemed a pri-
son.

It seems clear that any place whatsoever wherein a person under a lawful arrest for a supposed crime is restrained of his liberty, whether in the stocks, or street, or in the common gaol, or the house of a constable, or private person, is properly a prison within this statute; for imprisonment is nothing else but a restraint of liberty. 2 *Haw. c. 18. § 4*.

And therefore this extendeth as well to a prison in law as a prison in deed. 2 *Inst.* 589.

Must be an ac-
tual breaking.

But there must be an actual *breaking*; for if the door be open and he goes out, it is not felony, but a misdemeanor only. 2 *Inst.* 589. 2 *Haw. c. 18. § 9*.

Breaking,
what consti-
tutes.

Where the prisoner made his escape by tying two ladders together, and so getting over the walls of the gaol, and in so doing threw down some bricks placed loose at the top of the wall, it was held unanimously by the judges, that this amounted to prison breach. *R. v. Haswell, E. T. 1821, C. C. R. 458*.

Punishment.

The prisoner in the above case had been convicted of horse-stealing, and sentence of death passed upon him; but was afterwards pardoned on condition of being imprisoned and kept to hard labour for two years, and from thence he made his escape: the judges held, that this was punishable as a common law felony. *S. C. ib.*, and 1 *Russ.* 382.

Prison on fire.

But if the prison be fired without the privity of the prisoner, he may lawfully break to save his life. *Hale's Sum.* 108.

Prison broke,
but no escape.

Also it seems that no breach of prison will amount to felony, unless the prisoner escape. 2 *Haw. c. 18. § 12*.

How punish-
able.

That none that breaketh prison shall have judgment of life or member] — that is, shall be guilty of felony. But nevertheless he is still punishable as for a high misprision, by fine and imprisonment; for it cannot be thought the meaning of the statute, in ordaining that such offences shall not be punished as capital ones, to intend that they shall not be punished at all. 2 *Haw. c. 18. § 21*.

Where not
felony.

Nevertheless, by stat. 3 Ed. 1. c. 15. (now repealed), those who have broken prison were not *bailable* by justices of the peace; and that for two reasons: 1. Because it carries a presumption of guilt; and, 2. Because it is a superadded offence to the former for which they stood committed. 2 Hale, 133. But see tit. *Bail*, ante.

Except the cause for which he was taken and imprisoned did require such judgment.] This is to be intended of a lawful cause; and therefore *false imprisonment* is not within this act. 2 Inst. 590.

And by stat. 4 G. 4. c. 64. § 43., it is enacted, That if any person shall convey or cause to be conveyed into any prison to which this act shall extend, any mask, vizard, or other disguise, or any instrument or arms proper to facilitate the escape of any prisoners, and the same shall deliver or cause to be delivered to any prisoner in such prison, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper of such prison; every such person shall be deemed to have delivered such vizard or disguise, instrument, or arms, with intent to aid and assist such prisoner to escape, or attempt to escape; and if any person shall, by any means whatever, aid and assist any prisoner to escape, or in attempting to escape from any prison, every person so offending, whether an escape be actually made or not, shall be guilty of felony, and being convicted thereof, shall be transported beyond the seas for any term not exceeding fourteen years.

§ 44. And to the intent that prosecution for escapes, breaches of prison, and rescues, may be carried on with as little trouble and expense as is possible, it is enacted, that any offender escaping, breaking prison, or being rescued therefrom, may be tried either in the jurisdiction where the offence was committed, or in that where he or she shall be apprehended and retaken; and in case of any prosecution for any such escape, attempt to escape, breach of prison, or rescue, either against the offender escaping or attempting to escape, or having broken prison, or having been rescued, or against any other person or persons concerned therein, or aiding, abetting, or assisting the same, a certificate given by the clerk of assize, or other clerk of the court in which such offender shall have been convicted, shall, together with due proof of the identity of the person, be sufficient evidence to the court and jury of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced.

Imprisonment is a restraint of a man's liberty under the custody of another, by lawful warrant, in deed, or in law. Lawful warrant is either when the offence appeareth by matter of record, as when the party is taken upon an indictment; or when it doth not appear by matter of record, as when a felony is done, and the offender by a lawful *mittimus* is committed to gaol for the same: but between these two cases there is a great diversity; for in the first case, whether any felony were committed or no, if the offender be taken by force of a *capias*, the warrant is lawful, and if he break prison, it is felony, although no felony were committed: but in the other case, if no felony be done at all, and yet he be committed to prison for a supposed felony, and break prison, this is no felony, for there is no cause. 2 Inst. 590.

Not bailable under 3 Ed. 1. c. 15.

4 G. 4. c. 64. Conveying vizards, &c. into prisons to assist prisoners to escape.

Transportation for assisting prisoners to escape.

Felony.

Offenders making escapes, &c.

Where they may be tried.

Certificate of conviction.

Imprisonment,] what.

On indictment.

By mittimus.

Felony by relation not sufficient.

So that the cause must be just and not feigned, for things feigned require no judgment. Thus, if a man give another a mortal wound, for which he is committed to prison, and breaketh prison, and the other dieth of the wound within the year, this death hath relation to the stroke: but because relations are but fictions in law, and fictions are not here intended, this prison-breaking is not felony. *2 Inst. 591.*

So that the offence for which the party was imprisoned must be a capital one at the time of the offence, and not become such by a matter subsequent. *2 Haw. c. 18. § 14.*

Offence complete, though it be not known for what cause the prisoners are confined.

The breaking of a prison where traitors are in durance, and causing them to escape, is treason; although the parties did not know that traitors were there; and so to break a prison whereby felons escape, this is felony, though they do not know them to be in prison for such offence. *Kel. 77. 3d res. Acc. Benstead's case, Cro. Car. 583. See R. v. Shaw and another, C. C. R. 586.*

Charge in the mittimus must be certain.

And the cause must be expressed in the *mittimus*, although not so certainly as in an indictment, yet with such a convenient certainty as it may appear judicially that the offence requireth such judgment; as, not for felony generally, but for felony in stealing such a horse, and the like. *2 Inst. 591.*

And in the event must appear to be felonious.

But if the offence for which the party is committed be supposed in the *mittimus* to be of such a nature as requires a capital judgment; yet if in the event it be found to be of an inferior nature, and not to require such a judgment, it seems difficult to maintain that the breaking of the prison, on a commitment for it, can be felony; for the words of the statute are, *except the cause for which he was taken and imprisoned did require such judgment*; and here it appears that the offence which is the cause of his imprisonment doth not require such a judgment. *2 Haw. c. 18. § 15.*

Suspicion of felony.

But if a man be committed by lawful warrant for suspicion of felony done, if he break prison he may be indicted for that escape, albeit the commitment be for suspicion of felony, and yet no judgment can be given against him for suspicion, but for the felony itself, whereof he is suspected. *2 Inst. 592.*

Informality of warrant.

If the party has been taken up upon such strong causes of suspicion as will be a good justification of his arrest and commitment, it seems it will be felony in him to break the prison, though he happen to have been committed by an informal warrant. *1 Rex 379.*, and the authorities there cited.

Indictment for prison-break must aver particulars.

And an indictment that such a person *feloniously broke the prison* generally is not good; but it ought to rehearse the *specality* of the matter, that he being imprisoned for such or such felony broke the prison. *2 Inst. 591.*

Not felony unless prisoner be charged with offence liable to judgment of life or member.

But if the party be only arrested for and in his *mittimus* charged with a crime which doth not require judgment of life or member, as petit larceny, or homicide by self-defence or by misadventure, and the offence be in truth no greater than the *mittimus* doth suppose it to be, it is clear from the express words of the statute that the breaking of the prison cannot amount to felony. *2 Haw. c. 18. § 15.*

New felony is within it.

But if a felony be made by a subsequent statute, and an offender is committed thereupon; if he break prison, it is felony. For since all breaches of prison were felonies by the common law, which is restrained by this statute in respect only of im-
prisonment.

sonment for offences not capital; when an offence becomes capital, it is as much out of the benefit of the statute, as if it had always been so. *Hale's Sum.* 108.

Also it is said that the party may be arraigned for prison-breaking, before he be convicted of the crime for which he was imprisoned; for that it is not material whether he were guilty of such crime or not; for the words of the statute are, *for which he was taken and imprisoned.* 2 *Haw. c.* 18. § 16.

But if he be first indicted and acquitted of the principal felony, he shall not be indicted for the breach of prison afterwards; for it being clear that he was not guilty of the felony, he is in law as a person never committed for felony, and so his breach of prison is no felony. 1 *Hale*, 612.

But the gaoler shall not be punished as a felon for the party's breach of prison, unless he voluntarily consented to it; but it seems to be a negligent escape in the gaoler, for which he may be punished by fine and imprisonment, because there wanted either that due strength in the gaol, or that due vigilance in the gaoler or his officers, that should have prevented it; and if gaolers might not be punished for this as a negligent escape, they would be careless either to secure their prisoners or to retake them that escape. 1 *Hale*, 601.

And therefore if a criminal endeavouring to break the gaol assault his gaoler, he may be lawfully killed by him in the affray. 1 *Haw. c.* 28. § 13.

By 59 G. 3. c. 136. § 17., any convicts confined in the penitentiary at *Millbank*, breaking prison or escaping, shall be punished with an additional confinement not exceeding three years; and if, being so punished by such addition to his term of confinement, he shall afterwards be convicted of a second escape or breach of prison, he shall be guilty of felony without benefit of clergy. And if any convict confined in the penitentiary shall attempt to break prison or escape, or shall forcibly break out of his cell, or make any breach therein with intent to escape, he shall be punished with an additional confinement not exceeding six calendar months.

By statutes relating to particular crimes, the offence of prison-breaking is made the subject of special enactment, which belongs to the title treating of such offences.

May be arraigned before conviction for principal felony.

Aliter if acquitted.

Not felony in gaoler unless consenting.

Prisoner trying to break gaol.

Escape, prison-breach, or attempt, &c. from penitentiary.

Special enactments.

Indictment for Prison-breaking, by escaping from a Constable.

County of _____ } *THE* jurors for our lord the king upon their
to wit. _____ } oath present, That A. C. late of _____ yeoman,
constable of our said lord the king in and for the
town of _____ in the said county, on the _____ day of
_____, in the _____ year of the reign of _____, at
within the town and constablewick aforesaid in the county aforesaid, did take and arrest one A. O. late of _____ labourer,
on suspicion of having committed a certain felony, in feloniously taking and leading away one black gelding, the property of _____, of the value of _____, and thereupon he the said A. O. under the custody of him the said A. C. the constable aforesaid, was brought before J. P. esquire, one of the justices of our said lord the king assigned to keep the peace in the said county, and also to hear and

determine divers felonies, trespasses, and other misdemeanors within the said county committed; and he the said J. P. by his warrant directed to the said A. C. and others, did command the said A. C. to carry and convey the said A. O. to the gaol of our said lord the king at _____ in the county aforesaid, there to be safely kept until he should be lawfully delivered from thence; by virtue of which said warrant he the said A. O. was taken and detained by him the said A. C.; and he the said A. C. was conveying and carrying him the said A. O. to the gaol aforesaid, afterwards, to wit, on the _____ day of _____ in the year aforesaid, he the said A. O. of _____ aforesaid, in the county aforesaid, with force and arms did feloniously break away and escape from and out of the custody of him the said A. C. the constable aforesaid, against the will of him the said A. C., and against the peace of our said lord the king, his crown and dignity.

Indictment for breaking out of Gaol.

County of _____ } *THE* jurors for our lord the king upon their oath
to wit. } present, That A. O. late of _____ in the county
aforesaid, labourer, _____ on the _____ day of
_____ in the _____ year of the reign of _____, at _____
aforesaid, in the county aforesaid, was arrested, imprisoned,
and detained in the gaol of our said lord the king for a cer-
tain felony by him committed; that is to say, for feloniously
taking and leading away one black gelding, the property of _____
of the value of _____; and that he the said A. O. on the _____
day of _____ in the year aforesaid, with force and arms the
aforesaid gaol of our said lord the king at _____ aforesaid in the
county aforesaid feloniously did break, and thereby did escape from
and out of the said gaol, against the peace of our said lord the king,
his crown and dignity.

Prisoners of War.

[52 G. 3. c. 156.]

52 G. 3. c. 156.
Punishment of
persons aiding
prisoners of
war to escape.

BY stat. 52 G. 3. c. 156., every person who shall, from and after the passing of this act, knowingly and wilfully aid or assist any alien enemy of H. M., being a prisoner of war in H. M.'s dominions, whether such prisoner shall be confined as a prisoner of war in any prison or other place of confinement, or shall be suffered to be at large in H. M.'s dominions, or any part thereof, on his parole, to escape from such prison or other place of confinement, or from H. M.'s dominions, if at large upon parole, shall, upon being convicted thereof, be adjudged guilty of felony, and be liable to be transported as a felon for life, or for such term of fourteen or seven years as the court before whom such person shall be convicted shall adjudge.

Felony.

Persons guilty
of aiding though
they do not
assist the pri-

§ 2. Every person who shall knowingly and wilfully aid or assist any such prisoner at large on parole in quitting any part of H. M.'s dominions where he may be on his parole, although he shall not aid or assist such person in quitting the coast of any part of H. M.'s

minions, shall be deemed guilty of aiding the escape of such person under the provisions of this act.

§ 3. If any person or persons owing allegiance to H. M., after such prisoner as aforesaid hath quitted the coast of any part H. M.'s dominions in such his escape as aforesaid, shall knowingly and wilfully upon the high seas aid or assist such prisoner in escape to or towards any other dominions or place, such person shall also be adjudged guilty of felony, and be liable to be transported as aforesaid: and such offences committed upon the high seas and not within the body of any county, shall and may be inquired of, tried, heard, determined, and adjudged in any county within the realm, in like manner as if such offences had been committed within such county.

§ 4. This act shall not be deemed or taken to prevent any person committing any offence mentioned in this act from being prosecuted in such manner as he might by law have been prosecuted if this act had not passed; but nevertheless no person prosecuted otherwise than under the provisions of this act, shall be liable to be prosecuted for the same offence under the provisions hereof; and no person prosecuted under the provisions of this act, shall for the same offence be liable to be otherwise prosecuted.

Where *H. M.*, a female, being indicted for a misdemeanor, in aiding the escape of a prisoner at war, was proved to have taken a *French* prisoner of war in a chaise, and to have carried him a certain distance for the purpose of causing him to escape, but it appeared that the *French* prisoner himself had no intention of going away, but was acting in concert with the agent of the transport board, in order to detect *H. M.*; on ca. res., the judges held the conviction wrong, inasmuch as the prisoner at war never escaped, nor intended to escape. *R. v. Hannah Martin, C. C. R.* 186.

It was held to be an indictable offence to supply prisoners at war with bread made of unwholesome materials, and not fit to be eaten by man. It appeared in this case, that the bread was so furnished by a person who was under a contract with government, that that circumstance was not stated in the indictment. *R. v. Reeve, 2 East, P. C. 821.*

52 G. 3. c. 156.

soner in quitting the coast. Punishment of persons assisting, on the high seas, prisoners to escape.

Felony.

Place of trial.

Offences may be tried otherwise than under the provisions of this act.

Offence not complete where the prisoner at war has no design of escaping.

Indictable to supply unwholesome food to prisoners at war.

Process.

Process prior to Indictment, not referable to Appearance in Courts of Record.

See *tit. Summons, Warrant, Search Warrant, Commitment.*

Process after Indictment, and referable to Appearance in Courts of Record; and herein,—

- I. To compel an Appearance.
- II. Of Outlawry for Non-appearance.

I. To compel an Appearance.

[3 Ed. 1. c. 14. — 8 H. 6. c. 10. — 1 Ed. 4. c. 2. — 31 El. c. 3. — 21 J. 1. c. 4. — 29 C. 2. c. 7. — 48 G. 3. c. 58.]

Process by the commission.

BY the commission of the peace, the justices in sessions have power to make and continue processes upon indictments against the persons indicted, until they can be taken, surrender themselves, or be outlawed.

1 Ed. 4. c. 2.
Process on indictments taken in the tourn.

And by stat. 1 Ed. 4. c. 2., indictments and presentments taken in the sheriff's tourn shall be delivered to the next sessions, who may award process thereupon in like form as if they had been taken before themselves.

Process by justices out of sessions.

And the law also in several cases in express words directs process to be made by justices out of sessions; and in other cases by necessary implication; and where a statute doth give power to justices out of sessions to inquire, hear and determine, there they may make process to cause the party to come and answer, otherwise they cannot proceed to hear and determine; and this may be either before or after presentment or indictment, as the several statutes do require: before presentment or indictment, it is called a *warrant*; after presentment or indictment, it is properly called *process*. *Dalt. c. 193. p. 471.*

Process, what.

Commonly, an indictment, being but an accusation against a man, is of no force but only to put him to answer unto it. And hereof all process hath the name, because it *procedet* or goeth out upon former matter, either original or judicial. *Lamb. 519.*

No need of process, if the party be present.

And it seemeth plain from the nature of the thing, that there can be no need of process where the defendant is present in court, but only where he is absent. *2 Haw. c. 27.*

To be in the king's name.

The process ought to be in the name of the king. And if it issue from the king's bench, it ought to be under the teste of the chief justice: if it issue from any other court, there seems to be the same reason that it ought to be under the teste of the first in the commission. *2 Haw. c. 27. § 8.*

When returnable, in misdemeanor.

Upon an indictment in sessions (for a misdemeanor, not being felony), there must be fifteen days between the teste and return of the *venire*; but if the entry be by consent of parties, the *venire* may be returnable *immediatè*, and the trial be the same day. *3 Salk. 371.*

Process for felony.

Process on an indictment for felony, by the 25 Ed. 3. c. 14. is two *capias*, and then an exigent. *Hale's Sum. 209. 2 Hen. c. 27. § 115.*

Process for offences under felony.

The ordinary processes upon all indictments of trespass against the peace, or of other offences against penal statutes, not being felony, or a greater offence, are as follow: first, if the offender be absent, a *venire facias*, which is but in the nature of a summons to cause the party to appear, shall be awarded, except where other process is directed by some statute. *2 Hen. c. 27. § 9.*

Distress, if party has lands; if not, a *capias*, &c.

If it appear by the return of such *venire* that the party hath lands in the county whereby he may be distrained, the *distress infinite* shall be awarded from time to time till he do appear, and by force thereof he shall forfeit on every default so much as the

heriff shall return upon him in issues. But if a *nihil* be returned in such a *venire*, then three *capias*'s, that is, a *capias*, *alias*, and *luries*, shall issue. 2 Haw. c. 27. § 10.

Where the inhabitants of a parish are indicted or presented, the process is, first, a *venire*, then a *distringas*.

By stat. 21 J. 1. c. 4., by which all popular actions on penal statutes are restrained to their proper counties, the like process in every popular action, bill, plaint, suit, or information on a penal statute, before the quarter sessions, (or higher courts,) shall be awarded as in an action of trespass *vi et armis* at the common law.

And consequently, the process in all such suits must be by attachment or *pone per vadios*; and after by distress *infinite*, whereby the return the party appears to be sufficient, otherwise by *capias*. Haw. c. 27. § 13.

By stat. 48 G. 3. c. 58. § 1., it is enacted, that whenever any person is charged with any offence for which he may be prosecuted by indictment or information in the K. B., not being treason or felony, and the same shall be made to appear to any judge of the same court by affidavit, or by certificate of an indictment or information being filed against such person in the said court for such offence, such judge may issue his warrant under his hand and seal, and thereby cause such person to be apprehended and brought before him or some other judge of the same court, or before some justice of the peace, in order to his being bound with two sufficient sureties in such sum as the said warrant shall express, with condition to appear in the said court at the time mentioned in the said warrant, and to answer all and singular indictments or informations for any such offence; and if he shall neglect or refuse to become so bound, such judge or justice may respectively commit him to the common gaol of the county, city, or place where the offence shall have been committed, or where he shall have been apprehended, there to remain until he shall become bound as aforesaid, or be discharged by order of the said court in term time, or of one of the judges of the said court in vacation; and the recognizance to be thereupon taken shall be returned and filed in the said court, and shall continue in force until such person shall have been acquitted of such offence, or in case of conviction shall have received judgment for the same, unless sooner ordered by the said court to be discharged; and that where any person, either by virtue of such warrant of commitment, or by virtue of any writ of *capias ad respondendum* issued out of the said court, is now or hereafter shall be committed or detained in any gaol for want of bail, it shall be lawful for the prosecutor to cause a copy hereof to be delivered to such person, or to the gaoler, keeper, or turnkey of the gaol, wherein he is or shall be so detained, with notice indorsed, that unless such person shall, within eight days from the time of such delivery of a copy of the indictment or information as aforesaid, cause an appearance, and also a plea or demurrer to be entered in the said court to such indictment or information, an appearance and the plea of not guilty will be entered thereto in the name of such person; and in case he shall thereupon for the said space of eight days after such delivery of a copy of the indictment or information as aforesaid neglect to cause an appearance, and also a plea or demurrer, to be entered

Where inhabitants are indicted.

21 J. 1. c. 4.
Process on informations.

48 G. 3. c. 58.
When any person charged with an offence prosecutable by indictment or information (not being treason or felony) on certificate of indictment filed, any judge of K. B. may apprehend and hold the party to bail, &c.

48 G. S. c. 58.

in the said court, to such indictment or information, it shall be lawful for the prosecutor, upon affidavit made and filed in the said court of the delivery of a copy of such indictment or information, with such notice so indorsed, to such person, or to such gaoler, keeper, or turnkey, as the case may be, which affidavit may be made before any judge or commissioner of the said court authorised to take affidavits in the said court, to cause an appearance and the plea of not guilty to be entered in the said court to such indictment or information for such person, and such proceeding shall be had thereupon as if the defendant in such indictment or information had appeared and pleaded not guilty according to the usual course of the said court; and if upon the trial thereof the defendant so committed and detained shall be acquitted of all the offences charged there upon him, the judge before whom such trial shall be had, although he may not be one of the judges of the K. B., may order the defendant to be forthwith discharged out of custody as to his commitment as aforesaid, and such defendant shall be thereupon discharged.

Process on an escape.

If a defendant appear to an indictment of felony, and afterwards before issue joined make an escape either from his bail or from prison, the common *capias*, *alias*, and *pluries* shall be awarded against him, unless there had been an *exigent* before, in which case a new *exigent* shall be awarded. 2 *Haw. c. 7. § 19.*

3 Ed. 1. c. 14.
Process against accessories.

By stat. 3 *Ed. 1. c. 14.*, the *exigent* shall not be awarded against accessories until the principal shall be attained. 2 *Haw. c. 7. § 130.*

8 H. 6. c. 10.
Process into a different county.

By stat. 8 *H. 6. c. 10. § 2.*, on indictments for treason, felony, or trespass, against persons dwelling in other counties than where the indictment is taken, before any *exigent* awarded, presently after the first writ of *capias* awarded, and returned, another writ of *capias* shall be awarded, directed to the sheriff of the county whereof the person indicted was supposed to be conversant by the same indictment, returnable before the same justices or others before whom he is indicted, at a certain day containing the space of three months from the date of the said last writ, where the counties are holden from month to month; and where they are holden from six weeks to six weeks he shall have four months, until the return of the same writ; by which writ of second *capias* it shall be commanded to the same sheriff to take the person indicted by his body, if he can be found within his bailiwick; and if he cannot be found within his bailiwick, that the said sheriff shall make proclamation in two counties before the return of the same writ, that he which is so indicted shall appear before the said justices or others in the county, liberty, or franchise where he is indicted, at the day contained in the said last writ of *capias*, to answer to the king of the felony, treason, or trespass, whereof he is so indicted; after which second writ of *capias* so served and returned, if he which is so indicted come not at the day of the same writ of *capias* returned, the *exigent* shall be awarded. § 3. And every *exigent* and outlawry otherwise awarded or pronounced shall be void.

Where indictment is removed by *certiorari*.

And if any such indictment shall be removed by *certiorari*, then before the *exigent* awarded, presently after such first *capias* returned, another writ of *capias* shall be directed as before, returnable before the king in his bench.

§ 5. But this shall not extend to indictments taken in the county of *Chester*.

Chester excepted.

§ 6. Also, if any person be indicted of felony or treason, and at the time of the same felony or treason supposed was conversant within the county whereof the indictment maketh mention, the like process shall be made against the person so indicted, as hath formerly been used; that is, without sending process into the other county.

If residing in same county.

§ 4. But every person indicted in the form aforesaid, after he is lawfully acquitted by verdict, shall have an action upon his case, against the procurer of such indictment; and if such procurer be attainted thereof, the plaintiff shall recover treble damages. Which seemeth to be upon account of the distance at which he is supposed to live from the place where he is indicted, and consequently his extraordinary trouble in that behalf.

After acquittal.

Dwelling in other counties.] If the defendant be named of *B.* and late of *C.*, there is no need of any *capias* to the sheriff of the county where *C.* lies, because it appears that the defendant is at present conversant at *B.* But if a defendant be named of a certain place at present, but only late of *B.* and late of *C.* and late of *D.*, being all of them in counties different from that wherein the prosecution is commenced, a *capias* shall go to the sheriff of every one of those counties. 2 *Haw. c. 27. § 126.*

Where named of different counties.

Shall be void.] Not utterly void, but only voidable by writ of error. *Id.*

Voidable only.

County of Chester.] But it may be awarded into the counties adjacent to *Lancaster* and *Durham*; and it seems that it shall be directed to and returned by the chancellor of *Lancaster*, or bishop of *Durham*; and it hath been said that if he will not return it, the writ may be awarded as well as if he had returned it; because the court (of the sessions at least) cannot compel him to return it, and the prosecution might be unreasonably delayed, if the proceedings were to be stayed till he should return it. 2 *Haw. c. 27. § 125. Hale's Sum. 209, 210.*

Lancaster and *Durham*.

Mr. *Marrow* saith, that by the equity of this statute, if a person indicted in one county is imprisoned in another, the justices may award an *habeas corpus* to remove him before themselves. *Lamb. 526.*

Concerning the execution of the process, it is laid down as a general rule, that wherever the king is a party to the suit (as he certainly is to all informations and indictments), the process ought to be executed by the sheriff himself, and not by the bailiff of any franchise, whether it have the clause *non omitas* or not, and whether the defendant be within a franchise or in the county at large; for the king's prerogative shall be preferred to any franchise: but it is said, that this is to be intended only where in the grant of the franchise no mention is made of causes to which the king is a party. 2 *Haw. c. 27. § 17.*

To be executed by the sheriff;

though in a franchise.

And if the party be in a house, if the doors be shut, and the sheriff (having given notice of his process) demand admittance, and the doors be not opened, he may break open the doors, and enter to take the offender. 2 *Hale, 202.*

Breaking open doors.

Launock v. Brown, E. 59 G. 3., 2 B. & A. 592. Trespass for breaking and entering plaintiff's dwelling-house, and seizing a gun. Plea, not guilty. At the trial before *Holroyd J.* the defendants, two of whom were constables, and the third the game-

In the execution of process against any man in the case of a mis-

Launock v.
Brown.

demeanor, it is necessary to demand admittance, before the breaking of the outer door of the house can be legally justified.

Quære, if so in the case of felony?

keeper of the manor where the plaintiff resided, justified the trespass under a warrant granted by virtue of the stat. 22 & 23 Car. 2. c. 25. § 2., which empowers game-keepers and other persons, authorised by warrant under the hand and seal of any justice of the peace for the county, in the day-time to search the houses of unqualified persons suspected of having in their custody guns, &c. for the purpose of destroying game, and to seize, detain, and keep the same, to and for the use of the lord of the manor, or to cut to pieces and destroy them. The plaintiff was proved to be an unqualified person, but on the warrant being produced, several objections were taken to it as being informal. And it further appearing that the *outer* door of the plaintiff's house had been broken open without his having been previously requested to open it, the learned judge was of opinion that the justification was not sufficiently made out, and the plaintiff obtained a verdict. And now, on motion for a rule to shew cause why the verdict should not be put aside, and a nonsuit entered, it was contended that the defendants were justified in obeying the warrant; and that if the warrant was informal, the proper remedy of the plaintiff was not against them, but against the magistrate who had granted it. Then, as to the other objection, that the outer door was broken open, he contended that here there appeared to have been a misdemeanor on the part of the plaintiff; and that in the execution of criminal process, the outer door may be lawfully broken open. If a previous request be held to be necessary, it will be very inconvenient; for in many criminal cases, as, for instance, felony, it will give the party accused notice that he may make his escape. — *Abbott C. J.* I am of opinion that, in this case, the verdict is right. It is not at present necessary for us to decide how far, in the case of a person charged with felony, it would be necessary to make a previous demand of admittance before you could justify breaking open the outer door of his house; because, I am clearly of opinion that, in the case of a misdemeanor, such previous demand is requisite; and that is sufficient for the determination of the present case. It is reasonable that the law should be so; for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost. — *Bayley J.* The present verdict is quite right, because, even in the execution of criminal process, you must demand admittance before you can justify breaking open the outer door. That point was mentioned in the judgment of the court, in the case of *Burdett v. Abbott*, 14 East, 163. *Holroyd and Best* &c. concurred. R. R.

29 C. 2. c. 7.
Process on a
Sunday.

Process dis-
continued.

But by stat. 29 C. 2. c. 7. § 6., no person on the Lord's day shall serve or cause to be served any writ, process, or warrant, order or judgment (except in cases of treason, felony, or breach of the peace); but the service thereof shall be void, and the person serving the same shall be liable to answer damages to the party grieved, in the same manner as if he had done it without any writ, process, warrant, order, or judgment at all. See tit. *Lord's Day*.

It seems to be agreed that every suit, whether civil or criminal, and also every process in such suit against jurors, ought to be properly continued from day to day from its commencement to

its conclusion, without any the least gap or chasm; the suffering any such gap or chasm is properly called a *discontinuance*; and the continuing the suit by improper process, (as by a *capias* instead of a *distringas*;) or by giving the parties an illegal day, is properly called a *miscontinuance*; and if the justices before whom the matter is depending, do not come on the day to which it is continued, it is said to be *put without day*, and cannot be revived without a re-summons on re-attachment. 2 *Haw. c. 27. § 89. et seq.*

Now process may be discontinued several ways. As, 1. Where the second is not tested on the very same day on which the first is returnable. 2. Where this is a sessions intervening between the teste and the return of a *capias*, that the defendant may not be imprisoned an unreasonable time. But it is no objection to an *exigent* that it is not returnable the next sessions, because it must allow time for five counties to be holden between its teste and return. 3. Where, after issue or demurrer, the court gives the party a day to a distant sessions, without making any continuance to that immediately following. 4. Where the sessions to which the suit is continued is adjourned, and the suit is not adjourned accordingly. 5. Where any of the parties are described in any continuance of the suit, whether on the roll or by process, by a name or addition variant from those in the original, though only in one letter. 6. Where a *venire* or *distringas* is issued, without any award on the roll to warrant them. 2 *Haw. c. 27. § 90. et seq.*

How process is discontinued.

And it seems generally to be taken as an undoubted principle, that a discontinuance by suffering a total chasm in the proceedings, whether on the roll or in the process, by not giving a fresh continuance instantly upon the determination of the precedent, shall never be aided by any appearance of pleading over; but it is holden by the greater number of authorities that if the original be good, and the defendant present in court, he shall be compelled to answer to such original, let the process whereon he came in, or the execution of it, be never so erroneous or defective, so that it never were discontinued; for the end of process is to compel an appearance, and the end being served, and a legal charge appearing against the defendant no way discontinued, the law will not so far regard a slip in the process, as to let the defendant out of court, in order only to have him brought in again in better form. 2 *Haw. c. 27. § 107.*

Process once discontinued cannot be aided.

Aliter, where it is erroneous or defective.

The processes (as well of *capias* as of outlawry) may be stayed by a *supersedeas* issuing from other justices (out of sessions), testifying that the party hath come before them, and hath found sureties for his appearance to answer to the indictment, or to pay his fine. *Dalt. c. 193.*

Process stayed by putting in bail.

And it seemeth that even any one justice may bail persons indicted at the sessions for any offence under the degree of felony; for that the statutes relating specially to the power of justices in granting bail do not in this case seem to take away the power which one justice had before the making of the said statutes. 2 *Haw. c. 15. § 54.* See tit. *Bail.*

One justice may bail after indictment for offence under felony.

II. Of Outlawry for Non-appearance.

[81 Eliz. c. 3. — 3 & 4 W. 3. c. 9. — 4 & 5 W. 3. c. 18. c. 22.]

Process of outlawry.

Judgment of outlawry is given by the coroner, at the fifth county court, upon the party's not appearing to the exigent (which is a writ commanding the sheriff to cause the defendant (*exegi*) to be demanded from county court to county court until he be outlawed). And such judgment is entered thus, *Therefore by the judgment of the coroners of our lord the king of the county aforesaid he is outlawed.* 2 Haw. c. 48. § 21.

Meaning of the word outlaw.

The word outlaw (*utlaghe*), *utlagatus*, cometh not immediately from the Latin *lex*, but is derived to us through the Saxon *laga*, which signifieth law. And a person outlawed signifies one that is out of the protection of the king, and out of the aid of the law.

Process as to women.

And a man which is outlawed is called outlawed; but a woman which is outlawed is called waved, and not *utlagata*; for that women are not sworn in leets or tornes, as men at the age of twelve or more are; and therefore men may be called *utlagati*; that is, *extra legem positi*, but women are *waviatæ*, that is, *derelictæ*, left out or not regarded, because they were not sworn to the law; wherein it is to be noted, that of ancient time a man was not said to be within the law that was not sworn to the law, which is intended of the oath of allegiance in the leet. 1 Inst. 122.

Infant under twelve.

Hence it is, that a man under the age of twelve years cannot be outlawed. 1 Inst. 122.

For what offences a person may be outlawed.

Process of outlawry lies in all indictments of treason or felony, and on all returns of rescous; and also on all indictments of trespass with force and arms; and it seems probable that it lies on an indictment of conspiracy or deceit, or any other crime of a higher nature than a trespass with force and arms; but not on any indictment for a crime of an inferior nature. And it seems agreed that it lies not on any action on a statute, unless it be given by such statute, either expressly, as in the case of a *præmunire*, or impliedly, as where a recovery is given by an action wherein such process lay before, as on a writ of trespass for a forcible entry, on stat. 8 H. 6. c. 9., because the statute expressly gives a recovery by such a writ, and such process lies in it by the common law. 2 Haw. c. 27. § 113.

31 E. c. 3. Outlawry to be proclaimed at the sessions, &c.

By stat. 31 Eliz. c. 3., in every action personal, wherein any exigent shall be awarded out of any court, one writ of proclamation shall be awarded out of the same court, having day of return and return as the writ of exigent shall have, directed and delivered of record to the sheriff where the defendant dwells; which writ of proclamation shall contain the effect of the action; and the sheriff shall make one proclamation in the open county court, and another at the general quarter sessions where the defendant dwells, and another a month at least before the *quinto exactus*, by virtue of the said writ of exigent, at or near the most usual door of the church or chapel where the defendant shall be dwelling at the time of the exigent awarded, upon a Sunday immediately after divine service.

4 & 5 W. 3. c. 22.

Also by stat. 4 & 5 W. 3. c. 22. § 4., upon issuing any exigent out of any of the king's courts against any person for a criminal

matter, before judgment or conviction, there shall also issue a writ of proclamation, bearing the same teste and return, where the person in the record of proceeding is mentioned to inhabit, according to the form of stat. 31 *El. c. 3.*, which writ of proclamation shall be delivered to the sheriff three months before the return of the same.

Proclamation of outlawry.

If there are two coroners in a county, or more, one may execute the writ, as in case of an exigent, but the return must be in the name of the coroners. 2 *Hale*, 56.

Return of the outlawry.

And the return of the outlawry must be certain; it must shew where the county court was held, and in what county; and must return the day and year of the king, to every *exactus*. 2 *Hale*, 103.

Must be certain.

Also the sheriff's name and office must be subscribed to the return of the exigent. 2 *Hale*, 204.

It is said that the justices in sessions cannot issue a *capias ulagatum*, but must return the record of the outlawry into the C. B., and the process of *capias ulagatum* shall issue. 2 *Hale*, 52.

Capias ulagatum.

But in *T. 10 J. 1.*, the opinion of all the court of common pleas was, that if one be outlawed before the justices of the peace on an indictment of felony, they may award a *capias ulagatum*, and so was the opinion of *Periam* chief baron, and all the court of exchequer; for they that have power to award process of outlawry, have also power to award a *capias ulagatum*, as incident to their authority and jurisdiction. 12 *Rep.* 103.

Justices of peace may award. *Semb.*

If a person be outlawed at the suit of one man, all men shall take advantage of this personal disability. 1 *Inst.* 128.

Consequences of outlawry.

But such disability abateth not the writ, but only disableth the plaintiff, until he obtain a charter of pardon. 1 *Inst.* 128.

Upon outlawry in treason or felony the offender shall lose and forfeit as much as if he had appeared and judgment had been given against him, as long as the outlawry is in force. 2 *Haw.* c. 48. § 22.

For treason or felony.

But the outlawry for a misdemeanor doth not enure as a conviction for the offence, as it doth in cases of treason and felony: but as a conviction of the contempt for not answering, which contempt is therefore punished, not by fine as a conviction for the offence, but by forfeiture of goods and chattels for the contempt. *R. v. Tippen*, 2 *Salk.* 494.

For an inferior offence.

The very issuing of the exigent, in case of treason or felony, gives to the king the forfeiture of the goods of the party from the time of the teste of the writ of exigent: and the forfeiture by the exigent awarded stands, although the indictment be quashed, until there be a judgment of reversal on a writ of error: because the king's title being of record must be avoided by a record. 2 *Hale*, 204, 205.

Goods forfeited from the time of issuing the exigent.

And as the award of the exigent gives the forfeiture of the goods, so the outlawry gives the forfeiture or loss of the lands of the party outlawed; to wit, in case of outlawry of treason his lands are forfeited to the king, of whomsoever they are held; and in case of outlawry of felony to the lord by escheat, of whom they are immediately holden. 2 *Hale*, 206.

Lands forfeited from the time of the outlawry.

But it must be remembered that the bare judgment of outlawry by the coroner, without the return thereof of record, is no attainder, nor gives any escheat; but it must be returned by the sheriff, with

But the outlawry must be first returned.

the writ of *exigi facias*, and the return indorsed. 2 *Hale*, 206. Or else it must be removed by *certiorari*; for the judgment given by the coroner in the county court is not matter of record, that court not being a court of record. 1 *Inst.* 288.

Personal chattels.

Real chattels.

It is not lawful to kill an outlaw.

And by the outlawry all *personal* chattels are vested in the king by forfeiture; but *real* chattels, or freehold estates, are not vested in the king till after inquisition found. 3 *Salk.* 262.

In ancient times no man could have been outlawed but for felony, the punishment whereof was death; and upon this account an outlawed man was called *wolfeshead*; because he might be put to death by any man, as a wolf, that hateful beast, might. But in the beginning of the reign of K. *Ed.* 3. it was resolved by the judges, for avoiding of inhumanity, and of effusion of christian blood, that it should not be lawful for any man but the sheriff, having lawful warrant, to put to death any man outlawed, though it were for felony; and if he did, he shall undergo such pain of death, as if he had killed any other man: and so the law continues to this day. 1 *Inst.* 28.

Judges of assize may award execution of persons outlawed before justices of the peace.

Clergy in cases of outlawry.

If a man be indicted before justices of the peace, and thereupon outlawed, and is taken and committed to prison, the justices of gaol-delivery may award execution of this prisoner; for they are constituted to deliver the gaol. 4 *Inst.* 166. *Hale's Sum.* 158. 2 *Hale*, 35.

Where clergy is allowable, it shall be as much allowed to one who is outlawed, as to one who is convicted by verdict or confession. 2 *Haw. c.* 33. § 27.

But a statute taking the benefit of clergy from those who shall be found guilty doth not thereby take it from those who are outlawed. 2 *Haw. c.* 33. § 28.

3 & 4 W. 3. c. 9.

Person outlawed for offence not within clergy.

But by stat. 3 & 4 W. 3. c. 9. § 2., if any person be indicted of any offence, for which, by any former statute, he is excluded from clergy upon conviction, if he shall be outlawed thereupon, he shall not have his clergy.

By any former statute.] Hereby it appears that this extends not to offences made felonies by statutes *subsequent* to this statute. 2 *Haw. c.* 33. § 49.

Person outlawed cannot be plaintiff.

Where a person is outlawed, the defendant may shew all the matter and outlawry returned of record, and demand judgment: if he shall be answered, because he is out of the law, to sue an action during the time that he is outlawed. 1 *Inst.* 128.

Cannot be a juror.

It seems to be a good challenge of a juror, that he is outlawed either for a criminal matter, or as some say, in a *personal* action: but not a principal challenge, but only to the favour, unless the record of the outlawry be produced. 2 *Haw. c.* 25. § 16. c. 43. § 25.

May be a witness.

But it seems clear that outlawry in a *personal* action is not a good exception against a witness, as it is against a juror. 2 *Haw. c.* 46. § 21.

May make a will.

An outlawed person may make a will, and have executors or administrators. *Cro. El.* 575.

Executor may reverse.

And an executor may reverse the outlawry of the testator, where he was not lawfully outlawed. 1 *Leon.* 325.

Modes of reversing.

Outlawry may be reversed several ways; as, by procuring a *respedeas*, and delivering it to the sheriff before the *quinto exactus*, or by shewing any matter apparent on record which makes the

outlawry erroneous, as the want of an original, or the omission of process, or want of form in a writ of proclamation, or a return by a person appearing not to be sheriff, or a variance between the original and exigent or other process, or by a misnomer, or want of addition. 2 Haw. c. 50.

And upon a writ of error upon an outlawry in felony, the party outlawed must render himself in custody, and pray the allowance of the writ of error in person; and if the outlawry be reversed, he shall be put to answer the indictment. 2 Hale, 209.

But by stat. 4 & 5 W. 3. c. 18., one outlawed, except for treason or felony, need not appear in person to reverse an outlawry, but may appear by attorney. 2 Salk. 496.

There is another kind of process out of a court of record against offenders, called *attachment*, which is generally for contempt; which belongs to title Attachment.

The process against jurors may be seen in the title Jurors, ante. And the process against witnesses in title Evidence.

In what case the party must appear personally to reverse it.

4 & 5 W. 3. c. 18.

Other kinds of process.

Forms of Processes; and First, of a *Venire*.

GEORGE the Fourth, by the grace of God, of the united kingdom of Great Britain and Ireland king, defender of the faith. To the sheriff of the county of _____, greeting. We command you that you omit not, by reason of any liberty in your bailiwick, but that you cause A. O. of _____, in your said county, yeoman, to come before our justices assigned to keep our peace, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county, committed at _____, in your said county, on the _____ day of _____ next ensuing, to answer into us upon certain articles presented against him the said A. O. And have you there then this precept. Witness J. P. and K. P. it _____ the _____ day of _____, in the _____ year of our reign.

And upon this *venire*, if the defendant be returned sufficient, and maketh default, then a *distringas* shall be awarded, and so the same process infinite, until he come in: but if a *nihil habet* be returned at the first, then after the *venire* there shall go out a *capias*, alias, pluries, and exigent. Dalt. Sher. 160.

Form of a *Distringas*.

GEORGE the Fourth, by the grace of God, of the united kingdom of Great Britain and Ireland king, defender of the faith. To the sheriff of the county of _____, greeting. We command you that you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and distrain A. O. of _____ in your county, yeoman, by all his lands and tenements, &c., and that you answer for the issues thereof, &c. and that you have his body before our justices assigned [and so on as before in the *venire*].

But if a *nihil* (as hath been said) be returned at first upon the *venire facias*; then a *capias* shall issue thus:—

GEORGE the Fourth, by the grace of God, of the united kingdom of Great Britain and Ireland king, defender of the faith. To the sheriff of the county of _____, greeting. We command

you that you omit not, by reason of any liberty in your bailiwick, but that you enter the same, and take A. O. of _____ in your county, yeoman, if he shall be found in your bailiwick, and him cause to be safely kept, so that you have his body before our justices assigned to keep our peace, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, at _____, in your county, on the _____ day of _____ next ensuing, to answer unto us concerning divers trespasses, contempts, and offences, of which he is indicted. And have you there then this writ. Witness J. P. and K. P. at _____, the _____ day of _____, in the _____ year of our reign.

At which day A. S. knight, sheriff of the county aforesaid, returned that he is not found in his bailiwick, and he did not come. Therefore it is commanded as before.

Note. The cause why the entry is made, and he did not come, is, because the party may appear voluntarily, and so avoid the attachment or arrest of his body.

The *Alias Capias*.

GEORGE _____ To the sheriff _____ We command you; as we before commanded you, that you omit not _____ (as before).

At which day _____ (as before); and he did not come. Therefore it is commanded to the sheriff, as it hath been often commanded, &c.

The *Pluries Capias*.

GEORGE, &c. The sheriff, &c. We command you, as we have often commanded you, that you omit not (as before).

At which day A. S. knight, the sheriff aforesaid, returned, that the aforesaid A. O. is not found in his bailiwick, and he did not come. Therefore it is commanded, that you cause to be demanded, &c.

The *Exigent*.

GEORGE, &c. To the sheriff, &c. greeting. We command you that you cause A. O. of _____, in your county, yeoman, to be demanded, until by the law and custom of our kingdom of England he be outlawed, if he shall not appear; and if he shall appear, that then you take him and cause him to be safely kept, so that you have his body before our justices assigned to keep our peace, and also to hear and determine divers felonies, trespasses, and other misdemeanors in your said county committed, at the next quarter sessions of the peace of your county, next after the feast of _____ next ensuing to be held, wheresoever in the same county the said sessions shall happen to be holden, to answer unto us of divers trespasses, contempts, and offences, of which he is indicted. And have you then there this writ. Witness Sir J. P., baronet, at _____, in the said county, the _____ day of _____, in the _____ year of our reign.

At which day A. S., knight, sheriff of the county aforesaid, returned, that at the county holden at _____, the _____ day

of ———, in the ——— year of the reign of our lord the king, that now is, and so at four other counties then next following here holden, the aforesaid A. O. was demanded, and did not appear. Therefore, by the judgment of the coroner of our said lord he king, in the county aforesaid, he was outlawed.

The Capias Uilagatum.

GEORGE, &c. *To the sheriff, &c. greeting. We command you that you omit not, by reason of any liberty in your county, ut that you take A. O., late of ———, in your county, labourer, if he shall be found within your county, and him cause safely to be kept, so that you have his body before the keepers of our peace and our justices assigned to hear and determine divers felonies, respases, and other misdemeanors in your county committed, at ———, the ——— day of ———, to stand right in our court before our justices aforesaid, upon a certain outlawry against him he said A. O. promulgated, at our suit, for certain felonies (or respases) whereof he is indicted. And have you then there this writ. Witness, &c.*

Profaneness. See tit. Blasphemy.

Prophecies.

33 H. 8. c. 14.—1 Ed. 6. c. 12.—3 & 4 Ed. 6. c. 15.—5 El. c. 15.]

BY stat. 5 Eliz. c. 15., if any person shall advisedly and directly advance, publish, and set forth by writing, printing, signing, or any other open speech or deed, any fond, fantastical, or false prophecy, upon or by the occasion of any arms, fields, beasts, badges, or such other like things accustomed in arms, cognizances, or signets, or upon or by reason of any time, year, or day, name, bloodshed, or war, to the intent thereby to make any rebellion, insurrection, dissension, loss of life, or other disturbance in the realm; and shall be convicted thereof before a judge of assize, or justice of the peace, within six months after the offence committed, he shall for the first offence be imprisoned for a year, and forfeit 10*l.*; and for the second offence shall be imprisoned for life, and forfeit his goods: half the forfeitures to the king, and half to him who shall sue for them in any court of record.

The intent of the act was to abolish certain foolish and superstitious notions which prevailed in the times of ignorance, as were set forth in a statute made in the 33 H. 8. c. 14. reciting, Where divers and sundry persons, making their foundation by prophecies, have taken upon them a knowledge (as it were) what shall become of them which bear in their arms, cognizance, or badge, fields, beasts, fowls, or any other thing which hath been used or accustomed to be put in any of the same, or in and upon the letters of their names, have devised, descanted, and practised to make folk think, that by their untrue guesses, it might be known what good or evil things should come, happen, or be done, by or to such persons as bore or had such badges or cognizances, or had such letters in their names, to the great terror and destruction of such

5 Eliz. c. 15.

Prophecies from armorial bearings, times, events, &c.

Punishment.

33 H. 8. c. 14. Similar enactments.

noble personages, of whom such false prophecies have or should hereafter be set forth, whereby in times past many noblemen have suffered, and (if their prince would give any ear thereto) might hap to do hereafter; and therefore enacted, that he who should do so should be guilty of felony without benefit of clergy.

1 Ed. 6. c. 12.

This statute was repealed in the lump by the 1 Ed. 6. c. 12, which repealed all statutes making any offences felony from the first year of the reign of king *Henry* the eighth. And the substance thereof was re-enacted, with a mitigation of the penalty, by stat. 3 & 4 Ed. 6. c. 15. Which statute expiring, the 5 El. c. 15. was enacted as above.

3 & 4 Ed. 6.
c. 15.

Public Worship.

[1 Ed. 6. c. 1.—1 Mar. sess. 2. c. 3.—1 J. 1. c. 4.—13 & 14 C. 2. c. 4.—1 W. & M. sess. 1. c. 18.—22 G. 2. c. 33. art. 1.—9 G. 4. c. 31.]

Impugners of
the rites of the
church.

IMPUGNERS of the book of common prayer, of the thirty-nine articles, of the rites and ceremonies of the church of *England*, of the episcopal government of the church, or of the form of ordering and consecrating archbishops and bishops, shall be *ipso facto* excommunicated, and not restored but upon repentance, and public recantation. *Can.* 4, 5, 6, 7, 8.

1 Ed. 6. c. 1.
Speaking irre-
verently of the
sacrament.
Indictable.

By stat. 1 Ed. 6. c. 1., if any person shall speak irreverently of the sacrament of the Lord's supper, he shall suffer imprisonment, and make fine and ransom at the king's will. And three justices (1 Q.) may take information by the oaths of two witnesses; and afterwards, at the sessions, may inquire thereof by the oath of twelve men upon indictment. And they shall, at the sessions where the offender shall be indicted, direct a writ to the bishop to appear by himself or deputy at the trial. But no person shall be molested, but within three months after the offence committed.

22 G. 2. c. 33.
Public worship
in the navy.

All commanders, captains, and officers at sea, shall cause the public worship of Almighty God according to the liturgy of the church of *England*, to be performed in their respective ships; and prayers and preachings by the chaplains shall be performed diligently. *Stat.* 22 G. 2. c. 33. art. 1.

13 & 14 C. 2.
c. 4.
Qualifications
of lecturer.

By stat. 13 & 14 C. 2. c. 4. §§ 19, 20, 21., no person shall be received as a lecturer, or allowed to preach or read any lecture or sermon, without licence from the bishop, and assenting to the thirty-nine articles, and reading the common prayer, before his first sermon, and on the first lecture day of every month; on pain of three months' imprisonment for every offence, by two justices of the peace, on certificate from the bishop of the offence committed.

1 Mar. sess. 2.
c. 3.
Disturbers of
public worship.

By stat. 1 Mar. sess. 2. c. 3., if any person shall disturb a preacher in his sermon by word or deed, he shall be apprehended and carried before a justice of the peace, who shall commit him to safe custody, and within six days he and another justice shall examine the fact, and if they find him guilty by two witnesses, or confession, they shall commit him to gaol for three months, and further to the next sessions; and if at the sessions he repents and is reconciled, he shall be discharged on finding sureties for his

Punishment.

good behaviour for a year; if not, he shall be continued in gaol if he does; saving the ecclesiastical jurisdiction; and he shall be punished both ways.

This statute, though made in queen *Mary's* reign, extendeth to the divine service now established. *Gibbs*. 372.

Williams v. Glenister, *E. 5 G. 4., 2 B. & C. 699.* Trespass for assault and false imprisonment. A parish clerk refused to read in church a notice which was presented to him for that purpose, and a person presenting it read it himself at a time when no part of church service was actually going on, viz. whilst the minister was walking from the communion table to the vestry room. The defendant, a constable, by order of the minister, took him out of the church, and detained him an hour after the service was over. He then allowed plaintiff to go, on his promise to attend a magistrate the next day, which he accordingly did, but no complaint being made against him was discharged. Verdict for plaintiff. On motion for R. N., the *Rubric* and stats. 1 *M. sess. 2. c. 3. § 3. 1 W. & M. 18. § 18.* were cited. — *Per Abbott C. J.* It appears to me, that the 1 *M. sess. 2. c. 3.* merely gave to the common law cognizance of an offence which was before punishable by the ecclesiastical law: in order to be within that statute, the party must maliciously, wilfully, or of purpose molest the persons celebrating divine service. Had the notice been read by the plaintiff whilst any part of the service was actually going on, we might have thought that he had done it on purpose to molest the minister; but the act having been done during an interval when no part of the service was in the course of being performed, and the party apparently supposing that he had a right to give such a notice, I am not prepared to say that the 1 *M. sess. 2. c. 3.* warranted his detention, in order that he might be taken before a justice of the peace. Neither does the case come within the toleration act, 1 *W. & M. c. 18.* That only applies where the thing is done wilfully, and of purpose maliciously to disturb the congregation or misuse the preacher. The detention of the plaintiff after the time when the service ended, was therefore illegal, and we ought not to disturb the verdict which has been found. *R. R.*

By stat. 1 *W. & M. sess. 1. c. 18. § 18.*, "If any person or persons, at any time or times after the 10th day of June (1688), do and shall willingly and of purpose, maliciously or contemptuously come into any cathedral or parish church, chapel, or other congregation permitted by this act, and disquiet and disturb the same, or misuse any preacher or teacher, such person or persons, upon proof thereof before any justice of peace, by two or more sufficient witnesses, shall find two sureties to be bound by recognizance in the penal sum of 50*l.*, and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said general or quarter sessions, shall suffer the pain and penalty of 20*l.* to the use of the king's and queen's majesties, their heirs and successors." See also *tit. Hist.*

The court of K. B. refused to grant a *certiorari* to remove an indictment at the sessions, for a person not behaving himself modestly and reverently at the church during divine service; which, although punishable by ecclesiastical censures, yet the court conceived it a proper cause within cognizance of the justices of the

Reading notices in church.

Question of molesting the person performing service;

and of wilfully, &c. disturbing a congregation.

Disturbance of religious worship, how punished.

Conviction at sessions.

Indictment
may be re-
moved by
certiorari.

Arresting cler-
gymen while
doing service,
&c.

peace. And this was before the above-mentioned statute of the 1 *W. & M. c. 18.*—1 *Keb. 491.*—But in *R. v. Hube and others*, 5 *T. R. 542.*, it was held that an indictment upon stat. 1 *W. & M. c. 18.* at the quarter sessions may before verdict be removed by *certiorari* into the K. B., and upon conviction of several defendants, each is liable to the penalty of 20*l.* See 3 *Burn's Ecc. Law*, 8th ed. by *Tyrwhitt*, tit. *Public Worship*, § 3.

By 9 *G. 4. c. 31. § 23.*, "If any person shall arrest any clergyman upon any civil process while he shall be performing divine service, or shall with the knowledge of such person be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall suffer such punishment by fine or imprisonment, or by both, as the court shall award."

The arrest, though it may be punished, is still good in law, unless on a *Sunday*, so that if a rescue be made, and thereby any person shall be killed, the killing is murder. *Wats. c. 34.*, referring to a similar enactment in 1 *R. 2. c. 15.*

See tit. *Worship*.

Purveyors.

[12 *C. 2. c. 24.*]

Abuses of pur-
veyors.

ANCIENTLY the king's court was supplied with necessaries from the ancient demesnes of the crown; and in respect thereof, the tenants of those lands had many privileges, which they still enjoy. But this method being found to be troublesome and inconvenient, was by degrees disused; and afterwards the king was wont to appoint certain officers to buy in provisions for his household, who were called purveyors, and claimed many privileges by the prerogative of the crown. 2 *Inst. 542. 1 Hen. c. 47. § 1.*

Purveyance
taken away.

The several laws which restrained the exorbitance of these purveyors, make up a pretty large title in the old books; but these laws proving ineffectual to remedy the evil complained of, at length by stat. 12 *C. 2. c. 24.* purveyance was entirely taken away; by which it is enacted, that no sum of money or other thing shall be taken for any provision, carriages, or purveyances for the king.

Taking things
under colour of
purveyance.

And that no person under colour of purveyance shall take any timber, fuel, cattle, corn, grain, malt, hay, straw, victual, cart, carriage, or other thing, without consent of the owner; nor shall require any to furnish any horses, oxen, or other cattle, carts, ploughs, wains, or other carriages, for the use of the king or his household, without the owner's consent.

Indictable.

On pain of being committed to gaol by a justice of the peace, and the constable, until the next sessions, to be there indicted; and also of paying to the party treble damages and treble costs on an action at law.

Rape.

- I. *What it is.*
- II. *Evidence on an Indictment of Rape.*
[9 G. 4. c. 31.]
- III. *Punishment of Rape.*
[9 G. 4. c. 31.]
- IV. *Principal and Accessary.*
[9 G. 4. c. 31.]

I. What it is.

RAPE is when a man hath carnal knowledge of a woman, by force and against her will. 2 *Inst.* 180. 1 *Hawk. c.* 41. § 1.

The offence of a rape is no way mitigated by shewing that the man at last yielded to the violence, if such her consent were ceded by fear of death or of duress. 1 *Haw. c.* 41. § 2.

Also, it is not a sufficient excuse in the ravisher to prove that a woman is a common strumpet; for she is still under the protection of the law, and may not be forced. 1 *Haw. c.* 41. § 2.

Nor is it any excuse that she consented after the fact. 1 *Haw. c.* 41. § 2.

The notion that if a woman conceived it could not be a rape, the ground that she must in that case have consented, may now be considered as quite exploded. 1 *East, P. C.* 445. 1 *Russ.* 557.

Having carnal knowledge of a married woman under circumstances which induce her to suppose it is her husband; held, by a majority of eight to four judges, that it did not amount to a rape, but several of the eight judges intimated, that if the case were to occur again, they would advise the jury to find a special verdict. *Trin. Term, 1822, R. v. Jackson, C. C. R.* 487.

A husband cannot be guilty of a rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract. But he may be guilty as a principal by assisting another person to commit a rape upon his wife. 1 *St. Tr.* 387. *Hale, 629*; cited 1 *Russ.* 557.

Rape, what.

Consenting at last.

Ravishing a common strumpet.

Consenting after the fact.

Non-conception.

Personation of female's husband.

Crime of husband as to his wife.

II. Evidence on an Indictment of Rape.

The party ravished may give evidence on oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony. 1 *Hale, 633.*

For instance, if the witness be of good fame; if she presently discovered the offence, and made pursuit after the offender; shewn circumstances and signs of the injury, whereof many are of that nature that only women are the most proper examiners and inspectors; if the place wherein the fact was done were remote from people, inhabitants, or passengers; if the offender fled for it; if these, and the like, are concurring evidences to give greater probability to her testimony, when proved by others as well as herself. 1 *Hale, 633.*

But, on the other side, if she concealed the injury for any considerable time after she had opportunity to complain; if the place

The woman's oath.

Circumstances in favour of it.

Circumstances in disfavour of it.

where the fact was supposed to be committed were near to inhabitants or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; or if a man prove himself to be in another place, or in other company, at the time she charges him with the fact; or if she be wrong in the description of the place, or swear the fact to be done in a place where it was impossible the man could have access to her at that time, as if the room were locked up, and the key in the custody of another person; these and the like circumstances carry a strong presumption that her testimony is false or feigned. 1 *Hale*, 633.

General observations.

(a) But see 9 G. 4. c. 31. § 18. *infra*, 725.

In a work of this nature, it is not necessary to enter into a detail of the judicial opinions that have at different times been delivered on this subject; they are chronologically and correctly given at large in 1 *East*, P. C. c. 10. § 3. It is sufficient to state generally, that now the judges consider it to be the law of the land, that emission (a) as well as penetration must take place to constitute the offence. But though there must be an emission, it is not necessary that there should be direct and positive evidence of that fact: this, like all other facts, may be established in proof by the circumstances attending it. In various cases the female cannot swear to the fact, though it take place; as in the instance of infants; or in the case of some adults, who may have been rendered senseless by the previous violence of the man, or of others, who are never conscious of the fact when it does take place. Without, however, entering more minutely into the discussion of such a subject, it will be a sufficient hint to magistrates before whom a person may be brought charged with this crime, to attend to this distinction: if penetration be proved, and it appear on the whole that the man gratified his passion and appeared to be satisfied, it will be evidence from which a jury would be directed to infer emission; and consequently in such a case the magistrates ought to commit the party to take his trial for the capital offence. But if, on the contrary, the man were disturbed or interrupted before he appeared to have completed his purpose, a jury would probably infer that there had been no emission; and in such a case the justices should commit or bind the party over to take his trial for a misdemeanor, (*viz.*) an attempt to commit a rape only.

And with regard to penetration, it will be sufficient to make one observation only; that any penetration, however trifling, though it do not break the hymen, is sufficient for this purpose. *R. v. Russen*, O. B. Oct. 1777, 1 *East*, P. C. 438.

But the contrary was stated to be the law by Gurney B. in a case in which the prisoner was convicted. *Hereford Sum. Au.* 1832, *R. v. Gammon*, 5 C. & P. 321.

Infant a witness.

At any age if of sufficient mental capacity.

It has been made a doubt, at different periods in the history of our courts of law, at what particular age an infant could be sworn to prove a rape, or an assault with intent to ravish her; and at one time a rule appears to have prevailed, that no child could be admitted as a witness under the age of nine years, and very few under ten. *R. v. Travers*, 1 *Str.* 700. *R. v. Dunnell*, 1 *East*, P. C. 442. But it appears now to be well established, that a child of any age, if capable of distinguishing between good and evil, may be examined upon oath; but that, whatever may be its age, it cannot be examined unless sworn. *Brazier's case*, *Reading Sep.*

1779, 1 *East's P. C.* 443, 444. By such capability of distinguishing between good and evil, must be understood a belief in od, or in a future state of rewards and punishments; from which the court may be satisfied that the witness entertains a proper sense of the danger and impiety of falsehood. *White's case, Leach, 430.* See tit. Infant.

It appears to have been allowed, that the fact of the child's having complained of the injury recently after it was received, is confirmatory evidence; but where the child is not fit to be sworn, it is clear that any account which it may have given to others, ought not to be received. 1 *Russ. 565, citing Brazier's case, supra.* See *Phill. Ev.* 19. 222. 6th edit. Thus, on an indictment for a rape on a child of five years of age, where the child was not examined, but an account of what she had told her mother about three weeks after the transaction was given in evidence by the mother, and the jury convicted the prisoner principally, as was supposed, on that evidence; the judges, on a case reserved for their opinion, thought the evidence clearly inadmissible; and the prisoner was accordingly pardoned. *Tucker's case, Exeter Spr. Ass. 1808, cor. Marshall Serjt. MS. C. C. R.* 1 *Russ. 565.*

When the child has appeared not sufficiently to understand the nature and obligation of an oath, judges have often thought it necessary, for the purposes of justice, to put off the trial of a prisoner, directing that the child in the meantime should be properly instructed. Thus, in a criminal prosecution that was coming on to be tried before *Rooke J.* at *Gloucester*, finding that the principal witness was an infant, who was wholly incompetent to take an oath, he postponed the trial till the following assizes, and ordered the child to be instructed in the meantime by a clergyman in the principles of her duty, and the nature and obligation of an oath. At the next assizes the prisoner was put upon his trial, and the girl being found by the court, on examination, to have a proper sense of the nature of an oath, was sworn, and upon her testimony the prisoner was convicted, and afterwards executed. *Mr. J. Rooke* mentioned this at the *O. B.* in 1795, in the case of *Patrick Murphy*, who was indicted for a rape on a child of seven years old, and the learned judge added, that upon a conference with the other judges upon his return from the circuit, they unanimously approved of what he had done. *Vide 2 Bac. Abr. 577. (n).* *Leach, 430. (n).*

But where it appeared that the prosecutrix, who was an adult, was not sufficiently acquainted with the nature of an oath to be allowed to give evidence, and the judge discharged the jury, in order that she might be better instructed before the next assizes; the judges afterwards held that the discharge was improper, and that the prisoner ought to have been acquitted: a pardon was therefore recommended. *R. v. Wade, Easter Term, 1825, 1 R. & M. 86.*

In a case where the party ravished had died before the trial, her deposition, corroborated by other evidence of actual force and penetration, was held sufficient to warrant a conviction, though there did not appear to be any direct evidence of emission. It was left to the jury to determine whether the crime had been completed by penetration and emission; and they were directed that they might collect the fact of emission from the evidence,

Where child incompetent as a witness, her complaints not evidence.

Trial postponed on account of child's incompetency.

Adult prosecutrix not knowing the nature of an oath.

Where female is dead, her depositions are evidence.

though the unfortunate girl was dead, and could not therefore give any further account of the transaction than that which was contained in her deposition before the magistrate. *R. v. Fleming and Windham*, 2 *Leach*, 854.

Evidence confirmatory of a child, desirable,

Where the evidence of children is admitted, it is much to be wished, in order to render their evidence credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. There may be, therefore, in many cases of this nature, witnesses who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible or such as the jury is bound to believe. For one excellence of the trial by jury is, that the jury are triers of the credit of the witnesses as well as of the truth of the fact. 4 *Blac. Com.* 214. *Phill. Ev.* 19. 6th edit.

Wife witness of necessity against husband.

The party grieved is so much considered as a witness of necessity in this, as in other personal injuries, that if one assist another man to ravish his own wife, she is admissible as a witness against him. *Lord Audley's case*, 3 *Howell's St. Tr.* 419., cited in 1 *East's P. C.* 444.

General caution.

"It is true," says *Lord Hale*, "that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, it is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent." He then mentions two remarkable cases of malicious prosecution for this crime, that had come within his knowledge; and concludes, "I mention these instances that we may be more cautious upon trials of offences of this nature, wherein the court and jury may, with so much ease, be imposed upon without great care and vigilance; the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the person accused thereof, by the confident testimony, sometimes of malicious and false witnesses." 1 *Hale*, 635. 636. 4 *Blac. Com.* 214.

Cross-examination of prosecutrix;

On trial for rape it was held, that the prosecutrix was not compellable, on cross-examination, to answer whether she has not had connection with other men; or with a particular individual named, as these questions tended to criminate herself. And it was also held, that it was not allowable to give evidence of her having had such connection, as not being connected with the present charge, and which she could not come prepared to answer: after conviction, the judges were of opinion it was properly ruled on both points. *R. v. Hodgson*, C. C. R. 211.

evidence against her.

General impeachment of character.

It is said, however, that the character of the prosecutrix as to general chastity may be impeached by general evidence. C. C. R. 211. n. (a.) *R. v. Clarke*, 2 *Stark. N. P. C.* 241.

Evidence in answer.

And where the general character of the prosecutrix has been impeached on cross-examination as to particular facts, evidence of subsequent good conduct on her part is admissible. *R. v. Clark*, *ib.* See *Stark. Evid.* 1270.

Cross-examination of prosecutrix.

On an indictment for rape, it was held competent to ask prosecutrix on cross-examination, whether since the time of the supposed rape she had not been seen walking the streets in a soci-

cious and discreditable manner. In the same case it was stated, at evidence might be given of her general lightness of character, it not of particular acts of criminality. *Per Park and Parke Js.,xford Spring Ass., 1829, R. v. Barker, 3 Car. & P. 589.*

By 9 G. 4. c. 31. § 18., "And whereas, upon trials for the crimes buggery, and of rape, and of carnally abusing girls under the respective ages hereinbefore mentioned, offenders frequently escape reason of the difficulty of the proof which has been required of a completion of those several crimes; for remedy thereof be it acted, that it shall not be necessary, in any of those cases, to prove the actual emission of seed in order to constitute a carnal knowledge, but that the carnal knowledge shall be deemed complete upon proof of penetration only."

On indictment for a rape, the jury found penetration, but negated emission; and the judges on case held the conviction right. *T. 1832, R. v. Cox, MS. Bayley B. S. C. 1 M. 337.*

It is necessary to aver in the indictment, that the act was committed "against the will" of the party. 1 *Russ.* 561.

So, the word "ravish" is essential in the indictment, and no other term will supply the omission. *Ibid.*

It has been considered, that the words "did carnally know" are essential; but that, being appropriate and generally used, it would not be prudent to omit them. *Ibid.*

On indictment for a rape the words *carnaliter cognovit* were omitted: on case, six judges out of twelve thought it cured by indictment, because those words are not in 9 G. 4. c. 31.; but they thought it bad before verdict. *M. T. 1832, R. v. Warren, MS. Bayley B. See 7 G. 4. c. 64. § 21.*

In a case where the 1st count of the indictment charged the prisoner as a principal in the first degree, and in the 2d count was charged as a principal in the second degree, by aiding and abetting, and it appeared that the prisoner and others committed a crime in succession, the others aiding and abetting in turn; the prisoner was found guilty generally. An objection was raised, that 9 G. 4. c. 31. makes no specific provision against aiders and abettors: on case reserved, the judges held that the conviction was good on the 1st count. *Tr. T. 1832, R. v. Folkes and Ludd, M. 354. See 1 Russ. 25. et seq. See R. v. Burgess and others, 7ra, 726.*

Proof of completion of crime.

S. P.

Necessary averments "against the will;"

"Ravish;"

"Carnally know."

After verdict.

Prisoner indicted as principal, both in the first and second degree.

III. Punishment of Rape.

Of old time rape was felony, for which the offender was to suffer death: afterwards the offence was made less, and the punishment changed from death to the loss of those members whereby they ended; that is to say, it was changed to castration and loss of eyes, unless she that was ravished before judgment demanded a dowry for her husband. 2 *Inst.* 180.

By the 9 G. 4. c. 31. § 16. it is enacted, "That every person convicted of the crime of rape shall suffer death as a felon."

§ 17. enacts, "That if any person shall unlawfully and carnally know and abuse any girl under the age of ten years, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon. And if any person shall unlawfully and carnally know and abuse any girl, being above the age of ten

Felony without benefit of clergy.

Punishment of death.

9 Geo. 4. c. 31. Carnal knowledge of a girl under ten; the like of a girl above ten and below twelve.

years, and under the age of twelve years, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable to be imprisoned, with or without hard labour, in the common gaol or house of correction, for such term as the court shall award."

Pardon.

And by stat. 13 R. 2. st. 2. c. 1., no charter of pardon shall be allowed for rape, unless the rape be specified therein.

IV. Principal and Accessary.

Persons present and aiding are principals.

Mr. *Hawkins* says, all who are present and actually assist a man to commit a rape, may be indicted as principal offenders, whether they be men or women. 1 *Haw. c. 41. § 6.*

Joint indictment against several.

So one woman may be a principal to the ravishment of another. In *R. v. Burgess and others, Chester Spr. Ass. 1813*, upon an indictment charging three persons jointly with the commission of a rape, an objection was taken that three persons could not be guilty of the same joint act; but it was over-ruled, upon the ground, that the legal construction of the averment was only that they had done such acts as subjected them to be punished as principals in the offence. The execution was, however, respited, probably with a view to enable the learned judges to consult other authorities on the accuracy of their opinion: but the prisoners were afterwards executed. 5 *Ev. Col. St. Cl. 6. p. 244. n. (17.)* 2d ed., and see 1 *Russ. 562.*

Not present, accessaries.

And *Ld. Hale* says, that by stat. 18 *El. c. 7.*, the principals in rape are ousted of clergy, whether they be principals in the first degree, to wit, he that committed the fact; principals in the second degree, to wit, present, aiding, and abetting; but accessaries, before and after, have their clergy. 1 *Hale, 639.*

Accessaries before and after. Punishment.

By 9 *G. 4. c. 31. § 31.*, every accessary before the fact to felonies punishable under that act, for whom no punishment has been provided, are made liable, at the discretion of the court, to be transported for any term not exceeding fourteen nor less than seven years, or to be imprisoned, with or without hard labour, for any term not exceeding three years; and every accessary after the fact to any felony punishable under that act (except murder) is liable to be imprisoned, with or without hard labour, for any term not exceeding two years.

Warrant for a Rape.

County of } To the constable of ———, and to all other constables and peace officers in and for the said county of ———.

FORASMUCH as A. S. of ———, in the said county, single woman, hath this day made information and complaint upon oath before me, G. C. esquire, one of his majesty's justices of the peace in and for the said county, that A. R. of ———, in the said county, labourer, on the ——— day of ——— instant, ——— in the said county, did violently and feloniously make an assault upon her, the said A. S., and her, the said A. S., then and there, violently and against her will, did ravish and carnally know. These are therefore to command you in his majesty's name, forthwith to apprehend and bring before me, or some other of his majesty's

justices of the peace in and for the said county, the body of the said . R. to answer unto the said complaint, and to be further dealt with according to law. Herein fail you not. Given under my hand and seal, the ——— day of ———, in the year of our Lord 18—.

Indictment for a Rape.

county of } **THE** jurors for our lord the king upon their oath
present, that A. O., late of ———, in the county
———, yeoman, not having the fear of God before his eyes,
it being moved and seduced by the instigation of the devil, on the
—— day of ———, in the ——— year of the reign of ———,
with force and arms, at ———, in the county aforesaid, in and upon
the A. I., spinster, in the peace of God and of our said lord the
king then and there being, violently and feloniously did make an
assault, and her the said A. I. against the will of her the said A. I.
then and there feloniously did ravish and carnally know; against
the peace of our said lord the king, and against the form of the
statute in such case made and provided.

Recusant. See **Popery** and **Public Worship**.

Regrating. See **Forestalling**.

Rescue.

[25 G. 2. c. 37. — 1 & 2 G. 4. c. 88. — 3 G. 4. c. 126.]

RESCOUS is an ancient *French* word, coming from *rescouter*, that is, *recuperare*, to recover; and signifies a forcible setting at liberty against law a person arrested by the process or course of law. 1 *Inst.* 160.

It seems that it is necessary that the rescuer should have knowledge that the person is under arrest for a criminal offence, if he be in the custody of a private person; but if he be in the custody of an officer, there at his peril he is to take notice of it. 1 *Hale*, 606.

But it is said that to rescue a felon taken on a general warrant, to answer what shall be objected against him, no cause being expressed in the warrant, is no felony. 1 *Hale*, 578.

Nor unless a felony hath been really done. *Hale's Sum.* 116.

Although a *prison breaker* may be arraigned for that offence, before he be arraigned of the crime for which he was imprisoned, yet he who *rescues* one imprisoned for felony cannot, according to the better opinion, be arraigned for such offence, as for a felony, till the principal offender be attainted; but he may be immediately proceeded against for a misprision, if the king pleases. 2 *Haw. c.* 21. § 7.

Therefore, if the principal die before the attainder, he shall be fined and imprisoned. *Hale's Sum.* 116.

But if the person rescued were imprisoned for high treason, the rescuer may be immediately arraigned, all being principals in high treason. 1 *Russ.* 384.

Also, if the principal be found not guilty, or guilty of a crime not capital, the rescuer ought to be discharged of felony: but he may be fined for the misdemeanor. 1 *Hale*, 598, 599.

What a rescous is.

From private or public custody — distinction.

In what cases felony.

Not to be arraigned for felony till after attainder of party rescued.

High treason.

Where principal is acquitted, or convicted of a less crime.

penitentiary house, for any term not less than 1 & 2 G. 4. c. 88.
 three years.

any person shall assault, beat, or wound any
 person, or other person whomsoever, with
 arms thereof, to obstruct, resist, or
 detain of any person charged
 any person charged with or
 at, or wound any constable,
 person whomsoever with intent in
 to obstruct, resist, or prevent his
 officer; then and in every or any such
 persons so offending shall be convicted of
 it shall be lawful for the court by or before
 person or persons shall be so convicted as afore-
 said direct, in case it shall think fit, that such person
 shall, in addition to any other pains, penalties, or
 sent to which he, she, or they are now subject or liable, be
 to hard labour for any term not exceeding two years, and
 not less than six months.

There are also special penalties enacted for rescuing offend-
 ers against particular statutes, which belong not to this general
 title.

Although the felony for which a man is arrested be not within
 clergy, yet the rescuing him is within clergy. 1 Hale, 599. 607.

Upon the return of a *rescous*, process of outlawry shall issue.
 2 Haw. c. 27. § 113:

By the 25 G. 2. c. 37. § 9. it is enacted, "That if any person or
 persons whatsoever shall by force set at liberty or rescue, or at-
 tempt to rescue or set at liberty any person out of prison, who
 shall be committed for or found guilty of murder or rescue, or
 attempt to rescue any person convicted of murder, going to
 execution, or during execution, every person so offending shall
 be deemed, taken, and adjudged to be guilty of felony, and shall
 suffer death without benefit of clergy."

As to rescue of convicts sentenced to be transported, see 5 G. 4.
 c. 84. § 22.: and of convicts sentenced to the penitentiary, see
 56 G. 3. c. 63. § 44., tit. *Transportation*.

Under this title may properly be included the law respecting
 rescous and pound-breach in cases where there has been a distress
 of goods.

By the common law, if a man break the pound or the lock of
 it, or part of it, he greatly offendeth against the peace, and doth
 trespass to the king, and to the lord of the fee, and to the sheriff,
 and hundredors, in breach of the peace, and to the party, and to
 the delaying of justice; and therefore hue and cry is to be levied
 against him, as against those who break the peace. *Mir. c. 2. § 26.*
(See forms, post.) And the party who distrained may take the
 goods again, wheresoever he shall find them, and impound them
 again. 1 *Inst.* 47.

The forcibly rescuing goods distrained, and the rescuing cattle
 by the breach of the pound in which they have been placed, have
 been considered as offences at common law, and made the subject
 of indictment. 1 *Russ.* 363. and the authorities there cited.

An indictment will lie for taking goods forcibly, if such taking
 be proved to be a breach of the peace; and though such goods

Persons as-
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Clergy.

Outlawry.

Rescue of mur-
 derers.

Capital.

Of convicts
 sentenced to
 transportation,
 &c.

Rescous and
 pound-breach.

Indictable.

So, taking
 goods forcibly.

Indictment.

An indictment of *rescous* must set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question. 2 *Haw. c. 21. § 5.*

Rescue from the custody of bailiffs by a constable.

Upon an indictment at *Exeter Summer Assizes, 1795*, for an assault and rescue, it appeared that the sheriff's officers having apprehended a man by virtue of a writ against him, a mob collected and endeavoured by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs having been violently assaulted struck one of the assailants, a woman, and, as it was thought for some time, had killed her; whereupon, and before her recovery was ascertained, the constable was sent for and charged with the custody of the bailiff who had struck the woman. The bailiffs on the other hand gave the constable notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which, he proceeded to take them into custody upon the charge of murder, and at first offered to take care also of their prisoner, who however was soon rescued by the surrounding mob: and the woman having recovered, the bailiffs were released by the constable the next morning. *Heath J.* was clearly of opinion that the constable and his assistant were guilty of the assault and rescue, and directed the jury accordingly; who however acquitted the defendants. 1 *East's P. C. 305.*

Rescue and hinderance of arrest, distinction.

A hinderance of a person to be arrested that has committed felony, is a misdemeanor, but no felony: but if the party be arrested, and then rescued, if the arrest were for felony, the rescuer is a felon; if for treason, a traitor; if for trespass, fineable. *Hale's Sum. 116. 2 Haw. c. 21. § 7.*

Rescue of person committed by the superior courts.

The rescue of a prisoner, in any of the superior courts, committed by the justices, is a great misprision; for which the party and the prisoner (if assenting) will be liable to be punished by imprisonment for life, forfeiture of lands for life, and forfeiture of goods and chattels, though no stroke or blow were given. 1 *Russ. 385., and authorities there cited.*

1 & 2 G. 4. c. 88.

By stat. 1 & 2 G. 4. c. 88., intituled "*An act for the amendment of the law of rescue,*" § 1., after reciting that "Whereas divers daring attempts have of late been made to effect the rescue or prevent the detention of persons charged with or committed for or on suspicion of felony: And whereas it might tend more effectually to prevent the commission of such offences if further provisions were made for the punishment of persons who may hereafter be convicted thereof, as are hereinafter enacted:" It is therefore enacted, that "if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, headborough, or other person whomsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then if the person or persons so offending shall be convicted of felony, and be entitled to the benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the court by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid (a), shall be transported beyond the seas for seven years, or be imprisoned only, or be imprisoned and kept to hard labour in the common gaol, house

Rescuer convicted of felony liable to transportation.

(a) *Sic.*
Imprisonment with hard labour.

of correction, or penitentiary house, for any term not less than one and not exceeding three years.

§ 2. enacts, that if any person shall assault, beat, or wound any constable, officer, headborough, or other person whomsoever, with intent in so doing, or by means thereof, to obstruct, resist, or prevent the lawful apprehension or detainer of any person charged with or suspected of felony; or if any person charged with or suspected of felony shall assault, beat, or wound any constable, officer, headborough, or other person whomsoever with intent in so doing, or by means thereof, to obstruct, resist, or prevent his or her apprehension or detainer; then and in every or any such case, if the person or persons so offending shall be convicted of a misdemeanor only, it shall be lawful for the court by or before whom any such person or persons shall be so convicted as afore-said to order and direct, in case it shall think fit, that such person or persons shall, in addition to any other pains, penalties, or punishment to which he, she, or they are now subject or liable, be kept to hard labour for any term not exceeding two years, and not less than six months.

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Under this title may properly be included the law respecting *rescous* and pound-breach in cases where there has been a distress of goods.

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An indictment will lie for taking goods forcibly, if such taking be proved to be a breach of the peace; and though such goods

1 & 2 G. 4. c. 88.

Persons assaulting constables to prevent the apprehension or detainer of persons charged with felony, being convicted of a misdemeanor, may be kept to hard labour.

Clergy.

Outlawry.

Rescue of murderers.

Capital.

Of convicts sentenced to transportation, &c.

Rescous and pound-breach.

Indictable.

So, taking goods forcibly.

Aliter, if done without violence.

Pound-breach punishable at common law.

2 W. & M. sess. 1. c. 5.

Recovery of treble damages.

Though rent be tendered afterwards.

Treble costs, also.

What shall be a rescous.

3 G. 4. c. 126. Punishing persons guilty of pound-breach, where distress was made under general turnpike act.

are the prosecutor's own property, yet, if he take them in that manner, he will be guilty. *Anon.* 3 Salk. 187. 1 Russ. 52. 363.

But as a mere trespass, without circumstances of violence, is not indictable, it has been doubted whether even a pound-breach, which has been considered a greater offence at common law than a rescue, is an indictable offence, if unaccompanied by a breach of the peace. 3 Burr. 1701. 1731. 1 Russ. 52. 363.

But on the other hand, it has been submitted, that as pound-breach is an injury and insult to public justice, it is indictable as such at common law. 2 Chitt. Crim. L. 204., and the authorities there cited. 1 Russ. 363.

The civil remedy, however, given by stat. 2 W. & M. sess. 1. c. 5. § 4. will, in most cases of a pound-breach, or a rescue of goods distrained for rent, be found the most desirable mode of proceeding, where the offenders are responsible persons. That statute enacts, that, upon any pound-breach, or rescous of goods distrained for rent, the person grieved thereby shall, in a special action upon the case, recover treble damages and costs against the offender, or against the owner of the goods, if they be afterwards found to have come to his use or possession.

In *Firth v. Purvis*, 5 T. R. 432., it was held to be no answer to an action on this statute, that the rent in demand was tendered after the distress and impounding.

In *Lawson v. Storey*, 1 Ld. Raym. 20., it was adjudged that the costs shall be trebled as well as the damages.

And it is determined, that where an act of parliament gives treble damages for a cause of action, for which at common law a party would only be entitled to single damages, treble costs follow as of course. *Deacon v. Morris*, 2 B. & A. 393.

If a man distrain cattle, and as he is driving them to the pound they go into the owner's house, and he refuse to deliver them, this is a rescue in law. 1 Inst. 161. 6 Bac. Abr., tit. Rescue (A).

But here we must observe, that there can be no rescous but where the party has had the actual possession of the cattle or other things whereof the rescous is supposed to be made; for if a man come to arrest another, or to distrain, and be disturbed regularly, his remedy is by action on the case. 1 Inst. 161. 6 Bac. Abr. 87., and the authorities there cited.

By stat. 3 G. 4. c. 126. § 123., if any person or persons shall release, or attempt to release, any cow, horse, ass, swine, or other live stock or cattle which shall be seized for the purpose of being impounded under the authority of this (General Turnpike) act, from the pound or place where the same shall be so impounded, or shall pull down, damage, or destroy the same pound or place, or any part thereof, or any lock or bolt belonging thereto, or with which the same shall be fastened, or shall rescue or release, or attempt to rescue or release, any distress or levy which shall be made, under the authority of this act, until or before such cow, horse, ass, swine, or other live stock or cattle seized or so impounded, or such distress or levy so made shall be discharged by due course of law, every person so offending shall, upon conviction thereof before any one of H. M.'s justices of the peace for the county or place where the offence shall have been committed, either upon confession of the party or parties offending, or upon the oath of one credible witness, and which oath the said justice is hereby authorised and empowered

ed to administer, be committed by such justice, by warrant under his hand and seal, to the common gaol or house of correction of such of the said counties wherein the said offence shall have been committed, there to remain without bail or mainprize, for any time not exceeding three calendar months. See tit. *Highways*, (*Turnpike*.)

Indictment for a Rescue.

THE jurors for our lord the king upon their oath present, that on the — day of —, in the — year of the reign of —, J. P. esquire, one of the justices of our said lord the king assigned to keep the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the said county committed, did make, direct, and deliver a warrant or precept in writing, to A. C. of —, in the said county, yeoman, constable of the town of — aforesaid, in the county aforesaid, by which said warrant he the said A. C. the constable aforesaid, was commanded to take the body of A. O. late of — yeoman, and bring and have him the said A. O. before the said J. P., to be examined by him the said J. P. concerning an assault said to have been committed by him the said A. O. upon A. I. of —, yeoman; which said A. C. the constable aforesaid, afterwards, that is to say, on the — day of —, in the year aforesaid, at — aforesaid, in the county aforesaid, by virtue of the said warrant, did take and arrest him the said A. O. for the cause aforesaid, and him the said A. O. in his custody, by virtue of the said warrant, then and there had: and that the said A. O. late of — aforesaid, in the county aforesaid, yeoman, and B. O. late of the same, yeoman, well knowing the said A. O. so to be arrested as aforesaid, afterwards, to wit, on the said — day of —, in the year aforesaid, at — aforesaid, in the county aforesaid, with force and arms, in and upon the said A. C. the constable aforesaid, then and there being in the peace of God and of our lord the king, and in the execution of his said office then and there being, did make an assault, and him the said A. C. then and there did beat, wound, and ill-treat, and that the said B. O. him the said A. O. out of the custody of the said A. C. and against the will of the said A. C., then and there, with force and arms, unlawfully did rescue and put at large to go where he would; and that the said A. O. himself, out of the custody of the said A. C. and against the will of the said A. C., then and there, with force and arms, unlawfully did rescue, and escape at large, to go where he would; in contempt of our said lord the king and his laws, to the great damage of the said A. C., to the evil example of all others in the like case offending, and against the peace of our said lord the king, his crown and dignity.

Information for a Rescous and Pound-Breach, at Common Law.

County of } *THE information and complaint of A. I., constable*
 — of — [as the case may be], in the said
 county, taken and made upon oath before me, J. P. esquire, one of
 his majesty's justices of the peace in and for the said county, the
 — day of —, in the year of our Lord one thousand
 eight hundred and —: *Who says, that as constable of the said*

parish of ———, [or, *bailiff, &c.* or, as the case may be,] he received a warrant under the hand and seal of E. E. esquire, [or me, as the case may be,] one of his majesty's justices of the peace in and for the said county of ——— bearing date the ——— day of ——— instant, by which he, the said constable, was commanded to sell such and so much of the goods and chattels of A. O. late of ———, in the said county, yeoman, as should satisfy and pay T. K. constable of the aforesaid parish of ———, the sum of ———l., being the charges of conveying the said A. O. to the house of correction [or, as the case may be,] of the said county, at ———, in the said county, to which house of correction [or, as the case may be] he the said A. O. was committed for a misdemeanor [or, *felony*, as the case may be,] by a warrant under the hand and seal of the said E. E.; that under the said warrant first before mentioned, he the said informant yesterday morning, being the ——— day of ———, instant, took a distress on a quantity of potatoes [or, as the case may be,] belonging to the said A. O., in a house in the village of ———, in the parish of ———, in the county aforesaid, and put a lock on the door; but that last evening the said lock so placed on the said distress was wilfully broken by B. O. [or, the said A. O., as the case may be,] of ———, in the said county, labourer, and that the said potatoes, so taken as a distress, were rescued by the said B. O. [or, A. O., as the case may be,] in breach of the peace, and to the delaying of justice. He therefore prays that hue and cry may be levied against the said B. O. [or, A. O., as the case may be,] for the said rescous and pound-breach, as against those who break the peace.

Before me,

A. I.

J. P.

Warrant to levy Hue and Cry on the foregoing Information.

County of } To all constables and other officers, as well in the
said county of ——— as elsewhere, to whom the
execution hereof does or shall belong.

WHEREAS A. I., constable of ——— [as the case may be], in the said county, has this day made information and complaint on oath before me, J. P. esquire, one of his majesty's justices of the peace in and for the said county of ———, that as constable of the said parish of ———, [or, *bailiff, &c.* as the case may be,] he received a warrant under the hand and seal of E. E. esquire, [or me, as the case may be,] one of his majesty's justices of the peace in and for the said county of ———, bearing date the ——— day of ——— instant, by which he the said constable was commanded to sell such and so much of the goods and chattels of A. O., late of ———, in the said county, yeoman, as should satisfy and pay T. K., constable of the aforesaid parish of ———, the sum of ———l., being the charges of conveying the said A. O. to the house of correction [or, as the case may be,] of the said county, at ———, in the said county, to which house of correction, [or, as the case may be,] he the said A. O. was committed for a misdemeanor, [or, *felony*, as the case may be,] by a warrant under the hand and seal of the said E. E.; that under the said warrant first before mentioned, he the said informant yesterday morning, being the ——— day of ——— instant, took

a distress on a quantity of potatoes [or, as the case may be,] belonging to the said A. O., in a house in the village of ———, in the parish of ———, in the county aforesaid, and put a lock on the door: but that last evening the said lock, so placed on the said distress, was wilfully broken by B. O., [or, the said A. O., as the case may be,] of ———, in the said county, labourer, and that the said potatoes, so taken as a distress, were rescued by the said B. O. [or, A. O., as the case may be,] in breach of the peace, and to the delaying of justice: These are therefore to command you forthwith to raise the power of the towns within your several precincts, and to make diligent search therein for the said B. O. [or, A. O., as the case may be,] and to make fresh pursuit and hue and cry after him from town to town, and from county to county, as well by horsemen as by footmen; and to give due notice thereof in writing, describing in such notice the person of the said B. O. [or, A. O., as the case may be,] and the offence aforesaid, unto every next constable on every side, until he shall come to the sea-shore, or until the said offender shall be apprehended; and that you do carry the said B. O., [or, A. O., as the case may be,] when so apprehended, before some one of his majesty's justices of the peace in and for the said county of ———, or of the county where he shall be so apprehended, to be by such justice examined and dealt withal according to law. And hereof fail you not respectively upon the peril that shall ensue thereon. Given under my hand and seal, at ———, in the said county of ———, the ——— day of ———, in the year of our Lord one thousand eight hundred and ———.

J. P. (L. S.)

Commitment thereon.

County of —————	}	J. P. esquire, one of the justices of our lord the king assigned to keep the peace within the said county, to the constable of ———, in the said county, and to the keeper of the common gaol [or, house of correction] at ———, in the said county.
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THESE are to command you the said constable, in his majesty's name, forthwith to convey and deliver into the custody of the said keeper of the said common gaol, [or, as the case may be,] the body of B. O., late of ———, in the said county, labourer, charged upon the oath of A. I., constable of ———, [or, as the case may be,] in the said county, before me, with rescous and pound-breach, at the village of ———, in the parish of ——— aforesaid, on the ——— day of ——— instant, by wilfully breaking the lock placed on the door of a house in the said village of ———, by the said A. I., in which the said constable A. I. had impounded a quantity of potatoes, which he the said A. I. had taken and so impounded, by virtue of a warrant of distress under the hand and seal of E. E. esquire, one of his majesty's justices of the peace in and for the said county; [or, me, the said justice, as the case may be:] and you the said keeper are hereby required to receive the said B. O. into your custody, in the said common gaol, [or, as the case may be,] and him there safely to keep, until the next general quarter sessions of the peace [or, general gaol delivery,] for the said county, unless in the mean time he shall find sufficient sureties, as well for his ap-

pearance at the said general quarter sessions [or, general gaol delivery,] to answer unto the said offence, as in the mean time to keep the peace and be of good behaviour towards his majesty and all his liege people, and especially towards the said A. I. Given under my hand and seal at ———, in the said county, the ——— day of ———, in the year of our Lord one thousand eight hundred and ———.

Recognizance to prosecute for Rescous and Pound-Breach.

County of } *BE it remembered, that on the ——— day of ———, ———, in the ——— year of the reign of our sovereign lord William the fourth of the united kingdom of Great Britain and Ireland king, defender of the faith, A. I. constable of ———, in the said county, [or, as the case may be,] personally came before me, J. P. esquire, one of the justices of our lord the king assigned to keep the peace of the said county, and acknowledged himself to owe to our said lord the king the sum of ———l. of good and lawful money of Great Britain, to be made and levied of his goods and chattels, lands and tenements, to the use of our said lord the king, his heirs and successors, if he the said A. I. shall fail in the condition hereunder written.*

The condition of the above recognizance is such, that if the above-bound A. I. shall personally appear at the next general quarter sessions of the peace, [or, general gaol delivery, as the case may be,] to be holden at ———, for the said county of ———, and then and there prefer a bill of indictment against B. O., late of ———, in the said county, labourer, for a rescous and pound-breach at the village of ———, in the parish of ———, in the said county, on the ——— day of ——— instant, and shall then and there give evidence concerning the same to the jurors who shall inquire thereof on the part of our said lord the king; and in case the same shall be found a true bill, then if the said A. I. shall personally appear before the jurors who shall pass upon the trial of the said B. O., and give evidence upon the said indictment, and not depart without leave of the court, then this recognizance to be void.

Acknowledged before me,

J. P.

Recognizance with Sureties to answer to an Indictment for Rescous and Pound-Breach.

County of } *BE it remembered, that on the ——— day of ———, in the ——— year of the reign of our sovereign lord William the fourth, of the united kingdom of Great Britain and Ireland king, defender of the faith, B. O. of ———, in the said county, labourer, S. C. of ———, in the said county, cordwainer, and T. D. of ———, in the said county, saddler, personally came before me J. P. esquire, one of the justices of our lord the king assigned to keep the peace in the said county, and acknowledged themselves to owe to our said lord the king the several sums following, that is to say, the said B. O. the sum of ———l., and the said S. C. and T. D. the sum of ———l. each, of lawful money of Great Britain, to be levied of their several goods and chattels, lands and tenements respectively, to the use of our said lord the king, his heirs and successors, if the said B. O. shall make default in the condition hereunder written.*

*The condition of this recognizance is such, that if the above-
 round B. O. do and shall personally appear at the next general
 quarter sessions of the peace which shall be holden at _____, in
 and for the said county of _____, [or, next general gaol de-
 ivery, as the case may be,] and then and there answer to an indict-
 ment to be preferred against him, by A. I., constable of _____
 in the said county, for a rescous and pound-breach at the village
 of _____, in the parish of _____ aforesaid, on the _____
 day of _____ instant, and in the mean time shall keep the peace
 and be of good behaviour towards his majesty and all his liege
 people, and especially towards the said A. I., and not depart without
 leave of the court; then this recognizance to be void.*

Acknowledged before me,

J. P.

Restitution of Stolen Goods.

[31 El. c. 12. — 7 & 8 G. 4. c. 29.]

[THE means of restitution of goods for the party from whom
 they were stolen, (since the abolition of appeals by stat.
 9 G. 3. c. 46.) appear to be two. 1. By statute. And, 2. By the
 course of the common law. 1 *Hale*, 538.

The stat. 21 H. 8. c. 11. introduced a new law for restitution;
 or before this statute there was no restitution upon an indictment,
 but only upon an appeal; which said statute enacted as follows:

If any felon do rob or take away any man's money or goods,
 and thereof be indicted and arraigned, and found guilty or other-
 wise attainted, by reason of evidence given by the party robbed,
 or owner of the money or goods, or by any other by their pro-
 curement; then the party robbed, the owner of the goods, shall
 be restored to such his money or goods; and as well the justices
 of gaol delivery, as other justices before whom the felon shall be
 found guilty, or otherwise attainted, may award a writ of restitution,
 in like manner as if the felon were attainted on appeal.

If the servant be robbed of the master's money, or his servant,
 by his procurement, give evidence and convict the felon, the
 master shall have a writ of restitution, if it appear upon the in-
 dictment and evidence that it was the master's money; for the
 statute gives restitution to the party robbed, or owner. 1 *Hale*,
 542.

If the testator be robbed, and the thief be convict upon the
 procurement of the executor, such executor shall have restitution;
 for this being a beneficial law ought to be construed beneficially,
 so as to extend to executors and administrators. 3 *Inst.* 342.

The stat. 21 H. 8. c. 11. is now repealed, and by 7 & 8 G. 4. c. 29.
 § 57, for encouraging the prosecution of offenders, it is enacted,
 "That if any person, guilty of any such felony or misdemeanor as
 aforesaid, [as in the act mentioned,] in stealing, taking, obtaining,
 or converting, or in knowingly receiving any chattel, money,
 valuable security, or other property whatsoever, shall be indicted
 for any such offence, by or on the behalf of the owner of the
 property, or his executor or administrator, and convicted thereof,
 in such case the property shall be restored to the owner or his

21 H. 8. (now
 repealed.)

Restoration of
 stolen goods.

Where servant
 has been rob-
 bed;

or testator.

7 & 8 G. 4. c. 29.
 Restitution of
 goods, &c.
 taken under
 said act.

representative; and the court before whom any such person shall be so convicted, shall have power to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner: provided always, that if it shall appear, before any award or order made, that any valuable security shall have been *bona fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bona fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, or converted as aforesaid, in such case the court shall not award or order the restitution of such security."

Where owner shall have his goods again without prosecution.

Restitution by 31 El. c. 12.—horses.

Where not.

Stolen goods of several owners.

Owner may re-take stolen property.

Civil remedy for an injury after an acquittal for the offence.

The money for which the stolen goods were sold.

If goods be stolen, and not waived in flight, nor seized by the king's officers or lord of the manor, nor sold in open market, the owner may take them again without any writ of restitution, or may bring his action for them; and this, although he doth not prosecute the offender. 2 *Haw. c. 23. § 49. Kel. 48.*

And by stat. 31 *El. c. 12.*, where horses are stolen, and sold in open market, and the owner claims them again within six months, and pays the buyer as much as they cost him, he shall have them again without prosecution.

But otherwise, if the goods be waived by the felon in his flight, or in case they be not waived, yet if they be seized by the king's officers, or lord of the manor, as suspecting them to be stolen; there the party shall not have restitution, unless the felon be convicted at his prosecution. 2 *Haw. c. 23. § 49. Kel. 48.*

Where the goods of several persons are found upon the thief, the practice is, after the felon is convicted upon one indictment, for the court to order restitution to all who are ready to prosecute; but strictly the owner is not entitled to have the restitution of more goods than those specified in the indictment, for the offender might have escaped by the omission. 2 *East, P. C. 789.*

Trover being brought for some sheep, defendant pleaded that certain unknown persons had stolen the said sheep from plaintiff, and had brought them into a manor belonging to the queen, and left them there, and that defendant as her bailiff had taken them, as waifs, to her use. Held, on demurrer, that they were not legally waived or forfeited, and that the owner may take them when he will. *Foxley's case, 5 Co. 109 (a).*

An action of assault having been brought for a very serious injury, by stabbing under circumstances which would have made it a capital felony under 43 *G. 3.*, and it appeared that defendant had been tried for it, and acquitted; the court held, that after a *bona fide* acquittal, as well as after a conviction, the party injured might have his remedy by civil action. *Crosby v. Leag, 12 East, 409.*

A man stole cattle, and sold them in open market; the sheriff seized the thief and the money, and he was convicted and hanged at the prosecution of the owner of the cattle, and he had restitution of the money; for though the statute gives power to the justices to award restitution of the *money or goods stolen*, and though the money in this case was not stolen; yet, because it did arise by stealing, it shall be within the equity, though not in the very words of the statute. *Noy, 128.*

But it hath been a great question, if goods be stolen and by the thief sold in the market overt, whether, the thief being convicted upon the evidence of the party robbed, he shall have restitution upon this statute of the thing sold or not, the buyer not being privy to the felony; but *Ld. Hale* argues strongly, that he shall have restitution, notwithstanding the sale in market overt of the goods stolen. 1. Because this act was made to encourage persons robbed to pursue malefactors, and therefore they have an assurance of restitution; and it would be small encouragement if a thief, by a sale in a market overt, which is every day almost in every shop in *London*, should elude it. 2. Because the man that is robbed is robbed against his will, and cannot help it; but the buyer of stolen goods may choose whether he will buy, or if he buy, may yet refuse to buy unless well secured of the property of the goods, or knowing the owner. 1 *Hale*, 542, 543, 544. 2 *Haw. c. 23. § 55. Kel. 48.*

But the owner of goods stolen, prosecuting the felon to conviction, cannot recover their value in trover from a person who purchased them in market overt and sold them again before conviction; notwithstanding that the owner gave him notice of the robbery while they were in his possession. Indeed, if he could maintain such action, he might recover with equal propriety against any one of the various persons through whose hands the goods might have passed in the intermediate time between the felony and conviction; during which period the property remains *in dubio*, liable to be defeated by the attainer. The plaintiff, however, has a right to restitution, and perhaps would be entitled to recover damages in trover against any person who was fixed with the goods after conviction, and refused to deliver them; for then the goods would be converted to the prejudice of the owner. *Horwood v. Smith*, 2 *T. R.* 750.

If it shall appear to the court that the party hath been guilty of a gross neglect in prosecuting, it seemeth that in such case he shall not be entitled to restitution. 2 *Haw. c. 23. § 56.*

If a felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods, and recover a satisfaction in damages. But such action lies not before prosecution, for so felonies would be made up and sealed. 4 *Bl. Com.* 363. 1 *Hale*, 546.

In trover for a mare, it appeared that it had been stolen from the plaintiff, and afterwards sold to defendant: but that plaintiff had taken no steps for bringing the thief to justice. *Best C. J.* directed a nonsuit, on the ground that the plaintiff had not done his duty to the public in respect to the prosecution of the felon. *Gimson v. Woodfull*, 2 *C. & P. N. P.* 41.

If the owner take his goods again of the offender, to the intent to favour him, or maintain him, this is unlawful, and punishable by fine and imprisonment; but if he take them again without any such intent, it is no offence. 1 *Hale*, 546.

But after the felon is convicted, it can be no colour of crime to take his goods again, where he finds them; because he hath pursued the law upon him, and may have his writ of restitution, if he pleases. 1 *Hale*, 546.

Where the goods had been sold in market overt.

Purchase in market overt, and resale of stolen goods before conviction.

Neglect in prosecuting.

Action against felon after pardon, &c.
Aliter before prosecution.

Owner not doing his duty in prosecuting.

Retaking goods to favour felon is punishable.

Aliter as to taking them after conviction.

Riot, Rout, and unlawful Assembly. — Training to Arms, &c.

I. *What is a Riot, Rout, or unlawful Assembly.*

[3 G. 4. c. 114. — 7 & 8 G. 4. c. 30.]

II. *How the same may be restrained by a Private Person.*

III. *How by a Constable or other Peace Officer.*

IV. *How by one Justice — and of the Riot Act.*

[2 Ed. 3. c. 3. — 34 Ed. 3. c. 1. — 1 G. 1. st. 2. c. 5. — 1 & 2 W. 4. c. 41.]

V. *How by two Justices.*

[18 H. 4. c. 7. — 2 H. 5. c. 8. — 19 H. 7. c. 13.]

VI. *How by Process out of Chancery.*

[2 H. 5. c. 8. — 2 H. 5. c. 9. — 8 H. 6. c. 14.]

VII. *Seditious Meetings and unlawful Assemblies — Training to Arms.*

[39 G. 3. c. 79. — 57 G. 3. c. 19. — 60 G. 3. c. 1.]

I. *What is a Riot, Rout, or unlawful Assembly.*

What is an unlawful assembly.

WHEN three persons or more shall assemble themselves together with an intent mutually to assist one another against any act, shall oppose them, in the execution of some enterprise of a private nature, with force or violence, against the peace, or to the manifest terror of the people, whether the act intended were of itself lawful or unlawful; if they only meet to such a purpose or intent, although they shall after depart of their own accord, without doing any thing, this is an *unlawful assembly*.

What a rout.

If after their first meeting they shall move forward towards the execution of any such act, whether they put their intended purpose in execution or not, this, according to the general opinion, is a *rout* :

What a riot.

A.

Numbers assembled under circumstances to endanger the peace, and create terror; an unlawful assembly.

And if they execute such a thing indeed, then it is a *riot*. (A.) 1 Haw. c. 65. § 1. Dalt. c. 136. pp. 310, 311.

Persons joining and giving

It is now settled on high authority, that any meeting of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the king's subjects, seems properly to be called an *unlawful assembly*; as, where great numbers complaining of a common grievance meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly. So, in recent cases it has been ruled, that an assembly of great numbers of persons, which, from its general appearance and accompanying circumstances, is calculated to excite terror, alarm, and consternation, is generally criminal and unlawful, and all persons who join an assembly of this kind, disregarding its

robable effect, and the alarm and consternation which are likely to ensue, and all who give countenance and support to it, are criminal parties. 1 Russ. 254., and the authorities there cited.

Prisoners being indicted for a riot and also for an unlawful assembly, and it appearing that they had met tumultuously and cut down fences in *Dean Forest*: — *per Patteson J.* The difference between a riot and unlawful assembly is this: if the persons assemble in a tumultuous manner and execute their purpose with violence, it is a riot; but if they merely meet upon a purpose which, if executed, would make them rioters, and having done nothing, they separate without effecting their purpose, it is an unlawful assembly. *Liford Sum. Ass. 1831, R. v. Birt and others, 5 Car. & P. 154.*

A rout seems to be a disturbance of the peace by persons assembling together with an intention to do a thing, which, if it be executed, will make them rioters, and actually making a motion towards the execution of their purpose. And it seems, by the decisions in several statutes, that if people assemble themselves, and afterwards proceed, ride, go forth, or move, by instigation of one or several conducting them, this is a rout, inasmuch as they move and proceed in rout and number. 1 Russ. 254.

In some cases, however, it may be not only lawful, but an act of duty, to collect an assemblage for the purpose of using force; as for a sheriff or constable to get together a competent number of people to suppress rebels, or enemies, or rioters, or for a justice of peace to raise the *posse* to get the better of resistance in making an entry into lands, &c., or for the sheriff or other minister of justice having the execution of the king's writs; but it is said not to be lawful for them to raise a force for the execution of a civil process, unless they find a resistance; and it is certain, that they are highly punishable for using any needless outrage or violence. 1 Russ. 247.

If the jury acquit all but two, and find them guilty, the verdict is void, unless they be indicted *together with other rioters unknown*, because it finds them guilty of an offence, whereof it is impossible that they should be guilty; for there can be no riot where there are no more persons than two. 2 Haw. c. 47. § 8.

R. v. Scott and Hans, 3 Burr. 1262. Six persons were indicted; whereof two died before trial, two were acquitted, and two convicted. It was moved in arrest of judgment, for that two only could not be found guilty of a riot, unless they were indicted *together with other persons unknown*; which was not the case here; for it doth not appear that any others were guilty besides these two: here is no finding as to the two dead persons. — By *Ld. Mansfield*. Six were indicted. Two of them are acquitted. Two are dead untried. The jury have found the other two guilty of a riot; consequently it must have been with one or both of those who have not been tried; as it could not otherwise have been a riot.

Women are punishable as rioters; but infants, under the age of discretion, are not persons, within the aforesaid description, punishable as rioters. 1 Haw. c. 65. § 14.

Note. — In 1 Haw. pp. 156, 157, 158. (folio edition), the words *more than three persons* are three times over inserted instead of *three persons or more*; which is only remarked as an instance, that,

countenance to it, are parties.

Riot and unlawful assembly; distinction.

Assembly proceeding towards acts of riot.

Moving at the instigation of a leader.

Where the law authorises force, an assemblage will not be riotous.

Not less than three can be guilty of a riot.

Two alone may be convicted.

Women. Infants.

in a variety of matter, it is impossible for the mind of man to be always equally attentive. See 1 *Russ.* 247.

Sudden affray.

It seems agreed, that if a number of persons being met together at a fair, or market, or church aisle, or on any other lawful and innocent occasion, happen on a sudden quarrel to fall together by the ears, they are not guilty of a riot, but of a sudden affray only, of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention concerning it. Yet it is said, that if persons innocently assembled together, do afterwards, upon a dispute happening to arise among them, form themselves into parties with promises of mutual assistance, and then make an affray, they are guilty of a riot; because, upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design. 1 *Haw. c.* 65. § 3. 1 *Russ.* 249, 250.

Assemblage in defence of a man's house or person there.

An assembly of a man's friends for the defence of his person against those who threaten to beat him, if he go to such a market, &c. is unlawful; for he who is in fear of such insults must provide for his safety by demanding the surety of the peace against the persons by whom he is threatened, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorders, to the disturbance of the public peace. But an assembly of a man's friends at his own house, for the defence of the possession of it against such as threaten to make an unlawful entry, or for the defence of his person against such as threaten to beat him in his house, is indulged by law; for a man's house is looked upon as his castle. He is not, however, to arm himself and assemble his friends in defence of his close. *Per Heath J., R. v. the Bishop of Bangor, Shrewsbury Sum. Au.* 1796, 1 *Russ.* 254.; and see the authorities there cited.

Distinction.

Aider of riot.

And the law is, that if any person encourages, or promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter; for in this case all are principals. *Per Mansfield C. J., in Clifford v. Brandon, 2 Camp.* 370.

Riot must be in a matter of private concern.

It also seems agreed, that the injury or grievance complained of and intended to be revenged or remedied by such an assembly must relate to some private quarrel only; as the inclosing of lands in which the inhabitants of a town claim a right of common, or gaining the possession of tenements the title whereof is in dispute, or such like matters, relating to the interest or disputes of particular persons, and no way concerning the public; for wherever the intention of such an assembly is to redress public grievances, as to pull down inclosures in general, or reform religion, and the like, it is high treason. 1 *Haw. c.* 65. § 6.

Circumstances of terror necessary.

It seems to be clearly agreed, that in every riot there must be some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people, as the shew of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *in terrorem populi*. And from hence it clearly follows that assemblies at wakes, or other festival times, or

meetings for exercise of common sports or diversions, as bull-baiting, wrestling, and such like, are not riotous. (a) 1 Haw. c. 65. § 5.

But it is not necessary, in order to constitute this crime, that personal violence should have been committed. *Per Mansfield C. J. in Clifford v. Brandon*, 2 Campb. 369.

From the same ground also it seems to follow, that it is possible for three persons or more to assemble together with an intention to execute a wrongful act, and also actually to perform their intended enterprise, without being rioters; as if a man assemble a meet company, to carry away a piece of timber or other thing, whereto he pretends a right, that cannot be carried without a great number, if the number be not more than are needful for such purpose, although another man hath better right to the thing so carried away, and that this act be wrong and unlawful, yet it is of itself no riot, except there be withal threatening words used, or other disturbance of the peace. 1 Haw. c. 65. § 5. *Lamb*. 178. *Dalt.* c. 137.

Much more may any person, in a peaceable manner, assemble a meet company to do any lawful thing, or to remove or cast down any common nuisance: thus every private man, to whose house or land any nuisance shall be erected, made, or done, may in peaceable manner assemble a meet company, with necessary tools, and may remove, pull, or cast down such nuisance, and that before any prejudice received thereby; and for that purpose, if need be, may also enter into another man's grounds. Thus, a man erected a weir across a common river, where people have a common passage with their boats, and divers did assemble with spades, crows of iron, and other things necessary to remove the said weir, and make a trench in his land that did erect the weir, to turn the water, so as they might the better take up the said weir; and they did remove the same nuisance: this was holden neither any forcible entry, nor yet any riot. *Dalt.* c. 137.

But in the cases aforesaid, if, in removing any such nuisance, the persons so assembled shall use any threatening words, (as to say, they will do it though they die for it, or such like words,) or shall use any other behaviour, in apparent disturbance of the peace, then it seemeth to be a riot, and therefore, where there is cause to remove any such nuisance, or to do any like act, it is the safest not to assemble any multitude of people, but only to send one or two persons, or if a greater number, yet no more than are needful, and only with meet tools, to remove, pull, or cast down the same, and that such persons tend their business only, without disturbance of the peace, or threatening speeches. *Dalt.* c. 137.

It hath been generally holden that it is no way material, whether the act intended to be done by such an assembly be of itself lawful or unlawful, from whence it follows, that if three or more persons assist a man to make a forcible entry into lands to which one of them has a good right of entry, or if the like number in a violent and tumultuous manner join together in removing a nuisance, or

But riot may be without personal violence.

An assemblage may execute a wrongful act and not a riot;

much more a legal act.

Aliter, if threatening words are used.

It may be a riot, though the act be lawful.

(a) But see, in 2 *Chitt. Crim. L.* 494., an indictment said to have been drawn in the year 1797 by a very eminent pleader, for the purpose of suppressing an ancient custom of kicking about foot-balls on a *Shrove-Tuesday*, at *Kingston-upon-Thames*.

other thing which may lawfully be done in a peaceable manner, they are as properly rioters as if the act intended to be done by them were never so unlawful. 1 *Haw. c. 65. § 7. Dalt. c. 137.*

Indictment.

An indictment for a riot must shew for what act the rioters assembled, that the court may judge whether it was lawful or not; and it must state that the defendants unlawfully assembled; for a riot is a compound offence, and there must be not only an unlawful act to be done, but an unlawful assembly of more than two persons. 1 *Russ. 267.*

Indictment for riot must conclude in *terrorem populi.*

On the trial of an indictment for a riot, where the offence was clearly proved against the prisoners, but the indictment did not conclude in *terrorem populi* (a); it was held by *Patteson J.*, that they must be acquitted of the riot, but that they might be convicted on that indictment of an unlawful assembly, and they were found guilty accordingly. *Oxford Spr. Ass. 1831, R. v. Cox and others, 4 Car. & P. 538. Acc. R. v. Hughes, ibid. 373.*

Evidence.

A. being indicted with others for a conspiracy and unlawful meeting, together with persons unknown, for the purpose of exciting discontent and disaffection, at which meeting *A.* was chairman, it was held admissible to give evidence of resolutions passed at a previous meeting held for a similar purpose, at which *A.* was also chairman, in order to shew *A.*'s intention in calling and attending the meeting in question. 1 *Russ. 268.*

Prior acts to shew intention.

Copy of resolutions at a prior meeting.

And a copy of such resolutions given by *A.* to witness, and which corresponded with those which witness heard afterwards read, were held to be evidence, without producing the original. *R. v. Hunt and others, 3 B. & A. 566.; cit. 1 Russ. 268.*

Circumstances to shew the character and intent of the meeting.

So also, in order to shew the character and intention of the meeting, it was held admissible to shew that large bodies came to it from a distance, marching in military order, and the previous conduct of considerable numbers in drilling and training, at a place from whence part of the meeting came, was held evidence. *Id. ibid.*

Parol evidence of inscriptions, &c.

So, that parol evidence might be given of the devices and inscriptions on flags, &c. at the meeting, without producing the originals. *Id. ibid.*

Misconduct of prisoners dispersing the meeting, not evidence.

So also it was held, that, on the trial of this indictment, the supposed misconduct of those who dispersed the meeting was not admissible. *Id. ibid.*

Declarations of persons at the meeting and coming to it.

Declarations made by persons at the meeting and by others coming to it are evidence as to their intention and object. *Redford v. Birley, 3 Stark. Evid. 1510.; cit. 1 Russ. 269.*

General alarm; measures taken by magistrates.

Evidence is also admissible of the alarm and apprehension caused by the meeting; and of the information given to the civil authorities, and of the measures taken by them in consequence. *Id. ibid.*

Punishment.

The punishment for offences of the nature of riots, routs, or unlawful assemblies, at C. L., is fine and imprisonment, in proportion to the circumstances of the offence.

Hard labour.

And under 3 G. 4. c. 114., hard labour may be imposed, either in addition to or in lieu of other punishment in riot.

Riotously demolishing, or beginning, &c. houses, &c.

By the 7 & 8 G. 4. c. 30. § 8., it is enacted, "That if any persons, riotously and tumultuously assembled together to the disturbance

(a) See *R. v. James, post, 748.*

f the public peace, shall unlawfully and with force demolish, pull down, or destroy, or begin to demolish, pull down, or destroy any church or chapel, or any chapel for the religious worship of persons dissenting from the united church of *England and Ireland*, duly registered or recorded; or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof, or any machinery, whether fixed or moveable, prepared for or employed in any manufacture, or in any branch thereof, or any steam-engine, or other engine, for sinking, draining, or working any mine, or any staith, building or erection, used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying minerals from any mine; every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

7 & 8 G. 4. c. 90.

Machinery, &c.
engine, &c.

Death.

The 7 & 8 G. 4. c. 27. repeals the 9 G. 3. c. 29., 52 G. 3. c. 130., and 56 G. 3. c. 125., and so much of the 1 G. 1. st. 2. c. 5., as relates to any rioters demolishing or pulling down, or beginning to demolish or pull down any of the buildings therein mentioned.

On an indictment under the above statute for beginning to demolish the dwelling-house of *J. W.*, it appeared that the prisoner and others in a riotous manner burst open the door, broke some of the furniture and all the windows, and forced out an iron bar, and then went away, though there was nothing to hinder the others doing more mischief if they chose. Held, that this was not "a beginning to demolish" within the act, for that the jury must be satisfied that the ultimate object of the rioters was to demolish the house. *R. v. Thomson*, 4 C. & P. 237.

What is a be-
ginning to de-
molish.

In regard to remedies against the hundred for damage done by rioters, see tit. *Hundred*, in another volume.

I. How the same may be restrained by a private person.

By the common law, any private person may lawfully endeavour to suppress a riot, by staying those whom he shall see engaged therein from executing their purpose, and also by stopping others whom he shall see coming to join them. However, it seems extremely hazardous for private persons to proceed to these extremities; and such violent methods seem only proper against such riots as savour of rebellion. 1 *Haw. c. 65. § 11.*

Suppression of
riot by private
persons.

But if a felony be about to be committed, the interference of private persons will be justifiable; for a private person may do any thing to prevent the perpetration of a felony. *Per Chambre J.*, B. & P. 265.; cit. 1 *Russ.* 266.

Where felony is
about to be
committed.

In the riots (a) of 1780, however, this matter was much misunderstood, and a general persuasion prevailed that no indifferent person could interpose without the authority of a magistrate; in consequence of which much mischief was done which might otherwise have been prevented. (b) *Vide per Heath J.*, 2 *Bos. & Pull.* 364. *Handcock v. Baker and others.*

(a) See *R. v. Kennett*, post, 749.

(b) The following opinion as to the power of private persons and of the military to interfere for the suppression of riots, is said to have been given by the late *Ld. Ellenborough* when at the bar:—"In case of any sudden riot or dis-

Opinion of *Ld.*
Ellenborough.

III. How by a Constable or other Peace Officer.

Peace-officers.

By the common law, the sheriff, constable, and other peace officers, may and ought to do all that in them lies towards the suppressing of a riot, and may command all other persons to assist therein. 1 *Haw. c. 65. § 11.*

IV. How by one Justice—and of the Riot Act.

34 Ed. 3. c. 1. Justices of the peace, power against rioters.

By stat. 34 *Ed. 3. c. 1.*, The justices of the peace shall have power to restrain rioters, and to arrest and chastise them according to their offence; and cause them to be imprisoned and duly punished according to the law and custom of the realm, and according to that which to them shall seem best to do, by their discretions and good advisement.

Construction of statute.

And this statute hath been liberally construed for the advancement of justice; for it hath been resolved, that if a justice find persons riotously assembled, he alone, without staying for his companions, hath not only power to arrest the offenders and bind them to their good behaviour, or imprison them if they do not offer good bail; but that he may also authorise others to arrest them by a bare verbal command, without other warrant; and that, by force thereof, the person so commanded may pursue and arrest the offenders in his absence as well as presence. Also it is said that, after a riot is over, any one justice may send his warrant to arrest any person who was concerned in it, and also that he may send him to gaol till he shall find sureties for his good behaviour. 1 *Haw. c. 65. § 16.*

But it seems to be agreed that no one justice hath any power by force of this statute either to record a riot upon his own view, or to take an inquisition thereof after it is over. Also, if one justice, proceeding upon this statute, shall arrest an innocent person as a rioter, it seemeth that he is liable to an action of trespass, and that the party arrested may justify the rescuing himself, because no single justice is by this statute made a judge of the

turbance, any of H. M.'s subjects, without the presence of a peace officer of any description, may arm themselves, and of course may use any ordinary means of force to suppress such riot and disturbance. This was laid down in my *Ld. C. J. Popham's Reports*, 121., and *Kelyng*, 76., as having been resolved by all the judges, in the 39th of Queen *Eliz.*, to be good law: and has certainly been recognised in *Hawkins* and other writers on the crown law, and by various judges at different periods since. And what H. M.'s subjects may do, they also ought to do, for the suppression of public tumult, when any exigency may require that such means be resorted to. Whatever any other class of H. M.'s subjects may allowably do in this particular, the military may unquestionably do also. By the common law, every description of peace officers may and ought to do not only all that in him lies towards the suppression of riots, but may and ought to command all other persons to assist therein. However, it is by all means advisable to procure a justice of the peace to attend, and for the military to act under his immediate orders, when such attendance and the sanction of such orders can be obtained, as it not only prevents any disposition to unnecessary violence on the part of those who act in repelling the tumult, but it induces, also, from the known authority of such magistrates, a more ready submission, on the part of the rioters, to the measures used for that purpose; but still, in cases of great and sudden emergency, the military, as well as all other individuals, may act without their presence, or without the presence of any other peace officer whatsoever.

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aid offence. But if a riot shall be committed by persons armed in an unusual manner, contrary to the statute of *Northampton, Ed. 3. c. 3.*, and any one justice acting *ex officio*, in pursuance of the statute, seize the armour, and imprison the offender, and make record of the whole matter, such a record cannot be traversed, because it is made by one acting in a judicial capacity. And for the same reason, if a justice proceeding on the statute of the 15 R. 2. against forcible entries and detainers shall upon his own record a riot, which shall be committed in the making of any such forcible entry or detainer, a riot so recorded cannot be traversed. Also, if a justice acting as a judge by any statute whatever empowering him so to do, make a record upon his view of riot committed in his presence, such record shall not be traversed; for the law gives such uncontrollable credit to all matters of record made by any judge of record as such, that it will never admit of an averment against the truth thereof. 1 *Haw. c. 65. § 17.* But if the rioters are above the number of twelve, the offence is greatly enhanced, and the power of one justice very much enlarged, by stat. 1 G. 1. st. 2. c. 5., commonly called the Riot Act, and intitled "An act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing of the rioters." § 1. after citing that "Whereas of late many rebellious riots and tumults have been in divers parts of this kingdom, to the disturbance of the public peace, and the endangering of H. M.'s person and government, and the same are yet continued and fomented by persons disaffected to H. M., presuming so to do, for that the punishments provided by the laws now in being are not adequate to such heinous offences; and by such rioters H. M. and his administration have been most maliciously and falsely traduced, with intent to raise divisions, and to alienate the affections of the people from H. M.; therefore, for the preventing and suppressing of such riots and tumults, and for the more speedy and effectual punishing the offenders therein," enacts, "That if any persons to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, at any time after the last day of *July*, in the year of our lord 1715, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county, or by the under-sheriff, or by the mayor, bailiff or bailiffs, or other head officer or justice of the peace of any city or town corporate, where such assembly shall be, by proclamation to be made in the king's name, in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation, that then such continuing together to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony without benefit of clergy."

§ 2. "That the order and form of the proclamation that shall be made by the authority of this act shall be as hereafter followeth; that is to say,) the justice of the peace, or other person authorized

2 *Edw. 3. c. 3.*

15 R. 2.
Justice making
record of riot.

1 G. 1. st. 2,
c. 5.
Riot act.

Twelve persons
or more unlaw-
fully assembled
after the last of
July, 1715, and
not dispersing
after command-
ed by one jus-
tice, &c. by
proclamation,

shall be adjudg-
ed felons with-
out benefit of
clergy.

How the pro-
clamation shall
be made.

1 G. 1. st. 2. c. 5. by this act to make the said proclamation, shall, among the said rioters, or as near to them as he can safely come, with a loud voice, command, or cause to be commanded, silence to be while proclamation is making, and after that, shall openly and with loud voice make or cause to be made proclamation in these words, or like in effect:—

The proclama-
tion.

OUR sovereign lord the king chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of his George, for preventing tumults and riotous assemblies.

God save the King. (a)

Justices, &c. to
resort to the
place.

“And every such justice and justices of the peace, sheriff, under-sheriff, mayor, bailiff, and other head officer aforesaid, within the limits of their respective jurisdictions, are hereby authorised, empowered, and required, on notice or knowledge of any such unlawful, riotous, and tumultuous assembly, to resort to the place where such unlawful, riotous, and tumultuous assembly shall be, of persons to the number of twelve or more, and there to make or cause to be made proclamation in manner aforesaid.”

Persons so as-
sembled, and
not dispersing
within an hour,
to be seized.

§ 3. “And if such persons so unlawfully, riotously, and tumultuously assembled, or twelve or more of them, after proclamation made in manner aforesaid, shall continue together, and not disperse themselves within one hour, that then it shall and may be lawful to and for every justice of the peace, sheriff, or under-sheriff of the county where such assembly shall be, and also to and for every high or petty constable, and other peace officer within such county, and also to and for every mayor, justice of the peace, sheriff, bailiff, and other head officer, high or petty constable, and other peace officer of any city or town corporate where such assembly shall be, and to and for such other person and persons as shall be commanded to be assisting unto any such justice of the peace, sheriff, or under-sheriff, mayor, bailiff, or other head officer aforesaid, (who are hereby authorised and empowered to command all H. M.'s subjects of age and ability to be assisting to them therein,) to seize and apprehend, and they are hereby required to seize and apprehend such persons so unlawfully, riotously, and tumultuously continuing together after proclamation made, as aforesaid, and forthwith to carry the persons so apprehended before one or more of H. M.'s justices of the peace of the county or place where such person shall be so apprehended, in order to their being proceeded against for such their offences according to law; and if the persons so unlawfully, riotously, and tumultuously assembled, or any of them, shall happen to be killed, maimed, or hurt, in the dispersing, seizing, or apprehending, or endeavouring to disperse, seize, or apprehend them, by reason of their resisting the persons so dispersing, seizing, or apprehending, or endeavouring to disperse, seize, or apprehend them, that then every such justice of the peace, sheriff, under-sheriff, mayor, bailiff, head officer, high or petty constable, or other peace officer, and all and singular persons, being aiding or assisting to them, or any of them, shall be free, discharged, and indemnified, as well against the king's majesty, his heirs and successors, as against all and every

And if they
make resistance,
the persons kill-
ing them, &c.
to be indem-
nified.

(a) See *R. v. Child* and *R. v. Woolcock and another*, post, 748.

her person and persons of, for, or concerning the killing, maiming, or hurting of any such person or persons so unlawfully, riotously, and tumultuously assembled, that shall happen to be so lled, maimed, or hurt, as aforesaid."

§ 5. provides, "That if any person or persons do or shall, with force and arms, wilfully and knowingly oppose, obstruct, or in any manner wilfully and knowingly lett, hinder, or hurt any person or persons that shall begin to proclaim or go to proclaim, according to the proclamation hereby directed to be made, whereby such proclamation shall not be made, that then every such opposing, obstructing, letting, hindering, or hurting such person or persons, so beginning or going to make such proclamation as aforesaid, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy; and that also every such person or persons so being unlawfully, riotously, and tumultuously assembled, to the number of twelve as aforesaid, or more, to whom proclamation should or ought to have been made if the same had not been hindered, as aforesaid, shall likewise, in case they or any of them, to the number of twelve or more, shall continue together, and not disperse themselves within one hour after such lett or hinderance so made, having knowledge of such lett or hinderance so made, shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy."

§ 7. enacts, "That this act shall be openly read at every quarter sessions, and at every leet or law day."

§ 8. provides, "That no person or persons shall be prosecuted by virtue of this act, for any offence or offences committed contrary to the same, unless such prosecution be commenced within twelve months after the offence committed."

§ 9. enacts, "That the sheriffs and their deputies, stewards and their deputies, bailies of regalities and their deputies, magistrates of royal boroughs, and all other inferior judges and magistrates, and also all high and petty constables, or other peace officers, of any county, stewartry, city, or town, within that part of *Great Britain* called *Scotland*, shall have the same powers and authority for putting this present act in execution within *Scotland*, as the justices of the peace and other magistrates aforesaid respectively have by virtue of this act, within and for the other parts of this kingdom; and that all and every person and persons who shall at any time be convicted of any of the offences aforesaid, within that part of *Great Britain* called *Scotland*, shall for every such offence incur and suffer the pain of death, and confiscation of moveables; and also that all prosecutions for repairing the damages of any church or chapel, or any building or religious worship, or any dwelling-house, barn, stable, or out-house, which shall be demolished or pulled down, in whole or in part, within *Scotland*, by any persons unlawfully, riotously, or tumultuously assembled, shall and may be recovered by summary action, at the instance of the party aggrieved, his or her heirs or executors, against the county, stewartry, city, or borough respectively, where such disorders shall happen, the magistrates being summoned in the ordinary form, and the several counties and stewartries called by edictal citation at the market-cross of the

1 G. 1. st. 2. c. 5.

Opposing, &c. the making such proclamation, felony without benefit of clergy.

And persons so assembled, if the proclamation be hindered, shall nevertheless suffer as felons.

This act to be read at the quarter sessions, &c. Prosecution within twelve months.

Sheriff, &c. in Scotland to have the same power as justices, &c. have in England.

Punishment of persons offending in Scotland.

Damages of any church, &c. pulled down, &c. in Scotland, how to be recovered, and of whom.

(a) *Sic*.

1 G. 1. st. 2. c. 5. head borough of such county or stewardry respectively, and that in general, without mentioning their names and designations."

To what places in Scotland this act shall extend. § 10. provides, "That this act shall extend to all places for religious worship in that part of G. B. called *Scotland*, which are tolerated by law, and where H. M. king *George*, the prince and princess of *Wales*, and their issue, are prayed for in express words."

Indictment on 1 G. 1. need not aver in *terrorem populi*.

Prisoner was indicted with others on 1 G. 1. st. 2. c. 5., for being riotously assembled, and for remaining together for an hour and more after proclamation had been made by a justice of the peace, pursuant to the statute. It was objected that the indictment was bad, because it did not charge the riot to have been in *terrorem populi*; but *Patteson J.* held it was sufficient, as it pursued the words of the act on which it was framed, and that there was a distinction between an indictment for a riot, and an indictment for keeping together after being riotously assembled. Prisoner was convicted. *Gloster Sum. Assizes, 1831, R. v. James, 5 Carr. & P. 153.*

In reading the proclamation, it is necessary to add "God save the King" at the conclusion.

In an indictment on the same statute it appeared on the trial, which took place on a special commission, that the magistrate who read the proclamation from the Riot Act omitted to read the words "God save the King" at the conclusion. *Vaughan B. and Alderson J.* held, that on account of this omission the charge could not be supported, and an acquittal was directed. *Winchester Special Commission, Dec. 1830, R. v. Child and others, 4 Carr. & P. 442.*

Verbal variance between the proclamation made, and the proclamation stated, fatal.

Time counts from the first reading.

What is a riotous assembly to bring the case within the stat. 1 G. 1.

On the trial of a similar indictment it appeared, that the proclamation as read from a book which was produced, differed from the proclamation stated in the first count of the indictment, by containing the additional words "of the reign of:" this was held to be a fatal variance. It was further held, with reference to other counts, that where the proclamation was read more than once, the hour was to be computed from the time of the first reading. It was stated in defence that it was not a riot, and that it was at most an unlawful assembly only; but *per Patterson J.* if there was such an assembly that there would have been a riot if the parties had carried their purpose into effect, it would be within the act. *Carmarthen Spring Assizes, 1833, R. v. Woodcock and another, 5 Carr. & P. 516.*

Charge against a magistrate for neglect of duty in case of riot.

In an information filed against defendant, who was Lord Mayor of London at the time of the Riots in 1780, it was charged in several counts that he, knowing and being present when acts of riot were committed, wilfully and obstinately refused and omitted to read the Riot Act; and in a subsequent count it was charged that he unlawfully and wilfully neglected and refused to apprehend the rioters, or to use means for suppressing the riot, or to execute the powers vested in him as justice of the peace in that behalf. It appeared on the trial that the defendant was apprised that a riot was going on in *Moorfields*, and that he was present there when a Roman Catholic Chapel was in the act of being destroyed; that though a party of soldiers had been sent from the Tower, he neither read the Riot Act, nor used effectual means for suppressing the riot, or apprehending the offenders. *Ld. Mansfield C. J.* told the jury, that it was clear that justices of the peace, who were invested with great powers for quelling riots, might call

pon the military, who were subjects, and might act as such, for their assistance; but that this should be done with great caution; it is stated that it was not charged that defendant connived at the riots, but that he had neglected his duty in not making use of the power with which he was invested, and which *prima facie* it was his duty to have exercised; that his forbearing to do so from personal apprehension was no defence, but that the question was, whether under the circumstances he did all that could have been required of a man of ordinary firmness. Defendant was convicted. *ittings, March 1781, R. v. Kennett, 5 Carr. & P. 282. n.*

An information having been filed against the mayor of *Bristol*, for not doing his duty in suppressing the riots that took place there in October 1831. on a trial at bar the following principles and points were laid down and decided:—

It is the duty of a magistrate in case of riots to do all that he knows to be in his power to suppress them, and that can be expected from a man of honesty and of ordinary prudence, firmness, and activity, both by using those means which the law requires to assemble a sufficient force to prevent the mischief, and also by making such use of the force so obtained, and also of his own personal exertions as may reasonably be expected from a firm and honest man. *3 B. & Ad. 957.* Nor can he excuse himself on the mere ground of honest intention. *Ibid.* Nor will it shelter him, if he acted incorrectly in point of law, that he followed the best legal and military advice he could get, though it would be a circumstance in his favour. *Ib. 958.*

But it is no part of his duty to head the special constables, or to marshal and array them, as this more properly belongs to the chief or head constables. *Ib. 958, 959.*

It is the general duty of justices of the peace, arising from the nature of their office, to restrain rioters, and, if necessary, to pursue, arrest, and take them; and for this purpose they may call on the king's subjects to aid them; and the king's subjects are bound to assist to them in suppressing the riot, when reasonably armed. *Ib. 960.*

It was held by a majority of the court, that a magistrate is not responsible for not calling out special constables under 1 & 2 *W. 4. c. 41.*, unless some person has come before him, pursuant to that act, requiring him so to do. *Ib. 959.* Nor will he be chargeable with not calling out the *posse comitatus*, provided he has given due notice to the king's subjects to come to his assistance. *Ib. 962, 3.*

If a magistrate calls upon the military to act in suppressing a riot, he is not bound to go with them in person; it is enough if he gives them authority. The defendant was acquitted. *R. v. Pinney, 3 B. & Ad. 947.*

Power to call in the military.

Personal fear alone, no excuse. He is bound to all that can be required of a man of ordinary firmness.

Magistrate's duty in case of riot.

Honest intention, or that he followed advice, no defence.

Not his duty to head the special constables.

All the king's subjects bound to assist, when called upon in quelling the riot.

But magistrate not responsible for not calling out special constables, unless required pursuant to 1 & 2 *W. 4. c. 41.*

Magistrate calling out the military not bound to go with them.

V. How by Two Justices.

By stat. 13 *H. 4. c. 7. § 1.*, If any riot, assembly, or rout of people against the law be made, the justices, three or two of them at the least, and the sheriff, or under-sheriff, shall come with the power of the county, if need be.

And by stat. 2 *H. 5. c. 8., § 2.*, The king's liege people, being sufficient to travel, shall be assistants to them, upon reasonable warning, to ride with them in aid to resist such riots, routs, and as-

13 *H. 4. c. 7.* Justices with sheriff and power of the county.

2 *H. 5. c. 8.* All persons bound to assist.

semblies, on pain of imprisonment, and to make fine and ransom to the king.

On view or
credible information.

It is said that the justices are not only empowered hereby to raise the power of the county to assist them in suppressing a riot, which shall happen within their own view or hearing, but also that they may safely do it upon a credible information given them of a notorious riot happening at a distance, whether there were any such riot in truth or not; for it may be dangerous for them to stay till they can get certain information of the fact: but they seem to be punishable for alarming the country in this manner, without such probable ground for their proceeding as would induce a reasonable man to think it necessary and convenient. 1 *Haw. c. 65. § 22.*

Riotous assembly.

It seems clear from hence, that if the justices, in going towards the place where they have heard that there is a riot shall meet persons coming from thence riotously arrayed, they may arrest them for being assembled together in such an unlawful manner, and also make a record thereof; for the statute extends to all other unlawful assemblies whatsoever as well as to riots. 1 *Haw. c. 65. § 22.*

The king's liege people.] Except women, clergymen, persons decrepit, and infants under the age of fifteen.

To resist such riots.] And also to arrest the rioters, and conduct them to prison.

And shall arrest them.] 13 *H. 4. c. 7. § 1.*

May be arrested on fresh pursuit.

And if they shall escape, they may take them on a fresh pursuit; but they cannot at another time award any process against them on the record, but ought to send the record into the king's bench, that process may issue thereon from thence; yet there seems to be no doubt but that they may arrest them for their trespass on the aforesaid stat. 34 *Ed. 3.*, in order to compel them to find sureties for their good behaviour. 1 *Haw. c. 65. § 24.*

13 *H. 4. c. 7.*

B.
Power to record riot, &c.

C.

And by stat. 13 *H. 4. c. 7. § 1.*, The same justices and sheriff, or under-sheriff, shall have power to record (B.) that which they shall find so done in their presence against the law; by which record the offenders shall be convict in the same manner and form as is contained in the statute of forcible entries. (C.)

And this they may do, whether the offenders be in custody at the same time, or have escaped. 1 *Haw. c. 65. § 24.*

Such record a conviction not to be traversed.

And it seemeth to be certain that the record of a riot, expressly mentioned to have happened within the view of the justices by whom it is recorded, is a conviction of so great authority, that it can no way be traversed, however little ground of truth there might be to affirm that any riot at all was committed, or however innocent the parties may be of the fact recorded against them. 1 *Haw. c. 65. § 25.*

But not conclusive as to any felony, maim, &c.

However, it seemeth clear that if, in such a record of a riot, it be contained that the party was guilty therein of a felony, or maim, or rescous, the party shall be concluded thereby as to the riot only, and not as to any of the other matters; because the justices have by this statute a judicial authority over no other offences except riots, routs, and unlawful assemblies. 1 *Haw. c. 65. § 26.*

Certainty required.

And inasmuch as such a final record is a conviction of the parties, as to all such matters as are properly contained in it,

Riot, &c. (How restrained.)
acts, and might act as such, for peace and
done with great caution: is the matter
committed at the
use of the
it was
from
as it

tain both as to the time and place of the
 er of persons concerned therein, and the
 made use of by them, and all other
 or since the parties are excluded from
 ord, and have no other remedy to
 ut only by advantage of the in-
 in it, they may justly demand
 do not expressly shew both
 ng of the statute, and also
 justices have pursued the
 statute: from the same ground
 such a record may be excepted
 ar to have been made by the sheriff or
 arrence with the justices. 1 *Haw. c. 65. § 26.*
 ord ought to remain with one of the justices, and
 be left amongst the records of the sessions, it being
 e out of sessions, and not appointed to be certified thither.

Sheriff, &c.
 must join.

Where to re-
 main.

Dalt. c. 82.

In the same manner and form as is contained in the statute of
 orrible entries.] That is, the statute of the 15 R. 2. c. 2. And
 hereupon it is said, that the offenders being under the arrest of the
 justices, and also convicted by a record of their offence, ought
 mmediately to be committed to gaol by the same justices till they
 hall make fine and ransom to the king; which can be assessed by
 o other justices of the peace, except those by whom the record
 f the offence was made. 1 *Haw. c. 65. § 28.*

Fine and ran-
 som thereon.

To be estreated.

And this fine, Mr. Dalton (*cap. 82.*) says, the justices shall
 ause to be estreated into the exchequer, that so it may be levied
 o the king's use; and then they are to deliver the offenders
 gain.

But Mr. Hawkins says, that it hath been questioned whether
 he justices can safely dismiss the offenders upon their paying such
 fine as shall be imposed upon them, without some judgment for
 heir imprisonment as well as fine; because it is enacted by the
 2 H. 5. c. 8., that such rioters attainted of great and heinous riots
 hall have one whole year's imprisonment at the least, without
 being let out of prison by bail or mainprise; and that the rioters
 attainted of petty riots shall have imprisonment as best shall seem
 o the king or to his council. 1 *Haw. c. 65. § 35.*

Imprisonment.

And by stat. 13 H. 4. c. 7. § 1., If the offenders be departed
 before the coming of the said justices, and sheriff or under-sheriff,
 he same justices, three or two of them, shall diligently inquire
 D.) within a month after such riot, assembly, or rout of people
 o made, and thereof shall hear and determine according to the
 aw of the land.

13 H. 4. c. 7.

D.
 Inquisition by
 justices.

It is generally said, that any justices of the county may take
 uch an inquiry, whether they dwell near the place where the
 riot happened, or at a distance, or whether they went to view
 he riot or not; for the statute ought to be construed as largely
 is the words will bear in favour of the justices' power in the
 uppressing of such riots; and therefore those words in the sta-
 ute, *that the same justices shall inquire*, ought to be thus ex-
 ounded, *that the same justices who were before empowered to*
raise the posse shall inquire, and that is, any justices in the county.
 1 *Haw. c. 65. § 32.*

1 G. 1. st. 2. c. 5.

To what places
in Scotland this
act shall extend.

Indictment on
1 G. 1. need
not aver in *terrorem populi*.

In reading the
proclamation
is necessary
to add
save
at the
sio

13 H. 4. c. 7.
Justices and
sheriff, &c.
may certify to
the king and
council.

Which may be
tried in K. B.

19 H. 7. c. 13.

Certificate as to
maintainers or
embracers.

Certificate re-
quires certainty.

King's council.

2 H. 5. c. 8.
Costs of jus-
tices, &c.

head borough of such county or
in general, without mentioning

§ 10. provides, "That the
religious worship in that par-
tolerated by law, and with
princess of Wales, as
words."

Prisoner was in-
riously assem-
more after pro-
pursuant to
bad, became
populi;
words
disti-
ke

process under their own teste against those
acted before them of any of the offences above
according to the form of this statute; and also may
the like process for the trial of a traverse of such an
inquisition; and do all other things in relation thereto, which
are of course incident to all courts of record. 1 *Haw. c. 65.*
§ 34.

And the riot being so found by inquisition, the justices must
make a record thereof in writing of such their inquiry or present-
ment found before them; which record also is to remain with one
of the justices. *Dalt. c. 82.*

And by stat. 13 H. 4. c. 7. § 2., If the truth cannot be found in
the manner as is aforesaid, then within a month then next follow-
ing, the justices, three or two of them, and the sheriff or under-
sheriff, shall certify before the king and his council all the deeds
and circumstances thereof, which certificate shall be of the like
force as the presentment of twelve men; upon which certificate
the offender shall be put to answer, and shall be punished accord-
ing to the discretion of the king and his council.

§ 3. And if they do traverse the matter so certified, the cer-
tificate and traverse shall be sent into the K. B. to be tried.

And by stat. 19 H. 7. c. 13., If the offence be not found, by
reason of any maintenance or embracery of the jurors, then the
same justices and sheriff or under-sheriff shall in the same cer-
tificate certify the names of the maintainers and embracers, with
their misdemeanors.

It seemeth certain that such certificate, being in nature of an
indictment at the common law, ought to comprehend the certainty
of time, place, and persons, and other material circumstances
both of the riot and maintenance. 1 *Haw. c. 65.* § 13.

Before the king and his council.] It seems clear, by the council
being here distinguished both from the chancery and K. B.
that the certificate ought to be made to the privy council board,
and not to either of those courts, which in some statutes relating
to judicial proceedings are taken for the king's council. 1 *Haw.*
c. 65. § 41.

And by stat. 2 H. 5. c. 8., the said justices and other officers shall
execute their offices aforesaid at the king's costs in going and con-
tinuing in doing their said offices, by payment thereof to be made by
the sheriff, by indentures betwixt the said sheriff and justices and

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/ H. 8. hath been

... a month, they are
ay inquire after the month;
to determine their authority, but
... duty. 2 *Salk.* 593.

... duty. 2 *Salk.* 593.

said, whereof the sheriff upon his account in
ve due allowance.

ing of which, the said statute directs the
enlarged, and thereout the sheriff may
justices; and of the jury, that is,
ees, and the like. *Dalt. c. 82.*

ighest in the county where
together with the sheriff or
aid statute of the 13 H. 4.,

Penalty on
justices and
sheriffs, &c.
for neglect.

alty, yet if any others
ult, they are fineable at

What justices
liable.

ot dwell nearest to the place, do
e, they excuse all the rest. 1 *Haw.*

ighest, but in another county, they are not in
this penalty. 1 *Haw. c. 65. § 45.*

In execution of
the whole stat.

do execution of the said statute.] That is, in the whole,
d not in part only; as by recording a riot, and committing the
rties. 1 *Haw. c. 65. § 50.*

1 & 2 W. 4. c. 41.
Appointment
of special con-
stables.

By 1 & 2 W. 4. c. 41. § 1., where, upon the oath of any credible
ness, any tumult, riot, or felony has taken place, or may be
sonably apprehended, two justices of the peace are empowered
appoint special constables for the preservation of the public
ace, &c.

Allowances to.

§ 13. The justices of the division may, at a special session, order
sonable allowances to be paid to the special constables for
uble, loss of time, and expenses. See tit. *Constable.*

VI. Process out of Chancery.

By stat. 2 H. 5. c. 8., if default be found in the two justices,
eriff, or under-sheriff, then, at the instance of the party grieved,
ommission shall be entered under the great seal, to inquire as well
the truth of the case for the complainant, as of such default.

2 H. 5. c. 8.
Process against
justices, &c. at
suit of party
grieved.

And by stats. 2 H. 5. c. 9. and 8 H. 6. c. 14., rioters shall be
en by writ and proclamation out of chancery, on suggestion of
o justices and the sheriff, of the common fame of such riot.

2 H. 5. c. 9.
8 H. 6. c. 14.
Writ out of
chancery
against rioters.

VII. Seditious Meetings and unlawful Assemblies.

By stat. 39 G. 3. c. 79. § 1., after reciting that a traitorous con-
iracy had long been carried on, in conjunction with the persons
exercising the powers of government in *France*, to overturn the
ws and government in *G. B.* and *Ireland*, it is enacted, that all
cieties calling themselves *United Englishmen*, *United Scotchmen*,
United Irishmen, and *United Britons*, and the society commonly
lled the *London Corresponding Society*, and all other *Correspond-*
g Societies of any other city, town, or place, shall be suppressed
nd prohibited. See stat. 57 G. 3. c. 19. *post.* 758.

39 G. 3. c. 79.
Certain socie-
ties suppressed.

§ 2. And all the said societies, and every other society, the
members whereof shall according the rules thereof, or to any
greement for that purpose, be required or admitted to take any
ath or engagement deemed unlawful within the meaning of stat.
7 G. 3. c. 123., for more effectually preventing the administering or

Societies, the
members of
which shall take
unlawful oaths
or engage-
ments, &c. or

39 G. 3. c. 79.

Penalty.

have been previously licensed in manner hereafter mentioned; and the person by whom such place shall be opened or used for any of the purposes aforesaid shall forfeit 100*l.* for every day or time so opened or used as aforesaid, to the person who shall sue, and be otherwise punished as the law directs in cases of disorderly houses: And every person conducting the proceedings, or acting as moderator, president, or chairman, at any such place, or therein debating or delivering any discourse, or furnishing any book, pamphlet, newspaper, or other publication as aforesaid; and also every person who shall pay, give, collect, or receive any money or other thing, or agree so to do, in respect of the admission of any person, or shall deliver out, distribute, or receive any ticket or token as aforesaid, knowing such place to be so opened or used for such purpose as aforesaid, shall, for every such offence, forfeit 20*l.*

Persons appearing as master liable to prosecution, although not the real owner.

§ 16. Every person who shall appear at, or behave as master, or as the person having the command, government, or management of any such house or place, shall be deemed to be a person by whom the same is opened or used as aforesaid, and shall be liable to be prosecuted as such, notwithstanding he be not in fact the real owner or occupier.

Justices may enter suspected places.

§ 17. And any justice who shall by information upon oath have reason to suspect that any house, room, field, or place, or any part thereof, is opened or used for the purpose of delivering lectures, or for public debate, or for reading books, pamphlets, newspapers, or other publications contrary to this act, may go to such place, and demand admittance; and if he shall be refused, the same shall be deemed a disorderly house or place, and all the provisions herein contained, and in the said act of 36 G. 3. c. 5. shall be applied to such house or place; and every person refusing such justice admittance shall forfeit 20*l.*

Two justices at general or special sessions may license houses for lecturing, &c. and justices at a general sessions may revoke it.

§ 18. Provided nevertheless, that two justices at any general or special sessions may, by writing under their hands and seals, grant a licence to any person to open any such house or place for the purpose of delivering, for money, any such lectures as aforesaid on any subject, the same being clearly expressed in such licence: or for reading books, pamphlets, newspapers, or other publications (for which licence 1*s.* shall be paid, and no more), and the same shall be in force for one year, and no longer, or for any less time therein specified; which licence the justices at any general sessions may revoke by their order, a copy whereof shall be served upon the person to whom such licence was granted, or be left at such place, and thereupon the same shall cease and be utterly void.

Justices may enter licensed places.

§ 19. And any justice may go to any such licensed place at the time of delivering or appointed for delivering lectures therein, or while opened or used for that purpose, and demand admittance: and if he shall be refused, notwithstanding such licence, the same shall be deemed a disorderly house or place within this act: and every person refusing such admittance shall forfeit 20*l.*

And if used for seditious purposes may declare the licence void.

§ 20. Any two justices upon evidence on oath that any such licensed place is commonly used for delivering lectures of a seditious or immoral tendency, or that books or other publications of the like nature are there commonly kept and delivered to be

read, may declare such licence forfeited, and the same shall from henceforth be utterly void.

39 G. 3. c. 79.

§ 21. And every house or place licensed to sell ale, beer, wine, or spirits, shall also be deemed a place licensed for reading books, pamphlets, and other publications within the meaning of this act; but nevertheless, any two justices, on proof on oath that publications of a seditious or immoral nature are usually distributed for the purpose of being read at such place, may adjudge such licence forfeited (E.); and the person keeping such house shall, after such adjudication, be liable to every penalty and forfeiture as if such licence had expired.

Every alehouse, &c. to be deemed licensed for reading.

E.

§ 22. Provided always, that nothing herein shall extend to any lectures delivered at the universities, or in the inns of court, or barristers' halls, or by the professors of *Gresham College*; and no payment made to any schoolmaster or other person delivering lectures for the instruction of youth only shall be deemed a payment for admission within the meaning of this act.

Not to extend to the universities, &c. nor to payments to schoolmasters.

§ 13. Every person who shall knowingly permit any meeting of any society hereby declared to be an unlawful combination or confederacy, or of any division, branch, or committee of such society, to be held in his house or apartment, shall for the first offence forfeit 5*l.*, and for every other offence committed after the date of his conviction be deemed guilty of an unlawful combination and confederacy.

Penalty for permitting unlawful meetings.

§ 8. And every person who shall be guilty of any such unlawful combination and confederacy as in this act described may be proceeded against in a summary way, either before one justice, or by indictment; who, on conviction (F.) on the oath of one witness by such justice, shall be committed to the common gaol or house of correction without bail for three calendar months, or shall forfeit 20*l.*, as to such justice shall seem meet; which if not forthwith paid into the hands of such justice he may levy the same by distress, together with the costs, and for want of sufficient distress may commit such offender to the common gaol or house of correction, for any time not exceeding three calendar months. And if any such offender be convicted upon indictment, he may be transported for seven years, or may be imprisoned for not exceeding two years, as the court shall think fit.

Punishment of persons guilty of combinations and confederacies.

F.

§ 9. Provided always, that such justice may mitigate such punishment (if he shall see cause), so as not to reduce the same to less than one third, whether it be by imprisonment or fine.

Justices may mitigate punishments.

§ 10. But no person prosecuted before a justice shall be prosecuted also by indictment; and if prosecuted by indictment, shall not be prosecuted before a justice.

Offenders not to be prosecuted two ways.

§ 11. Provided, that nothing herein shall extend to prevent any prosecution by indictment or otherwise for any offence within the meaning of this act, which might have been prosecuted if this act had not been made, unless the offender hath been prosecuted under this act.

This act not to prevent any other prosecution.

§ 34. Provided always, that no person shall be prosecuted or sued for any penalty hereby imposed, unless such prosecution be commenced, or action brought, within three calendar months.

Prosecutions to be within three months.

§ 35. All pecuniary penalties hereby imposed exceeding 20*l.* shall be recovered in the courts at *Westminster*. If not exceeding 20*l.* (for the recovery whereof no provision is herein-before

Penalties, how to be recovered.

59 G. 3. c. 79.

G.

contained) may be recovered before one justice where such penalty shall be incurred, or the person having incurred the same shall happen to be, in a summary way (G.). And in case such last-mentioned penalty shall not be forthwith paid, such justice shall cause the same to be levied by distress and sale of the offender's goods, together with the costs of such distress and sale, and for want of sufficient distress such offender shall be committed to the common gaol or house of correction, for not exceeding six nor less than three calendar months.

Application of penalties.

§ 36. All pecuniary penalties, whether recovered before a justice or by action, shall be applied half to the informer, and half to the king.

Limitation of actions.

§ 37. And every action and suit against any justice, peace officer, or other person acting in pursuance of this act, shall be commenced within three calendar months, and shall be laid in the proper county; and if the defendant recover he shall have double costs.

Conviction, &c.

57 G. 3. c. 19.

For preventing seditious meetings.

§ 38. And all convictions, &c. shall be in the forms E, F, G.

By stat. 57 G. 3. c. 19. § 23. (a), after reciting that it is highly inexpedient that public meetings or assemblies should be held near the houses of parliament, or near the courts of justice in *Westminster-hall* on certain days; it is enacted, that it shall not be lawful for any person to convene, or to give any notice for convening any meeting consisting of more than fifty persons, or for any number of persons exceeding fifty to meet in any street, square, or open place in the city or liberties of *Westminster*, or county of *Middlesex*, within the distance of a mile from the gate of *Westminster-hall*, (except such parts of the parish of *St. Paul's Covent-garden*, as are within such distance,) for the purpose of considering of or preparing any petition, &c. for alteration of matters in church or state, on any day on which the two houses, or either house of parliament, shall meet and sit, nor on any day on which the courts shall sit in *Westminster-hall*. And that if any meeting or assembly for such purposes shall be assembled or holden on such day, it shall be deemed an *unlawful assembly*: Provided that this enactment shall not apply to any meeting for the election of members of parliament, or to persons attending upon the business of either house of parliament, or any of the said courts. See stat. 60 G. 3. c. 6. § 23. *post*, p. 762.

Spencean societies or clubs, &c. suppressed and prohibited.

§ 24. After reciting that whereas divers societies or clubs have been instituted, in the metropolis and in various parts of this kingdom, of a dangerous nature and tendency, inconsistent with the public tranquillity, and the existence of the established government, laws, and constitution of the kingdom; and that the members of many of such societies or clubs have taken unlawful oaths and engagements of fidelity and secrecy, and have taken or subscribed, or assented to, illegal tests and declarations; and that many of the said societies or clubs elect, appoint, or employ committees, delegates, &c. to confer or correspond with other societies or clubs, and to induce other persons to become members, and by such means maintain an influence over large bodies of men, and delude many ignorant and unwary persons into the commission of

(a) By § 22. the clauses and provisions of the act therein-before contained were to continue in force until 24th July 1818.

ts highly criminal: and whereas certain societies or clubs 57 G. 3. c. 19.
 lling themselves *Spenceans* or *Spencean Philanthropists*, hold
 d profess for their object the confiscation and division of the
 nd, and the extinction of the funded property of the kingdom:
 d whereas it is expedient and necessary that all such societies
 clubs should be utterly suppressed and prohibited as un-
 wful combinations and confederacies, highly dangerous to the
 ace and tranquillity of this kingdom, and to the constitution of
 e government thereof, it is enacted, "That all societies or clubs
 lling themselves *Spenceans* or *Spencean Philanthropists*, and all
 her societies or clubs, by whatever name or description the same
 e called or known, who hold and profess, or who shall hold and
 ofess, the same objects and doctrines, shall be and the same are
 rebly utterly suppressed and prohibited, as being unlawful com-
 nations and confederacies against the government of our sove-
 ign lord the king, and against the peace and security of H. M.'s
 ge subjects."

§ 25. enacts, "That all and every the said societies or clubs,
 d also all and every other society or club now established or here-
 ter to be established, the members whereof shall be required or
 mitted to take any oath or engagement which shall be an unlaw-
 l engagement within the meaning of 37 G. 3. c. 123., or within
 e meaning of 52 G. 3. c. 104. (see tit. *Oaths*), or to take any
 th not required or authorised by law; and every society or club,
 e members whereof or any of them shall take or in any manner
 d themselves by any such oath or engagement, on becoming,
 in order to become, or in consequence of being a member or
 embers of such society or club; and every society or club, the
 embers or any member whereof shall be required or admitted to
 ke, subscribe, or assent to, or shall take, subscribe, or assent to
 y test or declaration not required or authorised by law, in what-
 ever manner or form such taking or assenting shall be performed,
 hether by words, signs, or otherwise; either on becoming or in
 der to become, or in consequence of being a member or mem-
 ers of any such society or club; and every society or club that
 all elect, appoint, nominate, or employ any committee, dele-
 ate or delegates, representative or representatives, missionary or
 issionaries, to meet, confer, or communicate with any other
 ociety or club, or with any committee, delegate or delegates,
 representative or representatives, missionary or missionaries, of
 ch other society or club, or to induce or persuade any person
 r persons to become members thereof, shall be deemed and
 aken to be unlawful combinations and confederacies, within the
 eaning of 39 G. 3. c. 79., and shall and may be prosecuted, pro-
 ceeded against, and punished, according to the provisions of the
 aid act; and every person who, from and after the passing of this
 ct, shall become a member of any such society or club, or who,
 fter the passing of this act, shall act as a member thereof, and
 very person who, from and after the passing of this act, shall
 irectly or indirectly maintain correspondence or intercourse with
 ny such society or club, or with any committee or delegate, re-
 resentative or missionary, or with any officer or member thereof,
 s such, or who shall, by contribution of money or otherwise, aid,
 bet, or support such society or club, or any members or officers
 thereof, as such, shall be deemed guilty of an unlawful combin-

Societies taking
unlawful oaths,
&c.

Or electing
committees,
delegates, &c.

Members guilty
of unlawful
combination.

57 G. 3. c. 19. ation and confederacy within the intent and meaning of the said 39 G. 3. c. 79.; and shall and may be proceeded against, prosecuted, and punished, according to the provisions of the said act, with regard to the prosecution and punishment of unlawful combinations and confederacies."

Act not to extend to Freemasons' lodges; nor to declaration approved by two justices; nor to extend to meetings or societies for charitable purposes.

39 G. 3. c. 79. § 2. not to extend to quakers' meetings, &c.

Penalty on persons permitting unlawful assemblies.

Licences of public houses where unlawful clubs are held, to be forfeited.

Penalties exceeding 20*l.* how to be recovered.

§ 26. provides, that nothing in this act contained shall extend to lodges of Freemasons complying with the regulations of 39 G. 3. c. 79.; nor to any declaration approved and subscribed by two or more justices of the peace, and confirmed by the major part of the justices present at a general session, or at a general quarter sessions of the peace, pursuant to the regulations of 39 G. 3. c. 79.; nor to any meeting of quakers; or to any meeting or society formed or assembled for purposes of a religious or charitable nature only, and in which no other matter or business whatsoever shall be treated of or discussed.

§ 27. after reciting statute, 39 G. 3. c. 79. § 2., enacts, that the said enactment shall not extend to any meeting of quakers, or to any meeting or society formed or assembled for purposes of a religious or charitable nature only, and in which no other matter or business whatsoever shall be treated of or discussed.

§ 28. "If any person shall knowingly permit any meeting of any society or club hereby declared to be an unlawful combination or confederacy, or of any division, branch, or committee of such society or club, to be held in any house or apartment, building, or other place, to him or her belonging, or in his or her possession or occupation, such person shall, for the first offence, forfeit the sum of 5*l.*, and shall, for any such offence committed after the date of his or her conviction for such first offence, be deemed guilty of an unlawful combination and confederacy, in breach of this act."

§ 29. "It shall be lawful for any two or more justices of the peace, acting for any county, stewardry, riding, division, city, town, or place, upon evidence on oath that any meeting of any society or club hereby declared to be an unlawful combination and confederacy, or any meeting for any seditious purpose, hath been held, after the passing of this act, at any house, room, or place licensed for the sale of ale, beer, wine, or spirituous liquors, with the knowledge and consent of the person keeping such house, room, or place, to adjudge and declare the licence or licences for selling ale, beer, wine, or spirituous liquors, granted to the person or persons keeping such house, room, or place, to be forfeited; and the person or persons so keeping such house, room, or place, shall, from and after the day of the date of such adjudication and declaration, and notice thereof given to him, her, or them, be subject and liable to all and every the penalties and forfeitures for any act done after that day, which such person or persons would be subject and liable to, if such licence or licences had expired, or otherwise determined on that day."

§ 30. All pecuniary fines, penalties, or forfeitures, exceeding 20*l.*, incurred under this act, in *England, Wales, or Berwick-upon-Tweed*, may be recovered by action of debt in any of H. M.'s courts of record at *Westminster*, and in *Scotland* in the court of session there; and it shall be sufficient to declare in *England* or conclude in *Scotland*, that the defendant or defender is indebted to the plaintiff or pursuer in the sum of ——— (being the sum

demanded by the said action,) being forfeited by an act made in the 57th year of the reign of his present majesty, intituled *An act for the more effectually preventing seditious meetings and assemblies*; and the plaintiff or pursuer, if he shall recover in such action, shall have his full costs or expenses; and any pecuniary penalty imposed by this act not exceeding 20*l.*, and for the recovery whereof no provision is herein-before contained, may be recovered before any justice of the peace for the county, city, town, or place, in which the same shall be incurred, or the person having incurred the same shall happen to be, in a summary way; and in case such last-mentioned penalty shall not be forthwith paid, such justice shall by warrant under his hand and seal, and directed to any constable or other peace officer, cause the same to be levied by distress and sale of the offender's goods and chattels, together with all costs and charges attending such distress and sale; and in case no sufficient distress can be had or made, such justice shall commit the offender to the common gaol or house of correction for such county, city, town, or place, there to remain without bail or mainprize, for any time not exceeding six calendar months, nor less than three calendar months: Provided always that no person shall be prosecuted or sued for any pecuniary penalty imposed by this act, unless such prosecution shall be commenced, or action brought, within three calendar months next after such penalty shall have been incurred.

57 G. 3. c. 19.

Penalties not exceeding 20*l.* how to be recovered.

§ 31. All penalties and forfeitures shall, when recovered, be disposed of thus: one moiety thereof to the plaintiff in any action, and to the informer before any justice, and the other moiety thereof to H. M.

Application of penalties.

§ 32. Any action and suit which shall be brought against any justice of the peace, constable, peace officer, or other person, in *England, Wales*, or the town of *Berwick-upon-Tweed*, for any thing done in pursuance of this act, shall be commenced within three calendar months next after the fact committed, and the venue in every such action or suit shall be laid in the proper county where the fact was committed, and not elsewhere; and the defendant in every such action or suit may plead the general issue, and give this act and the special matter in evidence at any trial; and if such action or suit shall be brought or commenced after the time limited, or the venue shall be laid in any other place than as aforesaid, the jury shall find a verdict for the defendant; and in such case, or if the jury shall find a verdict for the defendant upon the merits, or if the plaintiff shall become nonsuit, or discontinue his action after appearance, or if upon demurrer judgment shall be given against the plaintiff, the defendant shall have double costs; which he may recover in such manner as any defendant can by law in other cases.

Limitation of actions.

General issue may be pleaded.

Double costs.

§ 33. Every action and suit which shall be brought or commenced against any person in *Scotland*, for any thing done or acted in pursuance of this act, shall in like manner be commenced within three calendar months after the fact committed, and shall be brought in the court of session in *Scotland*; and the defender may plead that the matter complained of was done in pursuance of this act, and may give this act and the special matter in evidence; and if such action or suit shall be brought or commenced after the time limited, the same shall be dismissed; and in such

Limitation of actions, &c. in Scotland.

57 G. 3. c. 19.

case, or if the defender shall be assoilzied, or the pursuer shall suffer the action or suit to fall asleep, or a decision shall be pronounced against the pursuer upon the relevancy, the defender shall have treble costs or expenses; which he may recover in such manner as any defender can by law recover costs or expenses in other cases.

Form of conviction.

§ 34. Convictions by any justices of the peace for offences against this act, and adjudications of forfeitures of licences to be made in pursuance of this act, shall or may be in the several forms set forth for such purposes respectively in the schedule to this act annexed, or in words to that effect. *Vide* forms H, I, K.

H. I. K.

Act not to affect other provisions made by law.

§ 35. Nothing in this act contained shall be deemed to take away or abridge any provision already made by the law of this realm, or of any part thereof, for the suppression or punishment of any offence whatsoever described in this act.

Persons not liable to prosecution under this act for having been members of any club previous to the passing of this act, &c.

§ 36. provides, that no person shall be prosecuted under this act for having been a member of any society or club declared hereby to be an unlawful combination and confederacy, if such person shall not have acted as a member after the passing of this act; but that nothing in this act shall extend to prevent any prosecution, by indictment or otherwise, for any thing which shall be an offence within this act, and which might have been so prosecuted if this act had not been made: Provided always, that no person who shall be prosecuted and convicted or acquitted of any offence against this act shall be liable to be again prosecuted for the same offence.

Provision empowering the attorney-general and lord-advocate and secretary of state to stay proceedings.

§ 37. In case any proceeding or prosecution shall be instituted, for any offence committed against stat. 39 G. 3. c. 79., or this act, either by action, or by information before any justice or otherwise, the attorney-general in *England*, or the lord advocate of *Scotland* may order any such proceeding to be stayed; and in case of any judgment or conviction, &c., one of H. M.'s principal secretaries of state may by an order under his hand stay the execution of such judgment or conviction, or mitigate or remit any fine or forfeiture, or any part thereof.

Act not to extend to Ireland.

§ 39. This act not to extend to *Ireland*.

60 G. 3. c. 1.

By stat. 60 G. 3. c. 1., intituled "*An act to prevent the training of persons to the use of arms, and to the practice of military evolutions and exercise*," [11th December, 1819.] § 1., after reciting that "whereas in some parts of the U. K. men clandestinely and unlawfully assembled have practised military training and exercise, to the great terror and alarm of H. M.'s peaceable and loyal subjects, and the imminent danger of the public peace;" it is enacted, "that all meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from H. M., or the lieutenant, or two justices of the peace of any county or riding, or of any stewartry, by commission or otherwise, for so doing, shall be and the same are hereby prohibited as dangerous to the peace and security of H. M.'s liege subjects and of his government; and every person who shall be present at or attend any such meeting or assembly, for the purpose of training and drilling any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or

Meetings and assemblies of persons for the purpose of being trained, or of practising military exercise, prohibited.

who shall train or drill any other person or persons to the use of arms, or the practice of military exercise, movements, or evolutions, or who shall aid or assist therein, being legally convicted thereof, shall be liable to be transported for any term not exceeding seven years, or to be punished by imprisonment not exceeding ten years, at the discretion of the court in which such conviction shall be had; and every person who shall attend or be present at any such meeting or assembly as aforesaid, for the purpose of being, or who shall at any such meeting or assembly be trained or drilled to the use of arms, or the practice of military exercise, movements, or evolutions, being legally convicted thereof, shall be liable to be punished by fine and imprisonment not exceeding ten years, at the discretion of the court in which such conviction shall be had."

60. G. 3. c. 1.

Punishment.

§ 2. enacts, "That it shall be lawful for any justice of the peace, or for any constable or peace officer, or for any other person acting in their aid or assistance, to disperse any such unlawful meeting or assembly as aforesaid, and to arrest and detain any person present at, or aiding, assisting, or abetting any such assembly or meeting as aforesaid; and it shall be lawful for the justice of the peace who shall arrest any such person, or before whom any person so arrested shall be brought, to commit such person for trial for such offence, under the provisions of this act, unless such person can and shall give sufficient bail for his appearance at the next assizes or general or quarter sessions of the peace, to answer any indictment which may be preferred against him for any such offence against this act, in *England and Ireland*; and in *Scotland* every such person shall be arrested and dealt with according to the law and practice of that part of the U. K. in the case of a similar offence."

Persons so assembled may be detained and required to give bail, and prosecuted.

§ 3. enacts, "That the sheriffs-depute and their substitutes, stewards-depute and their substitutes, justices of the peace, magistrates of royal burghs, and all other inferior judges and magistrates, and also all high and petty constables, or other peace officers of any county, stewartry, city, or town within that part of the U. K. called *Scotland*, shall have such and the same powers and authorities for putting this present act in execution within *Scotland*, as the justices of the peace and other magistrates and peace officers and constables aforesaid respectively have, by virtue of this act, within and for other parts of the U. K."

Sheriffs-depute, &c. in *Scotland* to have the same powers as magistrates in *England*.

§ 4. provides and enacts, "That nothing in this act contained shall extend to prevent any prosecution, by indictment or otherwise, for any thing which shall be an offence within the intent and meaning of this act, and which might have been so prosecuted if this act had not been made, unless the offender shall have been prosecuted for such offence under this act, and convicted or acquitted of such offence."

Offenders may be indicted, if not prosecuted under this act.

§ 5. enacts, "That any action or suit which shall be brought or commenced against any justice or justices of the peace, constable, peace officer, or other person or persons, in that part of G. B. called *England* or in *Ireland*, for any thing done or acted in pursuance of this act, shall be commenced within six calendar months next after the fact committed, and not afterwards; and the venue in every such action or suit shall be laid in the proper county where the fact was committed, and not elsewhere; and the defend-

Limitation of actions.

60 G. S. c. 1.

General issue
may be plead-
ed.

Double costs.

Limitation of
actions, &c. in
Scotland.

Treble costs.

Prosecutions to
be commenced
within six calen-
dar months
after offences.

ant or defendants in every such action or suit may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon; and if such action or suit shall be brought or commenced after the time limited for bringing the same, or the venue shall be laid in any other place than as aforesaid, then the jury shall find a verdict for the defendant or defendants; and in such case, or if the jury shall find a verdict for the defendant or defendants upon the merits, or if the plaintiff or plaintiffs shall become nonsuit, or discontinue his, her, or their actions after appearance, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall have double costs, which he or they shall and may recover in such and the same manner as any defendant can by law in other cases."

§ 6. enacts, "That every action or suit which shall be brought or commenced against any person or persons in *Scotland* for any thing done or acted in pursuance of this act, shall in like manner be commenced within six calendar months after the fact committed, and not afterwards, and shall be brought in the court of session in *Scotland*; and the defender or defenders may plead that the matter complained of was done in pursuance of this act, and may give this act and the special matter in evidence; and if such action or suit shall be brought or commenced after the time limited for bringing the same, then the same shall be dismissed; and in such case, or if the defender or defenders shall be assoilized, or the pursuer or pursuers shall suffer the action or suit to fall asleep, or a decision shall be pronounced against the pursuer or pursuers upon the relevancy, the defender or defenders shall have treble costs or expenses, which he or they shall and may receive in such and the same manner as any defender can by law recover costs or expenses in other cases."

§ 7. provides and enacts, "That no person shall be prosecuted by virtue of this act for any thing done or committed contrary to the provisions herein-before contained, unless such prosecution shall be commenced within six calendar months after the offence committed."

Indictment for a Riot.

County of } *THE jurors for our lord the king upon their oath*
_____. } *present, that J. A., late of, &c. H. A., late of, &c.*
H. B., late of, &c. and D. P., late of, &c. together with divers other
evil-disposed persons, to the number of [forty] and more, (to the
jurors aforesaid as yet unknown,) on the _____ day of _____,
the _____ year of the reign of our sovereign lord [William the
Fourth], by the grace of God of the united kingdom of Great
Britain and Ireland king, defender of the faith, with force and
arms, &c. at the parish of [St. M. L.], in the said county of _____
did unlawfully, riotously, routously, and tumultuously assemble
and gather together, to disturb the peace of our said lord the king,
and, being so assembled and gathered together, did then and there
unlawfully, riotously, routously, tumultuously, violently, and aw-
rageously make great noises, riot, tumult, and disturbance, and did
then and there unlawfully, riotously, routously, and tumultuously
stay and continue making such noises, riot, tumult, and disturbance,

or a long space of time, to wit, for the space of [six] hours then next following, to the great terror and disturbance, not only of the liege subjects of our said lord the king, there and thereabouts inhabiting, residing, and being, but of all the other liege subjects of our said lord the king there passing and repassing in and along the public streets and king's common highways there, in contempt of our said lord the king and his laws, to the evil example of all others, and against the peace of our said lord the king, his crown and dignity.

A. Indictment for a Riot and Assault.

A.

County of } **THE** jurors for our lord the king upon their oath
present, that A. O., late of the parish of—, of the county of—, yeoman, B. O., late of the same, yeoman, C. O., late of the same, yeoman, and divers other persons (to the jurors aforesaid as yet unknown) on the— day of—, in the— year of the reign of—, at the parish aforesaid, in the county aforesaid, with force and arms, unlawfully, riotously, and routously did assemble and gather together to disturb the peace of our said lord the king; and so being then and there assembled and gathered together, in and upon one A. I., in the peace of God and of our said lord the king then and there being, unlawfully, riotously, and routously did make an assault, and him the said A. I. then and there unlawfully, riotously, and routously did beat, wound, and ill treat, and other wrongs to the said A. I. then and there unlawfully, riotously, and routously did, to the great damage of the said A. I., and against the peace of our said lord the king, his crown and dignity.

B. Record of a Riot on View.

B.

County of } **BE** it remembered, that on the— day of—, in the— year of the reign of—, we J. P. and K. P. esquires, two of the justices of our said lord the king, assigned to keep the peace in the said county, and A. S. knight, heriff of the said county, at the complaint and request of A. I. of—, in the county aforesaid, yeoman, in our proper persons have come to the mansion house of him the said A. I. in— aforesaid, and then and there do find A. O. of—, yeoman, B. O. of—, yeoman, C. O. of—, yeoman, and other male factors and disturbers of the peace of our said lord the king to us unknown, in a warlike manner arrayed, to wit, with clubs, swords, and guns, unlawfully, riotously, and routously assembled, and the same house besetting, many evils against him the said A. I. threatening, to the great disturbance of the peace of our said lord the king, and terror of his people, and against the form of the statute in that case made and provided: And therefore we the aforesaid J. P., K. P., and A. S., the aforesaid A. O., B. O., and C. O. do then and there cause to be arrested, and to the next gaol of our said lord the king in the county aforesaid to be conveyed, by our view and record of the unlawful assembly, riot, and rout aforesaid convicted, there to remain every and each of them respectively, until they shall severally and respectively have paid to our said lord the king the several sums of 10*l.* each, which we do impose upon them and every of them separately for their said offence. In testimony whereof to this our

present record we do put our seals. Dated at ———, aforesaid the day and year aforesaid.

C.

C. Commitment of the Rioters upon View.

County of } J. P. and K. P. esquires, two of the justices of our
 ———, } said lord the king, assigned to keep the peace
 within the said county, and A. S. knight, sheriff of the said county;
 To the keeper of the gaol of our said lord the king at ———, in the
 said county, and to his deputy and deputies there, and to every of
 them, greeting: Whereas upon complaint made unto us by A. I. of
 ———, yeoman, we did this present ——— day of ——— go to
 the house of the said A. I., at ——— aforesaid, and there did we
 A. O. of ———, yeoman, B. O. of ———, yeoman, C. O. of ———,
 yeoman, and other malefactors to us unknown, assembled together in
 an unlawful, routous, and riotous manner, to the terror of the
 people, and against the peace of our said lord the king, and against
 the form of the statute in that case made and provided: We do
 therefore send you by the bringers hereof the bodies of the said
 A. O., B. O., and C. O., convicted of the said riot, rout, and un-
 lawful assembly by our own view, testimony, and record; com-
 manding you in the name of our said lord the king to receive them
 into the said gaol, and them and every of them respectively there-
 safely to keep until they and every of them shall respectively pay to
 our said lord the king the several and respective sums of 10*l.* each,
 which we have set and imposed upon them, and each and every of
 them separately, for the said offence. Given under our hands and
 seals at ——— aforesaid, in the county aforesaid, the day and year
 aforesaid.

D.

D. Precept to summon a Jury.

County of } J. P. and K. P. esquires, two of the justices of our
 ———, } lord the king, assigned to keep the peace in the
 county aforesaid, and also to hear and determine divers felonies,
 trespasses, and other misdemeanors in the said county committed;
 To the sheriff of the said county, greeting: On the behalf of our
 said lord the king, we command you, that you cause to come before
 us at ———, in the county aforesaid, on the ——— day of ———
 next ensuing, twenty-four honest and lawful men of the county aforesaid,
 every one of which to have lands and tenements within the said
 county to the yearly value of 20*s.* of charter land or of freehold, or
 26*s.* 8*d.* of copyhold, or both, over and above all charges, to inquire
 for our said lord the king, and for our indemnity in this behalf upon
 their oath, of certain riots, routs, and unlawful assemblies at ———
 in the county aforesaid, lately committed, as it is said; and that you
 return upon every person so by you to be impannelled 20*s.* of issue
 at the aforesaid day, to be by them respectively forfeited if they
 shall not appear and be sworn to inquire of the premises at the same
 time and place. And this you shall in no wise omit, on pain of 20*s.*
 Given under our hands and seals at ——— aforesaid, in the county
 aforesaid, the ——— day of ———, in the ——— year of the reign
 of ———.

Jurors' Oath.

YOU shall true inquiry and presentment make of all such things as shall come before you concerning a riot, rout, and unlawful assembly, said to have been lately committed at ———, in this county; you shall spare no one for favour or affection, nor grieve any one for hatred or ill will, but proceed herein according to the best of your knowledge, and according to the evidence that shall be given to you: So help you God.

The oath which your foreman hath taken on his part, you and every of you shall well and truly observe and keep on your parts; so help you God.

The Inquisition, Indictment, or Presentment of the Jury.

County of } *AN inquisition for our lord the king, indented and*
 ——— taken at ———, in the county aforesaid, the
 ——— day of ———, in the ——— year of the reign of
 ———, by the oath of ——— honest and lawful men of the
 county aforesaid, before J. P. and K. P. esquires, justices of our
 lord the king, assigned to keep the peace in the said county, and
 so to hear and determine divers felonies, trespasses, and other mis-
 demeanors in the said county committed, who say upon their oath
 aforesaid that A. O. of ———, yeoman, B. O. of ———, yeo-
 man, C. O. of ———, yeoman, together with other malefactors
 and disturbers of the peace of our said lord the king, to the jurors
 aforesaid as yet unknown, on the ——— day of ——— now
 at past, at ——— aforesaid, in the county aforesaid, with force
 and arms, to wit, with clubs, swords, and guns, unlawfully, rout-
 ously, and riotously did assemble, to disturb the peace of our said
 lord the king; and so being then and there assembled and gathered
 together, the mansion-house of A. I., yeoman, at ——— aforesaid,
 unlawfully, routously, and riotously did enter, and in and upon him
 the said A. I. then and there unlawfully, routously, and riotously did
 make an assault, and him the said A. I. then and there unlawfully,
 routously, and riotously did beat, wound, and ill treat, in distur-
 bance of the peace of our said lord the king, and to the terror of his
 people, and against the form of the statute in such case made and
 provided.

*We whose names are hereunto set,
 the above-said jurors, do find
 this inquisition true.*

*We the justices above-said do
 hereby impose the fines here
 under-written, on the afore-
 said offenders.*

A. O. 20*l*.

B. O. 20*l*.

C. O. 20*l*.

A. B.

C. D. &c.

- E. E. Form of Adjudication of Forfeiture of Licence to sell Ale, &c., by stat. 39 G. 3. c. 79.

County of } *BE it remembered, that on this* _____ *day of*
 _____, *in the* _____ *year of the reign of his*
 to wit. } *present majesty, A. O. of* _____, *being a person*
licensed to sell [as the case may be], is duly convicted before us,
two of his majesty's justices of the peace for the county of _____,
in pursuance of an act of the thirty-ninth year of the reign of
 _____ *[set forth the title of the act (a)], for that he the said*
A. O. of _____, *at* _____, *did permit a meeting of a society*
[describe the society], which is an unlawful combination and con-
federacy within the intent and meaning of the said act, to be held at
 _____, *being the house [as the case may be] of the said A. O.,*
wherein the said A. O. is licensed to sell [as the case may be]:
Wherefore we the said _____ *do adjudge and declare that the*
licence, [or, licences, as the case may be] is [or, are] for such offence,
forfeited. Given under our hands and seals this _____ *day of*
 _____, *in the year of our Lord* _____, *and in the* _____
 _____ *year of the reign of his majesty king* _____.

- F. F. Form of a Conviction of an unlawful Combination and Confederacy, by stat. 39 G. 3. c. 79.

County of } *BE it remembered, that on this* _____ *day of*
 _____, *in the* _____ *year of the reign of*
 to wit. } _____, *A. O. of* _____ *is duly convicted before*
 _____, *[or us] of his majesty's justices of the peace for* _____
in pursuance of an act of the thirty-ninth year of the reign of
king George the third [set forth the title of the act,] for that he
the said A. O., after the passing of this act, to wit, on the _____
day of _____, *at* _____, *did, contrary to the said act, become a*
member of [or, as the case may be, act as a member of, or maintain
correspondence or intercourse with, or by contribution of money or
otherwise, abet or support] a society [describing the society,
which society is an unlawful combination and confederacy within
the intent and meaning of the said act: Wherefore I [or, we] the
said _____ *do adjudge that he the said A. O. do pay [or, be im-*
prisoned] as a penalty for his offence, in pursuance of the said act:
Given under my hand and seal [or, our hands and seals], the
 _____ *day of* _____, *in the year of our Lord* _____, *and in the*
 _____ *year of the reign of his majesty king* _____.

- G. G. General Form of a Conviction, by stat. 39 G. 3. c. 79.

County of } *BE it remembered, that on this* _____ *day of*
 _____, *in the* _____ *year of the reign of* _____,
 to wit. } *A. O. of* _____ *is duly convicted before me [or us,*
 _____ *of his majesty's justices of the peace for* _____, *in pursuance*
of an act of the thirty-ninth year of the reign of king George the
third [set forth the title of the act, (a)] for that the said A. O., is

(a) "An act for the more effectual suppression of societies established for seditious and treasonable purposes; and for better preventing treasonable and seditious practices."

he — day of —, at —, did contrary to the said act as the case may be, specifying any offence against the act, and the time and place when and where the same was committed]: Wherefore I [or, we] the said —, do adjudge that he the said — do pay the sum of — as a penalty for his offence, in pursuance of the said act. Given under our hands and seals this — day of —, in the year of our Lord —, and in the — year of the reign of his majesty king —.

l. Form of Conviction of an unlawful Combination and Confederacy, by stat. 57 G. 3. c. 19.

H.

— } **BE** it remembered, that on this — day of
to wit. —, in the — year of the reign of
—, A. B. of — is duly convicted before me [or, us]
— of his majesty's justices of the peace for —, in pursuance of an act of the fifty-seventh year of the reign of king George the third, [set forth the title of the act,] for that the said A. B., in the passing of the said act, to wit, on the — day of —, at —, did, contrary to the said act, become a member of [or, as the case may be, act as a member of, or maintain correspondence or intercourse with, or by contribution of money or otherwise abet or support] a society [describing the society], which society is an unlawful combination and confederacy within the intent and meaning of the said act: Wherefore I [or, we] the said — do adjudge, that he the said A. B. do pay — [or, be imprisoned,] as a penalty for his offence, in pursuance of the said act. Given under my hand and seal [or, our hands and seals], this — day of —, in the year of our Lord —, and the — year of the reign of his majesty king —.

Form of Adjudication of Forfeiture of Licence to sell Ale, &c., by stat. 57 G. 3. c. 19.

I.

— } **BE** it remembered, that on this — day of —,
to wit. — in the — year of the reign of his present
majesty, A. B. of —, being a person licensed to sell [as the case may be], is duly convicted before us, two of his majesty's justices of the peace for the county of —, in pursuance of an act of the fifty-seventh year of the reign of king George the third, [set forth the title of the act,] for that he the said A. B., on —, did permit a meeting of a society [describe the society], which is an unlawful combination and confederacy within the intent and meaning of the said act, to be held at — being the house [as the case may be] of the said A. B., wherein he the said A. B. is licensed to sell [as the case may be]: Wherefore we the said — do adjudge and declare, that the licence [or, licences, as the case may be], is [or, are,] for such offence forfeited. Given under our hands and seals this — day of —, in the year of our Lord —, and in the — year of the reign of his majesty king —.

K.

K. Form of Conviction for Offences subject to pecuniary Penalties, by stat. 57 G. 3. c. 19.

BE it remembered, that on this ——— day of ———, in the ——— year of the reign of ———, A. B. of ——— is duly convicted before me [or, us] ——— of his majesty's justices of the peace for ———, in pursuance of an act of the fifty-seventh year of the reign of king George the third [set forth the title of the act,] for that the said A. B., after the passing of the said act, on ———, at ———, did contrary to the said act [here specify any offence against the act, as the case may be]: Wherefore I [or, we], the said ——— do adjudge, that the said A. B. do pay the sum of ——— as a penalty for this offence, in pursuance of the said act.

Rivers and Navigation.

[19 G. 2. c. 22. — 54 G. 3. c. 159. — 7 & 8 G. 4. c. 30.]

Destroying any sea bank, &c. or works on any river or canal.

THE 7 & 8 G. 4. c. 30. § 12. enacts, "That if any person shall unlawfully and maliciously break down or cut down any sea bank, or sea wall, or the bank or wall of any river, canal, or marsh, whereby any lands shall be overflowed or damaged, or shall be in danger of being so, or shall unlawfully and maliciously throw down, level, or otherwise destroy any lock, sluice, flood-gate, or other work on any navigable river or canal, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment. "And if any person shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank, or sea wall, or the bank or wall of any river, canal, or marsh, or shall unlawfully and maliciously open or draw up any flood-gate, or do any other injury or mischief to any navigable river or canal, with intent as so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

Removing the piles of any sea bank, &c. or doing any damage to obstruct the navigation of a river or canal.

19 G. 2. c. 22. Filling up havens.

By stat. 19 G. 2. c. 22. §§ 1, 2. 6., if any person acting as master of a ship or vessel shall cast out, throw out, or unlade, or there shall be cast out, &c. of any vessel, &c. being within any haven, port, road, channel, or navigable river, any ballast or rubbish, but only on the land where the tide never flows, any one justice near the place may summon or issue his warrant to apprehend and bring before him the master or owner, or other person acting as such.

gainst whom the information shall be made, and upon due proof made, either by confession of the party offending, or on view of such justice, or oath of one witness, that any ballast or rubbish hath been cast out, &c., the master or person acting as such shall be adjudged the offender, and shall forfeit not above 5*l*. nor under 1*l*., half to the informer, and half to the poor of the parish or place where such conviction shall be pronounced; to be levied by distress of the goods of the person so convicted, or of the ship or vessel; and the same, if not redeemed in five days, to be sold, rendering the overplus, if any be, after demand in writing, charges of distress and sale being first deducted; for want of sufficient distress to be committed to the common gaol of the county, city, town corporate, or to the house of correction, or to the house of correction of the county where the conviction shall be, for two months, or till payment of the penalties, or so much thereof for which the commitment shall be.

19 G. 2. c. 22.

Penalty.

§ 3. And as soon as any vessel shall be sunk, stranded, or run ashore in any harbour, port, channel, or navigable river, or be brought in, or be there in a shattered condition, and permitted to remain there, and the owner or some other person having or pretending to have any property therein, or the command or power thereof, or any other person by their order, or assent, or privity, shall begin to take down or carry away any of the rigging or tackle, or if there shall not be any person to take care of such vessel; any one justice of the county or place, where or near which such accident or offence shall happen, shall on information thereof summon the owner, or other person having, or pretending to have, the command or power over such vessel, or issue his warrant to bring him before him; and on ascertaining such offence to have been committed shall issue his warrant for seizing and removing such vessel, and also the rigging and tackle thereof, in such manner as he shall order and direct; and if such owner or other person shall not within five days give satisfactory security to the justice to clear the harbour, &c. of such vessel, and of all the wreck and remains thereof, and pay the charges of seizing, removing, and discharging of the vessel and furniture, then the justice shall cause the vessel and tackle to be sold, and with the money pay the charges of clearing the place where the vessel shall lie, and of seizing, moving, and selling the same, rendering the overplus to the owner of the manor where the same shall happen.

Owner, &c. of vessel wrecked, &c. not to remove rigging, &c.

Leaving vessel to injure the harbour, &c.

Authority of justice of peace.

Provision for clearing harbour.

§ 4. Justices may act herein though rated to the poor where a conviction shall be pronounced.

Conviction.

§ 5. Convictions to be final and not removable.

§ 7. But nothing herein shall extend to affect the right of any lord of a manor near such haven, &c., or of any other person having such rights, or having a right to any fishery, manufactory, or royalty; nor to any materials used in building, &c. any quay, or on the banks, &c. of any river, &c.

Rights saved.

§ 8. saves the former jurisdictions, rights, or remedies to punish any nuisances to be done in any haven, port, road, channel, or navigable river.

Unloading ballast from a ship into a machine, or vessel called a hopper, in a navigable river, with intent to carry and cast it into the high and open sea, and carrying it accordingly and casting it out of the said hopper, when the water was more than fourteen

Unloading ballast.

19 G. 2. c. 22. fathom deep, at a distance from any port, haven, channel, or navigable river, is an offence against the positive enactment of 19 G. 2. c. 22., and subjects the offender to the penalty of § 1. *Brucklesbank v. Smith*, 2 Burr. 656.

54 G. 3. c. 159. By stat. 54 G. 3. c. 159. § 1., stats. 9 G. 3. c. 30., and 10 Ann. c. 17., as far as they relate to the harbour moorings of the navy. and stat. 51 G. 3. c. 73., are repealed.

Repeal of
former statute.
Moorings.

§ 2. The admiralty may establish regulations for the preservation of the king's moorings, and for mooring merchant ships. Such regulations to be published in the *Gazette*, and to be hung up conspicuously in custom-houses, &c.

§ 3. No private ships to fasten to H. M.'s moorings, under penalty of not exceeding 10*l.* for each tide.

§ 4. Power given to harbour-master and other officers to unmoor and remove private ships of war or merchant ships, &c. Penalty of 10*l.* on owner, master, &c. of private ships, neglecting and refusing to remove after one hour's notice.

§ 5. Notice to be given when H. M.'s moorings are hooked.

As to gun-
powder.

§ 6. Places to be appointed for breaming ship^s, and for leaving and receiving gunpowder.

§ 7, 8. Penalties on breaming ships, except at appointed places, and on keeping guns shotted.

§ 9. Power given to harbour-master and other officers to enter private ships to search for gunpowder, &c. within limits prohibited. Penalty of 10*l.* for refusing admittance to proper officers.

§ 10. None to sweep for H. M.'s stores within 100 yards of H. M.'s ships or moorings, but licensed persons, under penalty of 10*l.*

Punishing per-
sons letting
ballast or rub-
bish go into
ports, &c., or
navigable
rivers.

§ 11. If the owner, master, or other person having the charge or command of any private ship of war, transport, or other private or merchant ship or vessel, lighter, barge, boat, or other craft whatsoever, or any person working any quarry, mine, or pit, near to the sea, or to any such harbour, haven, or navigable river as aforesaid, or any other person or persons whatsoever, shall cast, throw, empty, or unload, or cause or procure to be cast, thrown, emptied, or unladen, either from or out of any such ship or vessel, lighter, barge, boat, or other craft, or from the shore, any ballast, stone, slate, gravel, earth, rubbish, wreck, or filth, into any of such ports, roads, roadsteads, harbours, havens, or navigable rivers of this kingdom as aforesaid, so as to tend to the injury or obstruction of the navigation thereof, or in any place or situation on shore where the same shall be liable to be washed into the sea, or into any such ports, roads, roadsteads, harbours, havens, or navigable rivers, either by ordinary or high tides or by storms or ice-floods; all and every such person and persons so offending shall, for every such offence, forfeit and pay a sum not exceeding the sum of 10*l.* over and besides all expenses which may be incurred in removing to a proper place the said matters which may have been deposited contrary to the provisions of this act, such expenses to be recoverable in such manner and with such power of commitment on non-payment thereof, as in cases of penalties or forfeitures under this act: Provided that nothing herein contained shall extend or be construed to extend to the casting out, unlading, or throwing out of any ship or vessel, lighter, barge, boat, or other craft, any stones, rocks, bricks, lime, or other

materials used or to be used in or towards the building, repairing, or keeping in repair any quay, pier, wharf, wear, bridge, or other building, or the banks or sides of any port, harbour, haven, channel, or navigable river, or any materials for repairing any highway; anything herein contained to the contrary thereof in anywise notwithstanding.

§ 12. And for the more effectually preventing such injuries, it is enacted, that no ship or vessel, lighter, barge, boat, or craft whatsoever, shall unlade on any part of the shore (except on some wharf properly constructed for the purpose) any ballast, stone, slate, gravel, earth, rubbish, wreck, or filth, except at the time of high water, or within two hours before or two hours after high water; and that, for every such purpose, every such ship or vessel, lighter, barge, boat, or craft shall approach the shore, as far as the tide and the draught of water of such ship, vessel, lighter, barge, boat, or craft will admit, and shall, under no circumstances, and in no situation, deposit any of the said matters below low water mark at neap tides; and that every vessel drawing above eleven feet of water at the stern, shall unlade all such materials into some lighter, barge, or boat, as herein-before directed, in order that the same may be conveyed as near the shore as possible at the time of high water, as herein-before directed.

Manner in which ships may unlade their ballast.

§ 13. enacts, that all such ballast and other matter shall, in all the above-mentioned cases, be cast on shore from the side of the ship, lighter, barge, boat, or other craft, which shall be nearest to the land, and not otherwise; and every person who shall offend in any of the above particulars, shall, for every such offence, forfeit and pay a sum not exceeding the sum of 10*l.* over and above all expenses which may be incurred in removing to a proper place the said matters which may have been deposited contrary to the provisions of this act, such expenses to be recoverable in such manner, and with such powers of commitment on non-payment hereof, as in cases of penalties or forfeitures under this act.

Ballast to be cast on shore from the side of the ship nearest to the land.

§ 14. Penalty of 10*l.* for taking ballast from the shore in harbours, &c. after prohibition published in the *Gazette*.

§ 15. Penalty of 5*l.* for not using tarpaulins in taking in and discharging ballast.

§ 16. Admiralty may dispense with the provisions relative to ballast.

§ 17. Vessels sunk or stranded, after 28 days refusal or neglect of owner to raise the same, may be weighed and raised under direction of harbour-master, or commissioner of the navy, and the charge of raising be paid from sale of vessel or goods on board.

Vessels wrecked, raising of.

§ 18. Harbour-master, &c. indemnified for acts in pursuance of this act.

§ 19. On neglect of harbour-master, &c. for two months after the 28 days, owner or master of the vessel may weigh and raise it.

§ 20. Commissioners of the navy, residing at any port, &c. near to the place where any offence is committed against this act, are empowered to act as justices of the peace for all the purposes of the act.

§ 21. enacts, that all the penalties and forfeitures imposed by this act shall be sued for within 12 calendar months next after the offence or offences shall be committed, before any commissioner

Recovery of penalties. Within twelve months.

54 G. 3. c. 159. of the navy or justice of the peace residing at or near to the place where any such offence or offences shall be committed; all which said penalties and forfeitures shall be applied as follows: (that is to say,) one moiety thereof to the use of H. M., his heirs and successors, and the other moiety thereof, with full costs, to be adjudged by such commissioner of the navy or justice of the peace, to the informer; and every such commissioner of the navy and justice of the peace is hereby authorised and required, upon information exhibited, or complaint made, to grant and issue his warrant in writing under his hand, to bring before them respectively such offender or offenders at the time and place in such warrant specified; and if on the conviction of the offender or offenders respectively, on his, her, or their confession, or on oath. (which oath every such commissioner of the navy and justice of the peace is hereby authorised and empowered to administer.) such penalty or forfeiture, together with such costs as aforesaid, shall not be forthwith paid, it shall be lawful for such commissioner of the navy or justice of the peace to commit any such offender or offenders to the common gaol or house of correction for the county, city, or borough, at or near to the place where the offence or offences shall be committed, there to remain without bail or mainprise for any time not exceeding three months, unless such penalty or forfeiture and costs shall be sooner paid.

Power of commitment.

Commissioners of navy and justices may act, though offence committed out of the country.

Convicting, commissioner or justice may draw up general form of conviction.

§ 22. Commissioners of the navy residing at or near any port, &c. and justices of the peace acting in and for any district next adjoining any port, &c. where any offence is committed contrary to this act, may proceed in the execution of this act, though such offence may have been committed out of the limits of the jurisdiction of such commissioners or justices, or out of the body of any county of this realm.

§ 23., for the more easy and speedy conviction of offenders against this act, and also for the prevention of frivolous and vexatious appeals, enacts, that every commissioner of the navy and justice of the peace before whom any person shall be convicted of any offence against this act shall and may cause the conviction to be drawn up according to the following form, or in any form of words to the like effect, *mutatis mutandis*; which conviction shall be good and effectual to all intents and purposes, without stating the case, or the facts or evidence, in any more particular manner; (that is to say,)

BE it remembered, that on the ——— day of ———, in the year of our Lord ———, A. B. is convicted before ———, one of the commissioners of the navy, or one of the majesty's justices of the peace for the ——— of ———, [as the case may be,] for that the said A. B., on the ——— day of ———, at ———, did [here state the offence against the act], contrary to the statute in such case made and provided. Given under my hand and seal, the day and year first above written.

Which conviction the said commissioner or justice shall cause to be fairly written upon parchment or paper, and returned to the next general quarter sessions of the peace for the county, division, city, town corporate, liberty, or place where such conviction was made. to be filed by the clerk of the peace, and there to re-

main and be kept among the records of the same county, division, or place; and the same shall not be removed by *certiorari*, *adoption*, or suspension, or any other process whatsoever, into any court whatsoever. 54 G. 3. c. 159.

§ 24. Penalty of 10*l.* on persons not attending, after summons, as witnesses.

§ 25. Persons wilfully and corruptly giving false evidence, or wilfully and corruptly swearing or affirming any thing false before commissioner or justice, in any matter relating to the execution of this act, declared liable to the penalties of wilful and corrupt perjury. Witnesses swearing falsely, perjury.

§ 26. Appeal given to court of quarter sessions within three months after conviction, on giving ten days' notice of such appeal, and entering into recognizance with two sureties to abide the determination of such court. Appeal to sessions.

§ 27. Action or suit to be commenced within six months after offence.

§ 28. Act not to affect rights of property, privileges, jurisdictions, and powers of conservancy.

For Stealing from Boats, &c., see tit. *Larceny*, § VI.

Robbery.

I. *What it is.*

[7 & 8 G. 4. c. 29.]

II. *Assaulting with Intent to rob.*

[7 & 8 G. 4. c. 29.]

III. *Principal and Accessary in Robbery.*

IV. *What shall be done with the Goods of which a Person is robbed.*

I. *What it is.*

THESE are two kinds of robbery; from the *person*, and from the *house*: it is the former of these that is treated of under this title; the latter, viz. robbery from the house, belongeth to the titles *Larceny* and *Burglary*. Two kinds of robbery.

Robbery is a felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence, or putting him in fear. 2 *East's P. C.* 707. Definition of robbery.

The property taken must be of some value, and must be taken from the peaceable possession of the owner. 2 *Russ.* 62. Value.

A. and *B.* were walking together, and *B.* was carrying *A.*'s bundle: the prisoners came up and assaulted *A.*, upon which *B.* laid down the bundle for the purpose of assisting *A.*, and then one of the prisoners took it and made off with it: the prisoners were indicted for robbing *A.* of his bundle. The judge directed a conviction for simple larceny only, on the ground that the bundle, when taken, was not in *A.*'s possession. *Per Vaughan B., Bury Spring Assizes, 832, R. v. Fallows and another, 5 Carr. & P. 508.* Property must be taken from possession.

Where the prisoner obtained a note of hand from the prosecutor by threatening him with a knife held to his throat, the prisoner Compelling prisoner to make a pro-

missory note to prisoner.

No robbery.

Memorandum of money due.

Felonious intention.

Violence, or putting in fear.

The robber must have gained possession.

Taking not purged by redelivery.

Taking a man's goods from him and throwing them away, not robbery.

The taking need not be from the person; it is sufficient if it be in the presence of the owner.

Taking by violence what is attached to the person or clothes,

having furnished the paper and ink, and it appearing that the paper was never out of prisoner's possession, it was held to be no robbery; the judges being of opinion that the note was of no value, and that the circumstances of the case did not bring it within the meaning of 2 G. 2. c. 5. (which made it felony to steal a chose in action); and further, that even if it could be considered property, it was never in the peaceable possession of the prosecutor, and therefore was not taken from his person so as to constitute robbery. *Phipoe's case*, cit. 2 Russ. 62.

But where the case was that the prisoners, after using much violence against the prosecutor, took from him a slip of paper, containing a memorandum of a sum of money which a person owed him, it was held to constitute robbery, on the ground that the paper was of some value to the prosecutor. *Per Gurney B. Northern Spr. Ass. 1833, R. v. Bingley and another*, 5 Carr. & P. 602.

To make it robbery there must be a felonious intention; and it ought to be laid in the indictment. 1 Hale, 532.

The taking must be against the will of the owner; and to constitute the crime of robbery, the property must be taken from the person either by violence or by putting him in fear: either of these circumstances is sufficient; but no sudden taking of a thing unawares from the person, as by snatching any thing from the head or hand, is sufficient, unless some injury be done to the person, or unless there be some previous struggle for the possession of the thing taken, or some force used to obtain it. 2 Russ. 67, 68.

So it is necessary for the completion of this offence that the robber have the possession of the thing taken. So that if a man, having a purse fastened to his girdle, is assaulted by a thief, who cuts the girdle in order more easily to get the purse, and the purse thereby falls to the ground, this is no taking, for the thief never had the purse in his possession. 2 Russ. 63.

Where the offence of robbery is once actually complete by the taking, it cannot be purged by a subsequent redelivery of the property; as, if A. having robbed B. of his purse, and found in it a trifling sum only, give it him back again, still it is robbery. 2 Russ. 64.

A. assaulted B. on the highway with a felonious intent, and searched his pockets for money; but, finding none, pulled the bridle from his horse, and bread out of B.'s panniers, and threw them about the road: this was held not to be robbery, for the particular goods were not taken with a felonious intent. *Anon. 2 East, P. C. 662. 2 Russ. 65.*

The taking need not be from the person of the owner; it will be sufficient if it is taken in his presence: as if A. being assaulted by a thief throws his purse into a bush, and the thief takes it and carries it away; or, if the thief having first assaulted A., takes away his horse standing by him; or having put him in fear, drives away his cattle in his presence. 1 Hale, 533. 2 Russ. 65.

Where the prisoner, while a lady was stepping into her carriage, snatched at her diamond ear-ring, and separated it from her ear by tearing the ear entirely through; but there was no proof of the ear-ring ever having been seen in his hand, and, upon the lady's arrival at home, it was found amongst the curls of her hair, the judges, on a case reserved, were all of opinion, that there was

sufficient taking from the person to constitute robbery. They thought that it was sufficient, as the ear-ring was in the possession of the prisoner separate from the lady's person, though but for a moment, and though he could not retain it, but probably lost it gain the same instant. *Lapier's case*, O. B. May, 1784, 1 *Leach*, 20.

So, in the case of *Rex v. Davies alias Beard*, who was indicted for taking a gentleman's sword from his side *clam et secretè*, it was holden to be a robbery; because the gentleman, observing that the prisoner had laid hold of his sword, laid hold of it himself at the same time, and struggled for it. *Davies's case*, O. B. 11 Ann. East's P. C. 709.

Snatching an article from a man will constitute robbery, if it is snatched to his person or clothes so as to afford resistance.

R. v. Mason, O. B. October Sess. 1820, C. C. R. 419. The prosecutor's watch was fastened to a steel chain which went round his neck: the seal and chain hung from his fob. The prisoner laid hold of the seal and chain, and pulled the watch from the fob, but the steel chain still secured it: by two jerks the prisoner broke the steel chain, and made off with the watch. Case reserved on question whether this was a robbery. The judges in *M. T.* 820, were unanimous that it was; for the prisoner did not get the watch at once; he had to overcome the resistance the steel chain made, and actual force was used for that purpose.

In the case of *M'Daniel, Berry, Egan, and Salmon (Foster, 21. 19 Howell's State Trials, 746.)*, it appeared that all the prisoners and one *Thomas Blee*, in order to obtain to themselves the rewards (a) given by act of parliament for apprehending robbers, agreed that *Blee* should procure two persons to commit robbery on the prisoner *Salmon*; and that in pursuance of this agreement, and with the privity of all the prisoners, *Blee* procured *Ellis* and *Kelly*, two strangers, to go with him to *Deptford* in order to steal linen, but did not inform them of the intended robbery; that they went with *Blee* to *Deptford*, and the prisoner *Salmon* being waiting there in pursuance of the agreement, they robbed him of the money and goods mentioned in the indictment. This case was argued before all the judges, who were unanimously of opinion that, as the goods were taken from *Salmon* in pursuance of the agreement before mentioned, in legal construction he was not robbed at all, since it is of the essence of robbery, that the goods be taken against the will of the owner; although the circumstance of putting in fear is perhaps not necessary to be inserted in the indictment, at least it need not to be strictly proved; or if a man be knocked down without any previous warning, and thereby rendered insensible, or if he manfully resist and be overpowered without being under any fear at all, it is not the less robbery upon that account. And the prisoners were discharged of this indictment. But afterwards an indictment was found against them, and prosecuted at the expense of the crown, on the representation of the judges, for a conspiracy; in which the principal facts found by the special verdict in the robbery bill were charged. On this indictment they were all convicted; and the court gave judgment, that they be all set in and upon the

S. P.

Watch with
steel chain
round the neck.

No robbery,
unless it be
effected against
the will of the
owner.

The putting in
fear need not be
strictly proved.

pillory twice; that they stand committed for seven years, and until they find sureties for their good behaviour for three years afterwards. (See 19 *Howell's St. Tr.* 814.) One of them (*Eagles*) lost his life in the pillory, through the resentment of the populace, and on that account, the others did not stand a second time. But they were all in *Newgate* very closely confined, in pursuance of their sentence.

Robbery, though a man designedly place himself in the robber's way.

But where *A.*, understanding that a highwayman infested a particular road, armed himself and followed a coach that was going that way, and did so for the purpose of apprehending the robber, and upon the highwayman coming up with his pistol and demanding *A.*'s money, *A.* delivered it, and then with the assistance of others took him into custody; this was held to be a robbery of *A.* *Fost.* 129. 2 *Russ.* 72.

Putting in fear.

Robbery may also be constituted by putting in fear as well as by force; or perhaps in strictness it may be said that fear will supply the place of force. 2 *East's P. C.* 711.

A colourable gift, which in truth was extorted by fear, amounts to a taking and trespass in law. As, if a person with a drawn sword, or other circumstances of terror indicating a felonious intent, beg arms of another, who gives it him through mistrust and apprehension of violence, the offence is the same notwithstanding the pretence. So it is whether there were any weapon drawn or not; or whether it were an offensive weapon; or whether the person assaulted delivered his money upon the other's command, or afterwards gave it him upon his ceasing to use force, and asking it for alms; for the owner was put in fear by the assault, and there remained a reasonable ground for its continuance. 2 *East's P. C.* 555. 1 *Haw. c.* 34. § 6. *Fost.* 128.

Seising goods under pretext of law, robbery.

So it will be robbery if terror or force be made use of to get the property, though it be under the pretence of a legal proceeding: as where *A.* seized *B.*'s cart, (2 *Russ.* 68.) with cheeses in it, under pretence that a permit was necessary, and while they were absent, going before a magistrate, *A.*'s confederates took away the property; the seizure of the cart and goods by *A.* was held to be a robbery. 2 *East, P. C.* 709. 2 *Russ.* 68.

So, money obtained by ill-usage of a prisoner.

So, where a woman was handcuffed and ill-used by a police runner, and put into a coach to be carried to gaol, and he thus extorted money from her, it was held to be robbery, the jury finding that he acted with a felonious intent; although the woman had been ordered by a magistrate to find bail for an assault. *Gascoigne's case*, 2 *East, P. C.* 709. 2 *Russ.* 69.

The same rule holds, although the thing taken were not really within the original contemplation of the robber, nor the object of his pursuit at the time.

Taking money to desist from a rape.

Blackham assaulted a woman with intent to commit a rape, and she without any demand from him offered him money, which the prisoner took and put into his pocket, but continued to treat her with violence to effect his original purpose, till he was interrupted by the approach of another person. This was holden to be robbery by a considerable majority of the judges; for the woman, from violence and terror, occasioned by the prisoner's behaviour, and to redeem her chastity, offered the money, which it was clear she would not have given voluntarily; and the prisoner, by taking it, derived that advantage to himself from his felonious conduct.

though his original intent was to commit a rape. *Rex v. Blackham*, T. T. 1787, 2 *East's P. C.* 711.

During the riots in *London*, in the year 1780, a boy with a cockade in his hat knocked violently at the door of the prosecutor, *Mahon*, who thereupon opened it; and the boy said to him, "God bless your honour, remember the poor mob." *Mahon* told him to go along, on which he said, "Then I will go and fetch my captain." He went; and the mob, to the amount of 100, armed with sticks and whatever they could get, soon after came, headed by the prisoner, *Thomas Taplin*, on horseback, having his horse led by the same boy. On their coming up, the by-standers said, "You must give them money; and the boy said, "Now I have brought my captain." *Mahon* then asked the prisoner, "How much?" who answered, "Half-a-crown, sir." On which *Mahon*, who had before only intended to give a shilling, gave the prisoner the half-crown. This was holden to be a robbery. *Taplin's case*, O. B. June 1780, cor. *Nares J.*, 2 *East's P. C.* 712.

Compulsory giving to a mob;

Another case of the like sort occurred upon the trial of some of the rioters in the year 1780. The indictment was for robbing the prosecutor *Daking* in his dwelling-house, into which *Daking* swore that the prisoner *William Brown* and another man entered; and being asked by him what they wanted, *Brown*, having a drawn sword in his hand, said with an oath, "Put one shilling into my hat, or I have a party that can destroy your house presently;" on which the prosecutor gave him a shilling. Another witness present swore, that the prisoner also used the expression, that "if he (*Daking*) would keep the blood within his mouth, he must give the shilling." The offence was holden to be robbery. *Brown's case*, O. B., June 1780, cor. *Nares J.*, 2 *East's P. C.* 731.

or to a rioter.

No case however has gone further than that of *James and Ezekiel Asley*, who were indicted for robbing *Jonathan Grundy*. It appeared that the prisoners and a person unknown went to a public-house near *Birmingham*, during the time of the late riots, which was three or four hundred yards from Mr. *Grundy's* house, early in the morning, where one of them said that they were going up to Mr. G.'s house, "and if he did not turn out the whack, his house would be down by two o'clock in the morning;" on which the stranger observed that he himself would do it; that he was the head of the mob, and had three or four hundred men at command at any time, with other like discourse. They all departed towards Mr. G.'s house; but before they arrived there they saw his servant at a little distance from it, whom they accosted; *James Asley* telling him he was come as a friend to let Mr. G. know that this man (the stranger) was the head of the mob, and the first man who had entered all the places which were destroyed at *Birmingham*. They then, seeing Mr. G. come out of his house, pulled off their hats, and shouted "Church and King." Mr. G. did the same, advancing towards the prisoners in much alarm, when the stranger accosted him, saying, "I am come out of friendship to you, Mr. G., to let you know your house is marked to come down to-morrow morning at two o'clock. I am the head of the mob: they are two thousand strong in *Birmingham*. I must have something to make my men drink. I can

The prisoners threatened to bring a mob from *Birmingham* (then in a state of riot and disturbance), and burn the prosecutor's house down if he did not give them money, which he did under fear of that threat: Held robbery.

Robbery (*Putting in Fear by Threats.*) [Criminal

bring two or three hundred in an hour's time, or keep them back." Mr. G. said, "As to something to drink, you shall have any thing you have a mind for." The stranger said, "I must have money." Mr. G. pulled out half-a-crown from his pocket, and offered it to him; but the stranger refused it, and turned away with expressions of contempt. Mr. G. then asked what he wanted; the stranger replied, he must have 20 guineas; and on Mr. G. saying that he had not so much in his house, the other told him, that if he did not give him something handsome for his men to drink, his house should come down. Mr. G. said, that he might have nine or ten guineas, which the stranger asked to see: and as Mr. G. was taking his purse out of his pocket, *James Astley* told him he might depend upon it that the other man was at the head of the mob, and the like sort of discourse which had passed before concerning his power; particularly, that he was the first man who had entered every house that had been destroyed. Mr. G. was so struck with that expression that he immediately took the money out of his purse (nine guineas and a half), which he gave to the stranger: who counted it, and demanded to have something to drink. They all went then into Mr. G.'s house, where they had liquor, and in going away assured him that he should be protected. Mr. G. said, that he was greatly alarmed, but not for his person: that no injury was threatened to his person; that when he delivered his money his apprehension was, that if he had refused so to do, the prisoners would have gone to *Birmingham*, and have returned with other persons, and pulled down his house, and plundered it before he could have removed his wife, who was in the house in great agitation, as the prisoners had threatened, and in the same manner as different houses in *Birmingham* had been before pulled down. It appeared that the prisoners had a small share of the money afterwards. It was objected on their behalf, that there was no evidence of robbery, inasmuch as the prosecutor did not deliver his money from any immediate fear of danger to himself or his property, but from an apprehension of future injury to his house by pulling it down. And the counsel for the crown admitting it to be a new case, *Grose J.* proposed to have a special verdict found; but on account of the prisoner's situation, it was agreed that the truth of the evidence should be left to the jury, and if they should find the prisoners guilty, the judgment should be respited, and the facts submitted to the judges for their opinion, whether the evidence amounted to robbery. The jury found the prisoners guilty; saying that they were satisfied that Mr. *Grundy* did not deliver his money from any apprehension of danger to his life or person but from an apprehension that if he refused, his house would at some future time be pulled down, as the prisoners and the stranger threatened, in the same manner as other houses in *Birmingham* had been before. In *Mich.* term 1792, a majority of the judges held this to be robbery. *Rex v. J. Astley and E. Astley. Stafford Sum. Ass. 1792, cor. Grose J., 2 East's P. C. 720.*

Mob asking for money, evidence admitted of other similar acts.

On indictment for robbery it appeared that the prisoners came with a mob to prosecutor's house, and that one of the mob with much apparent civility advised prosecutor to give something to get rid of them, and to prevent mischief; and prosecutor gave them some money. In order to shew that this was in reality a mode of robbery, it was held competent to give evidence of other demands

of money, made by the same mob, at other houses, at different times of the same day, when some of the prisoners were present. *Per Parke, Vaughan, and Alderson, Js., Winchester Special Commission, Dec., 1830, R. v. Winkworth and others, 4 Carr. & P. 414.*

In *Simons's* case it appeared that the prisoners took a bushel and an half of wheat, worth 8s., and obliged the owner to take 3½d. for it, threatening to kill her if she refused; this was holden to be a robbery by all the judges, on a conference. *R. v. Simons, Cornwall Lent Assizes, 1783, 2 East's P. C. 712.*

So in *Spencer's* case, the prosecutor *Anderton* having in his possession corn belonging to other persons, the prisoner came to him together with a mob marching in military order; and one of the mob said, that if he would not sell they would take it away: the prisoner said, that they would give 30s. a load, and if he would not take that, they would take the corn away; on which the prosecutor sold that for 30s. which was worth 38s.: this was holden to be robbery; and the prisoner was convicted and executed. *Spencer's case, York Summer Assizes, 1783, cor. Buller J., East's P. C. 712.*

Where a higler or other chapman is compelled by force or threats to part with his goods, but the full value is given to him or them, it may be doubtful whether in all cases it amounts to the crime of robbery, and it seems proper to leave it to the consideration of the jury, whether the act was done with a fraudulent and a felonious intent. *2 East, P. C. 661, 662. 2 Russ. 65.*

The cases of robbery in which the property has been obtained by means of a fear being excited of injury to the character of the party robbed, appear to be confined to insinuations against or threats to destroy the character of the party pillaged, by accusing him of sodomitical practices. (*2 Russ. 76.*) The fears unavoidably excited by these means have, on several occasions, been determined by the judges to be sufficient to constitute the crime of robbery. The bare idea of being thought addicted to so odious and detestable a crime, is, of itself, sufficient to deprive the injured person of all the comforts and advantages of society; a punishment more terrible, both in apprehension and reality, than even death itself. The law, therefore, considers the fear of losing character by such an imputation as equal to the fear of losing life itself, or of sustaining personal injury. *Per Ashhurst J., in delivering the opinion of the judges in Rex v. James Knewland and Nathaniel Wood, O. B. February Sess. 1796, 2 Leach, 730.*

Thomas Jones alias *Evans*, who was convicted at the *O. B. June Sess. 1776*, of a robbery, in extorting money by threatening to charge the prosecutor with an unnatural crime; the prosecutor swearing that he was so alarmed by the idea, that he had neither courage nor strength to call out for assistance; and that the violence with which the prisoner detained him in the street, had put him in fear for the safety of his person. *Rex v. Jones, alias Evans, O. B. Feb. 1776, cor. Hotham B., 1 Leach, 139. 2 East's P. C. 714.*

Robert Harold was afterwards convicted for a similar robbery. *O. B. June 1778, 2 East's P. C. 715.*

The same question was afterwards most deliberately considered in the case of *James Donolly*, who was tried at the *O. B. Feb. Sess. 1779*, for a highway robbery on the person of the Hon. C.

Taking at an inadequate price under circumstances of fear.

Goods taken, and the full price given.

Fear of injury to the character, from infamous charges.

S. P.

S. P.

Obtaining money by putting in fear, by threatening a

charge of sodomy, is felony.

Fielding. It appeared that, on the 18th of *January* 1779, the prosecutor, a young gentleman, was passing through *Soho Square* between six and seven o'clock in the evening, when he met the prisoner, whom he had never seen before. The prisoner accosted him, and desired that he would give him a present. The prosecutor asked, for what? The prisoner answered, "You had better comply, or I will take you before a magistrate, and accuse you of an attempt to commit an unnatural crime." The prosecutor then gave him half-a-guinea, which the prisoner said was not sufficient; but the prosecutor had no more in his pocket. On the 20th of *January*, about four o'clock in the evening, the prosecutor again met the prisoner in *Oxford Street*, who made use of the same threats as before, telling the prosecutor that he knew what passed in *Soho Square*, and unless he would give him more money, he would take him before a magistrate, and accuse him of the same attempt; adding, that it would go hard with him, unless he could prove an *alibi*. The prosecutor then went into an adjoining shop, whither the prisoner followed him, and stayed at the outside of the door. The prosecutor took a guinea out of his pocket, and gave it to the shopkeeper, desiring him to give it to the man at the door, which was done; and the prisoner then departed. The prosecutor then deposed that he was exceedingly alarmed on both occasions, and under that alarm gave the money: that he was not aware what were the consequences of such a charge, but apprehended it might cost him his life. The jury were desired to consider, 1st, whether, upon the evidence, they were satisfied that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger? or, 2dly, if they did not think that the prosecutor apprehended his life was in danger, whether the money were not obtained by means of the prisoner's threats, and against the will of the prosecutor? for if it were, even in that case, though he were not in fear of his life, the crime would amount to robbery. The jury found the prisoner guilty; and said they were satisfied that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger. There being some difference of opinion among the judges on this case, they directed it to be argued before them, which was done on 29th *April* 1779, at Lord C. J. *De Grey's* house, present, all the judges: when, after very full consideration, they at length all agreed that the case amounted to robbery. *Rez v. Donolly, O. B. Feb. 1773. cor. Buller J., 2 East's P. C. 715. 1 Leach, 193.*

The putting in fear need not be laid in the indictment so that the fact be charged to be done violently and against the will of the party.

In the *May O. B. sess. following, 1779, Sess. Pap. No. 5. p. 5. Willes J.*, in giving judgment (after noticing the definition of robbery by *Ld. Hale* and others to the same effect), observed, that the following ingredients were necessary to constitute that offence: — 1. A felonious intent, or *animus furandi*; 2. Some degree of violence or putting in fear; 3. A taking from the person of another. He observed, that he should confine himself to shew that the prisoner's offence came within the above description, as the judges did not mean to draw the line as to what should or should not constitute robbery; but that the facts in this case warranted them in saying, as to the first point, that there was a felonious intention in the prisoner to rob the prosecutor. Upon the second point, that the putting in fear was not necessary to be laid in the indictment; so that the fact were charged to be done

violently and against the will of the party. Nor was the circumstance of actual fear necessary to be proved; but that the law, in *odium spoliatoris*, would presume it. In like manner it had been often holden that actual violence was not necessary, but that constructive violence was sufficient: for where such a terror was impressed on the mind as did not leave the party a free agent, and in order to get rid of that terror he delivered his money, it was robbery. It was also clear that no actual danger was necessary; for a man might commit a robbery without having any offensive weapon; and though a tinder-box or candlestick were used: for when a villain came and demanded a man's money, no one knew to what length he would proceed. That here the situation of the prosecutor was that of a young gentleman accosted at night in the street by a stranger, whom he had never before seen, and must have suspected to be a villain, who demanded a present. Even that seemed sufficient; but the stranger went on, and told him that he had better comply, &c. That was a threat of a personal injury; for he had every thing to fear in being dragged through the streets as a culprit charged with an unnatural crime. That, therefore, was a reasonable fear; which might operate *in constantem*, as well as *in meticulosum virum*. It had, he said, been urged on behalf of the prisoner, that this was a fraudulent extorting, and not a taking by violence. But in many cases, fraud would supply the want of violence; as in the case of burglary, where breaking was necessary to be laid in the indictment, and yet getting admission into a house under colour of law or pretence of taking a lodging or business had been often holden sufficient evidence of the breaking into the house. But the judges, he observed, did not entirely determine this case on that ground; but were of opinion that there was proof of a constructive violence, which they thought was sufficient. As to the third point, that there was clearly a taking from the person; though a taking in the presence of the party would have been sufficient. As to a taking by the collar or arm, all the judges, he said, held that that did not make any material distinction, but that sufficient was proved in this case for the jury to find the prisoner guilty of robbery. S. C.

In the October sess. following, *John Staples* was convicted of a similar offence, and executed. *Staples' case*, O. B. 1779.

Daniel Hickman was indicted for robbing *John Millard* in *St. James's Palace* of two guineas. He obtained the money from the prosecutor by charging him with a similar crime as in the foregoing cases; and by threatening that, if he did not make him satisfaction, he would bring a sergeant and a file of men to take him up before a magistrate. The prosecutor swore that he parted with his money for fear of losing his character, and that he had no other fear. The jury found the prisoner guilty; but, as some on the bench thought that this case differed from that of *Donolly*, it was reserved for the opinion of the judges; who in November 1783, were all of opinion that it was robbery. *Ashhurst J.* afterwards (O. B. Feb. 1784, 1 *Leach*, 279.) delivered their opinion; that this did not materially differ from the case of *Donolly*; for that the true definition of robbery is the stealing or taking from the person or in his presence property of any amount, with such a degree of force or terror as to induce the party unwillingly to part

Actual violence not necessary; constructive, sufficient.

It is robbery to extort money from a person by threatening to charge him with an unnatural crime; though he parted with his money only from fear for his character, and from no other fear.

with his property ; and that, whether the terror arose from real or expected violence to the person, or from a sense of injury to the character, the law made no kind of difference : for to most men the idea of losing their fame and reputation was equally if not more terrific than the dread of personal injury : that the principal ingredient in robbery was a man's being forced to part with his property ; and that the judges were unanimously of opinion, that upon the principles of law and the authority of former decisions, a threat to accuse a man of having committed the greatest of all crimes was a sufficient force to constitute the crime of robbery by putting in fear. *Hickman's case, O. B., July 1783, 2 East's P. C. 728.*

Where no force, there must be terror in fact, at the time of the money being given.

If the property be not taken by actual violence, and the owner only deliver it in consequence of prior threats, such delivery must be enforced by terror actually felt at the time to constitute the crime ; otherwise there is neither actual nor constructive violence in the taking, and, consequently, no robbery. *2 East's P. C. 733.*

Therefore, where the prosecutor, in consequence of the prisoner's having on a prior day threatened to charge him with an unnatural crime, unless he would give him money, &c., on a subsequent day gave them 20*l.*, and a bond to secure the annual payment of 50*l.* ; but added that, though at the beginning of the business he apprehended injury to his person or character, yet that he had no such apprehension when he gave the money and the bond, but parted with both for the purpose of bringing the prisoners to justice, and with that view only ; it was holden, on a reference to the judges, that this was not a robbery. *Reane's case, O. B. June, 1794, cor. Perryn B., 2 East's P. C. 734.*

The money must be taken at the time the threat is made.

In the case of *Jackson and Shipley, Nottingham Spr. Ass. 1802*, before Mr. Baron *Graham*, it was decided on a case reserved, that to constitute robbery by taking money from another upon a threat to charge him with an unnatural crime, the money must be taken *immediately* upon the threat made, and not after the parties have separated, and time for the prosecutor to deliberate and procure assistance, and especially after he had consulted a friend, who was even present at the time when the money was paid, though the prosecutor parted with his money from fear of losing his character. *Rex v. Jackson and Shipley, 1 East's P. C. Add. XXI.*

Where the property is given for the purpose of prosecuting, no robbery.

Where the prisoner made a demand of money from the prosecutor, who was a servant, under the threat of preferring an infamous charge, and prosecutor gave him money in order that he might prosecute, because he knew himself innocent, and not from the threats ; on case reserved, the judges held, that this taking did not amount to a robbery. *R. v. Fuller, 2 Russ. 87. C. C. R. 408.*

Property given under fear of loss of character, robbery.

Where the prosecutor, who was likewise a servant, as in the preceding case, parted with money and clothes to prisoner, under the terror of a similar threat, and stated that he gave his property for fear of injury to his character and losing his place, and not through apprehension of being taken into custody or of punishment ; after conviction, the judges held that he was rightly found guilty of robbery. *H. T. 1819, 2 Russ. 87. C. C. R. 375.*

Money got from a wife by threatening to

It has been held, however, not to amount to robbery, where the prisoners obtained money of *A.*'s wife, by threatening to charge

her husband with unnatural practices, the prisoners being indicted for robbing the wife. *Per Littledale J., Winchester Spr. Ass. 33, R. v. Edwards and another, 5 Carr. & P. 518.*

It has been stated, that it would be robbery if money were obtained from A. by threatening immediate violence to A.'s child, who was present. *Per Hotham B., 2 East, 718., and per Eyre J., 2 East, P. C. 735. 2 Russ. 72.*

It is equally a robbery to extort money from a person by threatening to accuse him of an unnatural crime, whether the party so threatened has been guilty of such crime or not. *Rex v. Ordner, 1 Carr. & P. 479.; per Littledale J., Gloster Sum. Ass. 4. N. B.* The prisoner was acquitted.

Thus the law stood before any enactment by statute. And now by 7 & 8 G. 4. c. 29. § 7., if any person shall accuse, or threaten to accuse, any other person of any infamous crime as hereinafter defined, with a view or intent to extort or gain from him any chattel, money, or valuable security, and shall by intimidating him, by such accusation or threat extort or gain from him any chattel, money, or valuable security, every such offender shall be deemed guilty of robbery, and shall be indicted and punished accordingly.

And by § 9., the abominable crime of buggery, committed either with mankind or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime, and every solicitation, persuasion, promise, or threat offered or made to any person, whereby to move or induce such person to commit or commit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this act.

But in *Rex v. Wood and Knewland*, who under pretence of an action got a woman into a house, and compelled her by threats of trying her before a magistrate and to prison, for not paying for a lot pretended to have been bid for by her, to pay them 1s. through fear of prison, and for the purpose of obtaining her property, but without fear of any other personal violence,—this was held to be duress, and not robbery. *Ashurst J.*, in delivering the opinion of the judges, observed, that there was no reason for such a degree of terror in this case as to induce the prosecutrix to part with her money; she might have known that, having done wrong, if she had been taken to prison, the law would have taken her under its protection, and set her free; and that the law did not allow the fear of being sent to prison to be a sufficient ground of terror to constitute a robbery. *2 Russ. 75.*

It is not enough that the fear arise after the property is taken. *Harman* being on horseback, desired *Halfpenny* to open a gap for him; and while he was so doing, *Harman* took the opportunity unperceived to pick his pocket of his purse. *Halfpenny* turning round and seeing the purse in *Harman's* hand, demanded it of him, who then menaced *Halfpenny*, and went away with the purse. On an indictment for robbery, the prisoner was holden guilty of simple larceny only; the property being obtained by stealth, and not by violence or putting in fear; the words of menace being used after the taking. *Harman's case, Hil. 17 Jac. 2. Coll. Rep. 154. 1 Hale, 534. 2 Russ. 66.*

charge her husband, no robbery.

Robbery of A. by threats of violence to his child.

Threat of accusation, whether party be innocent or not.

7 & 8 G. 4. c. 29. Accusation of infamous crime, with intent, &c. and extortion thereby.

Infamous crime, what.

Paying money under fear of groundless imprisonment, duress and not robbery.

Fear after the taking not sufficient.

Indictment —
assault made
feloniously.

With violence
and against will
of owner.

Violence.

Putting in fear.

Infamous
charge.

Place not ma-
terial.

Nor description
of place.

Robbery of a
woman who
afterwards
changed her
name by mar-
riage.

On indictment
for robbery,
party may be
convicted of
larceny.

7 & 3 G. 4. c. 29.
Punishment.
Robbery,—
death.

Stealing from
person, assaults
with intent to
commit rob-
bery, and de-
mands accom-
panied with
menaces or
force, felony,—
transportation,
&c.

Assault with
intent to rob:
demand with
menaces or
force.

Person intend-
ed to be robbed
must be the
same as the

In robbery the indictment must state an *assault* upon the person, and also that such assault was made *feloniously*. 2 Russ. 89.

So the taking must be charged to be *with violence*, and *against the will* of the party robbed. *Ibid.*

But the term “violently” is not essentially necessary: if it appear, upon the whole, that the fact was committed with violence it will be sufficient. And though it is usual to charge that the party was put in fear, yet it seems not to be absolutely necessary and that it will be sufficient if it plainly appear that the fact was committed with violence and against the will of the party. 2 Russ. 90 & n. (q.) *ib.*

Where the robbery has been committed by the threat of making an infamous charge, the indictments have charged the offence in the usual form. 2 Russ. 90.

The place where the robbery is said to have been committed is not material; as, where the robbery was said to have been committed was a highway, and the proof was, that it took place in a house, the offence was held to have been proved. 2 Russ. 90.

So, where the robbery is charged to have been committed in a dwelling-house, it is not necessary that the ownership of the house should be correctly stated. 2 Russ. 91.

Where the party robbed was a single woman, who changed her name by marriage before the finding of the indictment, she was described in the indictment by her maiden name, and it was held good. 2 Russ. 91.

On indictment for robbery, if the circumstances which constitute the aggravated offence are not proved, the prisoner may still be found guilty of the simple larceny. 2 Russ. 91.

By 7 & 8 G. 4. c. 29. § 6., if any person shall rob any other person of any chattel, money, or valuable security, every such offender, being convicted thereof, shall suffer death as a felon: and if any person shall steal any such property from the person of another, or shall assault any other person with intent to rob him, or shall with menaces or by force demand any such property of any other person, with intent to steal the same, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

II. Assaulting with Intent to rob, &c.

The offences of assaulting with intent to rob, and of demanding property of another with menaces or by force, with intent to steal the same, are made felony by 7 & 8 G. 4. c. 29. § 6. (which see last section, *supra*), and the prior acts respecting the same offences, viz. 7 G. 2. c. 21. and 4 G. 4. c. 54., are now repealed. Under the repealed statutes, which were enacted nearly in the same terms as 7 & 8 G. 4., the following decisions have taken place.

It is necessary that it should appear that the assault is made upon the same person whom it is intended to rob. Therefore, where the assault was made upon the postboy, but it was the intention of the prisoner to rob the person in the carriage, it was

held that the prosecution could not be supported. *R. v. Thomas, East, P. C. 418. 1 Russ. 617.*

Trusty and *Howard* were indicted for a felonious assault on *J. Halse*, with a certain offensive weapon called a pistol, with a felonious intent to rob him. It appeared in evidence that the prisoners rushed out of a hedge on the prosecutor, the driver of a turned chaise, as he was passing along the road; and one of them presenting a pistol to him bid him stop, which the boy did, but called out for assistance to some persons whom he had met just before. On this one of the prisoners threatened to blow out his brains if he called out any more, which the prosecutor nevertheless continued to do; and presently he obtained assistance, and took the men, who had made no demand of money. They were convicted and transported. *R. v. Trusty & Howard, O. B. July, 1783, East, P. C. 418.*; and see *R. v. Jackson & Randall*, next page.

So in *R. v. Sherwin, Oakham Sum. Ass. 1785.* The prisoner was indicted for having, with force and arms, with a certain offensive weapon (a) called a wooden staff, unlawfully, maliciously, and feloniously made an assault on *J. Gough*, with a felonious intent to rob him against the statute, &c. It appeared that while *Gough* and one *Jenkinson* were riding together on the highway, *Gough* received a violent blow from a great stone which was thrown by the prisoner from the hedge. Going towards the spot, *Gough* asked him how he could be such a villain as to throw the stone; at which the prisoner threatened *Gough*, and struck him violently with a staff; but at length he was overcome and secured. The prisoner's face was blacked, and he denied his name: but on being afterwards questioned as to his motive, he said he was very poor, and wanted half-a-guinea to pay his brewer. He did not ask for money or goods. After conviction, the question was submitted to the judges, whether this evidence were sufficient to maintain the charge in the indictment? In Michaelmas term following the judges (ten being present) held the conviction proper, for here the weapon laid in the indictment and the weapon proved produce the same sort of mischief, namely, by blows and bruises: and this description would have been sufficient upon an indictment for murder. *Sherwin's case, 1 East, P. C. 421.*

From the two preceding cases it appears that the offence may be complete within the former part of the first section of the act (b), though there be no demand of money or goods, notwithstanding a prior case of *R. v. Parfait, O. B. Dec. 1748*, which was supposed to establish a contrary rule. And on adverting to the statute, it is evident that the felonious intent to rob may be manifested, either by the offender making a malicious assault on the prosecutor with an offensive weapon or instrument, without also demanding money, or by his demanding money by menaces or in a violent manner, &c. *East's P. C. 416.*

So in the case of *Remnant*, who was committed, for "that with force and arms he made an assault on the prosecutor, with intent feloniously to steal, take, and carry away from his person," &c. the court of K. B. ordered that he should be bailed, being of

person assaulted.

There need not be any actual demand of money.

Description of the weapons.

No actual demand of money necessary.

S. P.

"Intent to steal" not sufficient.

(a) The act 7 G. 2. c. 2. (now repealed) required the assault to have been with an offensive weapon or instrument.

(b) 7 G. 2. c. 21. (now repealed).

opinion that this was not a charge of any offence within the statute. (a) *Rex v. Remnant*, 5 T. R. 169. 1 Russ. 619. See *Monteith's case*, next page, acc.

Demand and menaces, how to be charged.

Where the prisoner is indicted for demanding money, &c. with menaces or by force, with intent to steal, the indictment must state specifically from whom the demand was made, and also, in the case of menaces, it must state the person who was threatened: thus where, under 4 G. 4. c. 54. (now repealed), the indictment charged that prisoners by menaces did demand the monies of one T. A., with intent, &c., after conviction, judgment was arrested; for though it stated the money to be the money of T. A., it did not aver from whom the demand was made, neither did it charge to whom the menaces were addressed. *R. v. Dunkley and others*, 1 R. & M. 90.; cit. 1 Russ. 619.

Express demand not necessary.

In a prosecution for demanding money with menaces or by force, with intent, &c., it seems to have been held that it is not necessary to prove an express and actual demand, but rather that it is a fact for the consideration of the jury whether there had or had not been a demand in reality, and virtually, as by holding a pistol to a person's breast, &c. *R. v. Jackson & Randall*, 1 East, P. C. 419. 1 Russ. 619.

Unlawfully and maliciously, under 7 G. 2. (now repealed.)

In the case of *Rex v. Pegge, Derby Ass.* 1789, cor. *Thomson B.*, 1 East's P. C. 420., the indictment charged that the prisoner with a certain offensive weapon or instrument called a stick, in and upon J. R. feloniously did make an assault, and did then and there in a forcible and violent manner feloniously demand the goods, &c. of him the said J. R., with a felonious intent to rob him, &c. and his goods, &c. from his person and against his will feloniously to steal, take, and carry away, against the statute. The prisoner was convicted on clear evidence of the fact to support the charge. But the words of the statute not being pursued in that part of the indictment which charged the prisoner with assaulting the prosecutor with an offensive weapon, it not being said to be done *unlawfully and maliciously*, judgment was respited, that the opinion of the judges might be taken upon it. In *Trinity term* 1789, they held the conviction right, the statute being in the disjunctive, and an offence well charged within the act in the *latter part of the indictment*, without the words *unlawfully and maliciously*.

From the above it seems to be admitted, that where the assault was the only offence charged within the act, it must have been stated to be done *unlawfully and maliciously*, as well as feloniously; and that where the offence was that of demanding money, &c. by menaces or in a violent manner, the word "feloniously" is sufficient, without the others "unlawfully and maliciously." *N.B.* The words "unlawfully and maliciously" are not in either branch of 7 & 8 G. 4. c. 29. § 6.

Aliter under 7 & 8 G. 4. c. 29.

Intent to rob must be charged.

This intent must be alleged in the indictment. Therefore, where the indictment only charged that the prisoner with force and arms, i.e. with a certain offensive weapon, &c. unlawfully, maliciously, and feloniously made an assault on W. the prosecutor, "with a felonious intent the goods, chattels, and monies of him the said W. from the person and against the will of the said W. then and there feloniously to steal, take, and carry away," &c. the court held that this was not a sufficient description of the

(a) 7 G. 2. c. 21., by which it was necessary that the demand with menaces should have been with intent to rob, but *aliter* in 7 & 8 G. 4. c. 29.

ffence within the statute(a), namely, an attempt to rob, which always includes force and violence. The prisoner was accordingly discharged from this indictment, and tried upon a new one, in which the assault was alleged to be "with a felonious intent he monies of the said *W.* from the person and against the will of he said *W.* then and there feloniously and violently to steal, take, and carry away," &c.; and on this indictment he was convicted. *Monteith's case*, O. B. Oct. 1795, cor. *Heath J.*, 1 *East's P. C.* 420. *Leach*, 702.

III. Principal and Accessary in Robbery.

All that come in company to rob are principals, though one actually do it. *Hale's Sum.* 72. Accessary.

[For Accessary, see tit. Accessary.]

V. What shall be done with the Goods of which a Person is robbed.

If the person robbed do not prosecute the robber; if his goods be waived in flight, or seized by the king's officers, or lord of the manor, he shall not have them restored. *Kel.* 49. Restitution of goods taken by robbery.

But if they be not waived in flight, nor seized by the king's officers or the lord of the manor, he may take his goods again wherever he finds them, without the formality of restitution being awarded, if they be not sold in open market; and this also, although he do not prosecute the robber. *Kel.* 49.

But if he shall prosecute the robber to conviction, he shall have restitution, although they have been waived, and seized, and even sold in open market. *Kel.* 48.

See ante, tit. Restitution of Stolen Goods.

Indictment for a Robbery.

county of } *THE* jurors for our lord the king upon their oath
 ———. } present, that A. O., late of ——— in the county
 of ———, labourer, on the ——— day of ———, in the ———
 year of the reign of ———, with force and arms, at ——— in
 the county of ———, in the king's highway there, upon one A. I.,
 the peace of God and of our said lord the king then and there
 being, feloniously did make an assault, and him the said A. I.
 with bodily fear and danger of his life, in the highway aforesaid,
 then and there feloniously did put, and one gold watch of the
 value of ——— of the goods and chattels of him the said A. I.
 from the person and against the will of the said A. I. in the high-
 way aforesaid, then and there feloniously and violently did steal,
 take, and carry away; against the peace of our said lord the king,
 his crown and dignity.

Note, the form of a warrant for apprehending a robber upon a civil suit is inserted under the title *Burglary and Theft*.

Riot. See tit. Riot.

Sabbath. See tit. Lord's Day.

(a) 7 G. 2. c. 21. (now repealed), but see 7 & 8 G. 4. c. 29. § 6. *supra*, containing similar words.

Sacrilege, Larceny, or Robbery, in a Church or Chapel.

[7 & 8 G. 4. c. 29. § 10.]

THE stats. 23 H. 8. c. 1. and 1 Edw. 6. c. 12., under which this offence was formerly punishable, are repealed by 7 & 8 G. 4. c. 27.

Sacrilege, what is.

By 7 & 8 G. 4. c. 29. § 10., if any person shall break and enter any church or chapel, and steal therein any chattel, or having stolen any chattel in any church or chapel, shall break out of the same, every such offender, being convicted thereof, shall suffer death as a felon.

Accessaries.

In regard to principals in the second degree and to accessaries both before and after, see the general provisions of 7 & 8 G. 4. c. 29. § 61.

Things stolen.

The enactments of the repealed statutes were not confined to goods used for divine service, but extended to articles kept in the church to keep it in proper order, &c. And such goods will be under the protection of the statute whilst the church is under repair, unless they are brought in merely for the purpose of such repairs. So ruled by eleven judges in considering the following case.

2 Hale, 365.

Where the goods stolen are not such as are used in divine service.

Catherine Rourke (C. C. R. 386.) was convicted before *Bayley* J. at *Kingslon* Spring assizes 1819, of sacrilege, in stealing an iron pot, value 6d., and a snatch block, value 4s., the property of the churchwardens. (*N. B.* The church was repairing.) The block was to raise weights in case the bells wanted repairing, and the pot for charcoal to air the vaults. They had been kept in the church for years, and were not brought in for the then repairs. The learned judge, doubting whether these were such goods as were entitled to the protection of the church, respited sentence and submitted the point to the consideration of the judges. *E. T.* 1819, who were of opinion that a capital sentence ought to be passed upon the prisoner: that the protection of the place was not confined to what was used for divine service, but to what was kept to keep the church in proper order, and that the protection continued whilst the church was repairing. The violation of the sanctity of the place was the thing the statute meant to prevent.

Goods taken from the tower of a church.

Where articles were stolen from a church tower which was built higher than the church, and had a separate roof but no outer door, and was only accessible from the body of the church, from which it was not separated by a door or partition, it was held that this tower was a part of the church within the meaning of the above act. *Per Parke J.*, *R. v. Wheeler and others*, *Berks Spr. Ass.* 1829, 3 C. & P. 585.

Property, how laid.

It has been held that where bells, books, or other goods belonging to a church are stolen, they may be laid to be the goods of the parishioners. See 2 *Russ.* 45. and authorities there cited.

So, it is said that where goods are taken from a chapel or abbey in time of vacation, may be laid as *bona capellæ*, or *bona ecclesiæ vel ecclesiæ*, being in the custody of such and such. 2 *Russ.* i

See also tit. Burglary, and tit. Larceny.

Seamen.

Persons falsely assuming Names, &c. of Seamen to obtain Prize Money, &c.

[57 G. 3. c. 127. — 59 G. 3. c. 56.]

Y stat. 57 G. 3. c. 127. § 4. it is enacted, that in order to bring into one act the several provisions made for the prevention d punishment of the crimes of personation and forgery, for the rpose of obtaining prize money, if any person or persons shall llingly or knowingly personate or falsely assume, or cause or ocure any other person to personate or falsely assume, the name character of any commissioned officer, warrant or petty officer, seaman, or any commissioned or non-commissioned officer of rines, or marine, or any other person entitled or supposed to be titled to any wages, pay, prize money, bounty money, pension ney, or other allowances of money for or in respect of services rformed or supposed to have been performed on board of any ip or vessel of H. M., his heirs or successors, or the wife, widow, ecutor or administrator, relation or creditor of any such officer, aman, or other person as aforesaid, in order to receive any ges, pay, prize money, bounty money, pension money, or other owances of money due or supposed to be due for or in respect the services of any such officer, seaman, marine, or other pern as aforesaid, performed or supposed to have been performed board of any ship or vessel of H. M., his heirs or successors ; shall falsely make, forge, counterfeit, or alter, or cause or pro-re to be falsely made, forged, counterfeited, or altered, or wil-gly act or assist in the false making, forging, counterfeiting, or rtering any letter of attorney, order, bill, ticket, certificate of rvice, or other certificate whatsoever, assignment, last will, or her power or authority whatsoever, in order to receive or to able any other person to receive any wages, pay, prize money, untly money, pension money, or other allowances of money due supposed to be due for or in respect of the services of any such icer, seaman, marine, or other person as aforesaid, performed supposed to have been performed on board of any ship or vessel H. M., his heirs or successors, with intention to defraud any rson or persons, body or bodies politic or corporate whatsoever ; shall utter or publish as true, or shall aid or assist in uttering publishing as true, any false, forged, counterfeited, or altered tter of attorney, order, bill, ticket, certificate of service, or other rtificate whatsoever, assignment, last will, or other power or uthority whatsoever, in order to receive any wages, pay, prize oney, bounty money, pension money, or other allowances of oney due or supposed to be due for or in respect of the services any such officer, seaman, marine, or other person as aforesaid, rformed or supposed to have been performed on board of any ip or vessel of H. M., his heirs or successors, with intention to rraud any person or persons, body or bodies politic or corporate hatsoever, knowing the same to be false, forged, counterfeited, r altered ; or shall willingly and knowingly take a false oath to btain the probate of any will or wills, or to obtain letters of ad-

Persons falsely assuming the names or characters of others entitled to pay or prize-money, in order to receive the same ;

or counterfeit-ing letters of attorney, &c. ;

or uttering such letters of attorney, &c. ;

or taking a false oath to obtain probate of wills

57 G. 3. c. 127.

or letters of administration, in order to receive pay or prize money, shall suffer death.

ministration, in order to receive, or to enable any other person to receive any wages, pay, prize money, bounty money, pension money, or other allowances of money due or supposed to be due for or in respect of the services of any such officer, seaman, marine, or other person as aforesaid, performed or supposed to have been performed on board of any ship or vessel of H. M., his heirs or successors; or shall demand or receive any wages, pay, prize money, bounty money, pension money, or other allowances of money due or supposed to be due for or in respect of the services of any such officer, seaman, marine, or other person as aforesaid, performed or supposed to have been performed on board any of H. M.'s ships or vessels, upon or by virtue of any probate of any will or letters of administration, knowing the will on which such probate shall have been obtained to be false, forged, and counterfeited, or knowing the probate of such will, or such letters of administration as last aforesaid, to have been obtained by means of any such false oath as aforesaid, with intention to defraud any person or persons, body or bodies politic or corporate whatsoever, every such person so offending shall be deemed guilty of felony, without benefit of clergy.

Offence of personating though the seaman be dead.

Where in an indictment under 54 G. 3. c. 93. § 89., it appeared that the prisoner applied to the prize-office at *Greenwich*, assuming to be one *J. B.*, to whom prize money was due for service as a seaman, and who was at that time dead; on ca. res. the question was raised, whether under these circumstances the conviction was right, and the judges held that the act applied, though the seaman personated was dead. *R. v. Martin*, C. C. R. 324.; acc. *R. v. Cramp*, ib. 327.

Mistake in the name of the seaman personated, a fatal variance.

An indictment on stat. 57 G. 3. c. 127. § 4. charged the prisoner with wilfully and knowingly personating and falsely assuming the name and character of *Peter M' Cann*, a person entitled to prize money for and in respect of his services performed on board of a ship of H. M.'s called the *Tremendous*, in order to receive such prize money, with intent to defraud the commissioners and governors of the royal hospital for seamen at *Greenwich*, against the form of the statute, &c. A second count described *Peter M' Cann* as a person supposed to be entitled, &c. for services supposed to have been performed. Upon the evidence it appeared by the prize-list and muster-book of the *Tremendous*, produced by proper officers from *Greenwich* hospital, that there was a person of the name of *Peter M' Carn*, entitled to prize money, but no person of the name of *Peter M' Cann*. *Wood B.*, by whom the prisoner was tried, inclined to direct an acquittal upon this variance in the name: but he ultimately left the case to the jury, directing them to say whether the prisoner intended to personate *Peter M' Carn*. The jury found that he did so intend, and pronounced a verdict of guilty; upon which judgment was respited, and the point reserved for the consideration of the twelve judges: who determined that the conviction was wrong, for that "personating" must apply to some person who had belonged to the ship, and the indictment must charge the personating of some such person. *Rex v. Tannett*, *Kent Lent Ass.* 1818, C. C. B. 351.

Aiding and abetting the

Rex v. Potts, alias *Dangreen*. The prisoner was tried before *Wood B.* at *Kent Lent assizes* 1818; and by the first count it was

argued that *Martha Potts*, late of *Greenwich*, in the county of *Kent*, single woman, otherwise called *Martha, the wife of Gustoff Dangreen*, on the first day of *May* in the 57th year of the reign of our sovereign lord *George* the third, by the grace of God, the U. K. of *G. B.* and *Ireland* king, defender of the faith, with force and arms at the parish aforesaid, in the county aforesaid, feloniously, willingly, and knowingly did procure one *John Williams* to personate and falsely to assume the name and character of one *Thomas Jacobs*, a person entitled to a certain allowance of money for services done on board certain ships of our said lord the king, in order to receive such allowance of money due and payable for and on account of the services of the said *Thomas Jacobs* as aforesaid; and that the said *John Williams*, by the procurement of the said *Martha Potts*, otherwise called *Martha Dangreen* as aforesaid, then and there with force and arms, feloniously, willingly, and knowingly did personate and falsely assume the name and character of the said *Thomas Jacobs*, a person entitled to a certain allowance of money for services done on board certain ships of our said lord the king, in order to receive such allowance of money, due and payable for and on account of the services of the said *Thomas Jacobs* as aforesaid, with intent to defraud the commissioners and governors of the royal hospital for seamen at *Greenwich*, in the county of *Kent*, against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown and dignity.

The 13th count stated, that the said *John Williams*, late of *Greenwich*, in the county of *Kent*, labourer, afterwards, to wit, on the said first day of *May*, and in the year aforesaid, with force and arms, at *Greenwich* aforesaid, in the county aforesaid, feloniously, willingly, and knowingly did personate and falsely assume the name and character of one *Thomas Jacobs*, a person entitled to a certain allowance of money for services done on board certain ships of our said lord the king, in order to receive such allowance of money, due and payable for and on account of the services of the said *Thomas Jacobs* as aforesaid, with intent to defraud the commissioners and governors of the royal hospital for seamen, at *Greenwich*, in the county of *Kent*, and that the said *Martha Potts*, otherwise called *Martha Dangreen*, then and there, to wit, at the time of committing the felony aforesaid, with force and arms, feloniously, willingly, and knowingly was present, aiding, abetting, assisting, comforting, and maintaining the said *John Williams* to do and commit the felony aforesaid, in form aforesaid. And so the jurors aforesaid, upon their oath aforesaid, do say that the aforesaid *Williams*, and the said *Martha Potts*, otherwise called *Martha Dangreen*, the felony aforesaid, in manner and form aforesaid, feloniously, willingly, and knowingly did do and commit, against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown and dignity.

There being no evidence of previous procurement, the jury acquitted the prisoner of the first count, and all the other counts in the said indictment, except the thirteenth, on which they found the prisoner guilty; she being present, and asserting that *Williams* was *Thomas Jacobs*. The learned judge respited the judgment, to take the opinion of the judges upon that count, doubting whether it was a good one; as the act makes no provision as to

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personation of
a seaman.

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aiders, abettors, assisters, comforters, and maintainers in this part of the act, though in a subsequent part, as to forging letters of attorney, &c. it provides against those who shall willingly act or assist therein, or, with respect to uttering and publishing, against those who shall aid or assist. His lordship also doubted whether the doctrine of a *principal in the second degree* (which seems to be the idea of this count) could apply to this case, because principals in the second degree, and principals in the first degree, may be charged jointly as doing the act; whereas it appeared difficult to allege, that a man and a woman jointly personated one *mcx. Williams* had been convicted of personating *Jacobs* at a former assizes, and the record of his conviction was produced to prove that fact, on this indictment. The judges held the conviction right, being of opinion that a person present, aiding and abetting another whilst personating a seaman, was within 57 G. 3. c. 127.

59 G. 3. c. 56.
Persons falsely
representing
themselves as
relations, &c.
in order to re-
ceive such
wages or prize
money, or re-
ceiving not
being duly li-
censed, misde-
meanor.

By 59 G. 3. c. 56. § 3. "If any person who (a) shall falsely represent himself or herself to be within any of the degrees of relationship in blood as before described, in order to enable himself or herself to receive any prize money or bounty money, or share of prize money or bounty money, due or to grow due for or on account of the services of any such petty officer, non-commissioned officer, seaman, or marine, supernumerary, or boy, under any such order as aforesaid; or who (a), not being within any such degree of relationship, and not being licensed as aforesaid, shall receive any wages, pay, prize money, bounty money, or other allowances of money for the use of any such petty officer, non-commissioned officer, seaman, or marine, supernumerary, or boy; or if any agent or person, whose licence shall have been revoked as hereinafter mentioned, shall offer himself to receive or shall receive any such wages, pay, prize money, bounty money, or other allowance of money, not being within any of the degrees of relationship aforesaid, and be thereof duly convicted, shall (a) be deemed guilty of a misdemeanor, and punished accordingly."

(a) *Sic.*

Falsifying
dates of orders,
misdemeanor.

§ 12. "If any person or persons shall knowingly insert, or cause to be inserted, in any order for the payment of prize money, bounty money, grants, or other allowances of money payable by the commissioners and governors of the royal hospital for seamen at Greenwich, or by their treasurer, any other date than the day on which the said order shall be executed, or shall knowingly present or utter any order bearing any false date as aforesaid, such person or persons shall, for every such offence, be deemed guilty of a misdemeanor, and punished accordingly."

Persons en-
titled to prize-
money endea-
vouring to ob-
tain payment
by false certi-
ficates, &c. mis-
demeanor.

§ 17. "If any person or persons really entitled to prize or bounty money, pension money, grant, or other allowance of money on account of services on board of any ship or vessel, shall, by the production of any false certificate, or by making any false representation, obtain or endeavour to obtain from the said royal hospital, or from any licensed agent, the said prize or bounty money, pension money, or other allowance of money so due to him as aforesaid, such person or persons shall be deemed guilty of a misdemeanor, and shall forfeit all prize or bounty money, pension money, grant, or other allowance of money due to him on account of his said services."

§ 18. "If any person or persons shall willingly or knowingly personate, or falsely assume, or cause, procure, aid, or assist any person to personate or falsely assume the name or character of any commissioned officer, warrant or petty officer, or seamen (a), or any commissioned or non-commissioned officer of marines, or marine, supernumerary, or boy, or any other person entitled, or supposed to be entitled to any wages, pay, prize money, bounty money, pension money, or other allowances of money, for or in respect of services performed, or supposed to have been performed, on board any ship or vessel of his majesty, his heirs or successors; or shall personate or falsely assume the name or character, or shall assist in personating or falsely assuming the name or character of the wife, widow, executor, or administrator, relation or creditor of any such officer, seaman, or other person, in order to receive any wages, pay, prize money, bounty money, pension money, or other allowances of money due, or supposed to be due, for or in respect of the services of any such officer, seaman, marine, or other person as aforesaid, performed, or supposed to have been performed on board of any ship or vessel of his majesty, his heirs or successors; or shall falsely make, forge, counterfeit, or alter, or cause or procure to be falsely made, forged, counterfeited, or altered, or willingly act or assist in the false making, forging, counterfeiting, or altering any letter of attorney, order, bill, ticket, certificate of service, or other certificate whatsoever, assignment, last will, or other power or authority whatsoever, in order to receive or to enable any other person to receive any wages, pay, prize money, bounty money, pension money, or other allowances of money due, or supposed to be due, for or in respect of the services of any such officer, seaman, marine, supernumerary, or boy, or other person as aforesaid, performed, or supposed to have been performed on board of any ship or vessel of his majesty, his heirs or successors, with intention to defraud any person or persons, body or bodies politic or corporate whatsoever; or shall utter or publish as true, or shall aid or assist in uttering or publishing as true, any false, forged, counterfeited, or altered letter of attorney, order, bill, ticket, certificate of service, or other certificate whatsoever, assignment, last will, or other power or authority whatsoever, knowing the same to be false, forged, counterfeited, or altered, in order to receive any wages, pay, prize money, bounty money, pension money, or other allowances of money due, or supposed to be due, for or in respect of the services of any such officer, seaman, marine, supernumerary, or boy, or other person as aforesaid, performed or supposed to have been performed on board of any of his majesty's ships or vessels, his heirs or successors, or shall demand or receive any wages, pay, prize money, bounty money, pension money, or other allowances

59 G. 3. c. 56.

Falsely assuming name and character of others entitled to prize money, &c. forging, &c., letters of attorney, &c. to receive wages, &c., taking false oath to obtain probate, &c.

(a) Sic.

59 G. 3. c. 56.

of money due, or supposed to be due, for or in respect of the services of any such officer, seaman, marine, or other person as aforesaid, performed or supposed to have been performed on board any of his majesty's ships or vessels, upon or by virtue of any probate of any will or letters of administration, knowing the will on which such probate shall have been obtained to be false, forged, and counterfeited, or knowing the probate of such will, or such letters of administration, as last aforesaid, to have been obtained by means of any such false oath as aforesaid, with intention to defraud any person or persons, body or bodies politic or corporate whatsoever, then every such person or persons so offending, and being thereof convicted according to due course of law, shall be deemed guilty of felony, and shall suffer death as a felon, without benefit of clergy."

Punishment.

No longer capital.

By 1 *W. 4. c. 66. § 1*, this species of personation and forgery is no longer subject to capital punishment. See tit. *Forgery*.

See further as to offences in fraud of or by seamen, 10 *G. 4. c. 3. § 32*. — 1 *W. 4. c. 20. § 83*, and *sequ.*, 3 & 4 *W. 4. c. 52. § 1—4* & 5 *W. 4. c. 52. § 3*; and tit. *Forgery*. See also tit. *Seamen*, in another volume.

Search Warrant.

[7 & 8 G. 4. c. 29.]

General search warrants.

ALTHOUGH it hath been usual for justices to grant general warrants to search all suspected places for stolen goods, and there is a precedent in *Dalton* requiring the constable to search *all such suspected places as he and the party complaining shall think convenient*; yet such practice is generally condemned by the best authorities.

Not good.

Thus *Ld. Hale*, in his Summary of Pleas of the Crown, says, a general warrant to search all places for felonies or stolen goods, is not good. *Hale's Sum.* 93.

Justice cannot justify a warrant for searching all suspected houses.

Mr. Hawkins says, I do not find any good authority, that a justice can justify sending a general warrant, to search all suspected houses in general for stolen goods: because such warrant seems to be illegal in the very face of it; for it would be extremely hard to leave it to the discretion of a common officer, to arrest what persons and search what houses he thinks fit; and if a justice cannot legally grant a blank warrant for the arrest of a single person, leaving it to the party to fill up, surely he cannot grant such a general warrant, which might have the effect of a hundred blank warrants. 2 *Haw. c. 13. § 10. 17*.

S. P. Making such warrants a judicial act.

Again, *Ld. Hale*, in his History of the Pleas of the Crown, expresseth himself thus: I do take it, that a general warrant to search in all suspected places is not good, but only to search in such particular places, where the party assigns before the justice his suspicion, and the probable cause thereof; for these warrants are judicial acts, and must be granted upon examination of the fact. 2 *Hale*, 150.

Such warrants not to be made beforehand.

And therefore I take those general warrants dormant, which are many times made before any felony committed, are not jus-

fiable, for it makes the party to be in effect the judge: and therefore searches made by pretence of such general warrants give more power to the officer or party, than what they may do by law without them. 2 Hale, 150.

Likewise, upon a *bare surmise*, a justice cannot make a warrant to break any man's house, to search for a felon, or for stolen goods; the justices, being created by act of parliament, have no such authority granted to them by any act of parliament; and it would be full of inconvenience that it should be in the power of any stice of the peace, being a judge of record, upon a bare suggestion, to break the house of any person, of what state, quality, degree soever, either in the day or night, upon such surmises. *Inst.* 177.

But in case of a complaint, and oath made of goods stolen, and at the party suspects that goods are in such house, and *shews the cause of his suspicion*, the justice of peace may grant a warrant to search in those suspected places mentioned in his warrant, to attach the goods, and the party in whose custody they are found, and bring them before him, or some other justice of peace, give an account how he came by them, and farther to abide such order as the law shall appertain. *Vide Dalt. c. 169. p. 403. Hale, 113. 150.*

Ld. Hale says, it is fit that these warrants to search do express that search be made in the day-time; and though I will not say that they are unlawful without such restriction, yet they are very convenient without it; for many times, under pretence of arches made in the night, robberies and burglaries have been committed; and at best it creates great disturbances. 2 Hale, 150. But in case not of probable suspicion only, but of positive proof thereof, it is right to execute the warrant in the night-time, if the offenders and goods also be gone before morning. *Barl. Search War.*

Furthermore, such warrant ought to be directed to constables, or other public officer, and not to any private person; though it fit the party complaining should be present and assistant, because he knows his goods. 2 Hale, 150.

As to power of constables to act in any place within the jurisdiction of the justices who grant the warrant, see stat. 5 G. 4. 18. § 6. tit. Arrest, § 3.

By stat. 7 & 8 G. 4. c. 29. § 63., if any credible witness shall move upon oath before a justice of the peace a reasonable cause to suspect that any person has in his possession or on his premises any property whatsoever on or with respect to which any such (a) offence shall have been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods. And any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorised, and, if in his power, is required to apprehend and forthwith to carry before a justice of the peace the party offering the same, together with such property, to be dealt with according to law.

House not to be broken open upon bare surmise.

Aliter in case of complaint on oath, and cause of suspicion shewn.

Form of search warrant.

May be in the night, in case of positive proof.

Warrant to be directed to the constable.

7 & 8 G. 4. c. 29. Power to search for stolen goods under the Larceny act.

(a) Any offence punishable upon indictment or summary conviction by virtue of that act. See tit. Larceny, § XI.

- This has much extended the authority of the magistrate in granting search warrants.
- Execution.** So much for *granting* a search warrant; next, touching the *execution* of it.
- To enter, the doors being open.** Whether the stolen goods are in a suspected house or not, the officer and his assistants in the daytime may enter, the doors being open, to make search, and it is justifiable by the warrant. *2 Hale, 151.*
- The doors being shut.** If the door be shut, and upon demand it be refused to be opened by them within, if the stolen goods be in the house, the officer may break open the door. *2 Hale, 151.*
- Whether the goods are found.** If the goods be not in the house, yet it seems the officer is excused that breaks open the door to search, because he searched by warrant, and could not know whether the goods were there till search made: but it seems that the party that made the suggestion is punishable in such case; for, as to him, the breaking of the door is *in eventū* lawful or unlawful; to wit, lawful if the goods are there; unlawful, if not there. *2 Hale, 151.; acc. 11 St. Tr. 321. fol. edit.*
- Return of the warrant.** On the *return* of the warrant executed, the justice hath these things to do.
- Goods how to be disposed of.** As touching the *goods* brought before him, if it appears they were not stolen, they are to be restored to the possessor; if it appear they were stolen, they are not to be delivered to the proprietor, but deposited in the hand of the sheriff or constable, to the end the party robbed may proceed, by indicting and convicting the offender, to have restitution. *2 Hale, 151.*
- Party how to be disposed of.** As touching the *party* that had the custody of the goods; if they were not stolen, then he is to be discharged; if stolen, but not by him, but by another that sold or delivered them to him, if it appear that he was ignorant that they were stolen, he may be discharged as an offender, and bound over to give evidence as a witness against him that sold them; if it appear he was knowing they were stolen, he must be committed or bound over to answer the felony. *2 Hale, 152.*
- Taking other articles than those mentioned in search warrant.** In an action of trespass it appeared that a constable and others (defendants) had gone with a search warrant, granted by a magistrate, directing them to search the plaintiff's house for a certain quantity of cotton copps or thread, which had been stolen from one of defendants, and which were found and carried away in their packing cases, but they also brought away certain other articles which were not specified in the warrant; and *per Abbott C. J.* as these latter were neither mentioned in the warrant, nor likely to furnish evidence with respect to the articles stolen which were mentioned, the taking of them could not be justified. *Cruick v. Cundey and others, 6 B. & C. 232.*
- Officer may take back his search warrant from a person who detains it illegally, using no more force than necessary.** Where an excise officer had gone with a warrant to search the house of defendant a publican, for an illegal still; and defendant having asked to see the warrant, refused to return it; on which a scuffle ensued; it was ruled by Lord Tenterden C. J., that defendant having no right to keep the warrant, the officers had a right to take it from him, and even to coerce his person to get it, provided they used no more violence than was necessary. *R. v. Milton, Tr. T. 1827, 3 Car. & P. 31.*

Form of a Search Warrant.

County of } To the constable of _____.

WHEREAS it appears to me J. P. esquire, one of the justices of our lord the king, assigned to keep the peace in the said county, by the information on oath of A. I. of _____ in the county aforesaid, yeoman, that the following goods, to wit, _____ have, within _____ days last past, by some person or persons unknown, been feloniously taken, stolen, and carried away, out of the house of the said A. I. at _____ aforesaid, in the county aforesaid: and that the said A. I. hath probable cause to suspect, and doth suspect, that the said goods, or part thereof, are concealed in the dwelling-house of A. O. of _____, in the said county, yeoman; These are therefore, in the name of our said lord the king, to authorise and require you, with necessary and proper assistants, to enter in the day-me into the said dwelling-house of the said A. O. at _____ aforesaid, in the county aforesaid, and there diligently to search for the said goods; and if the same, or any part thereof, shall be found upon such search, that you bring the goods so found, and also the body of the said A. O. before me, or some other of the justices of our said lord the king, assigned to keep the peace in the county aforesaid, to be disposed of and dealt withal according to law. Given under my hand and seal at _____ in the said county, the _____ day of _____, in the _____ year of the reign of _____.

For Form of Information to obtain a Search Warrant for stolen goods, see *antè*, tit. *Larceny*, p. 492.

Seditious Meetings. See *Riot, Rout, &c. antè*.

Self-defence. See tit. *Homicide*.

Self-murder. See tit. *Homicide*.

Servants.

HOW far the master is allowed to beat his servant: and how far the master may beat another person in defence of his servant, or the servant in defence of his master, see tit. *Assault*, § III.

Of servants firing houses, see tit. *Burning*, § II.

Of servants stealing their masters' property, see tit. *Larceny*, p. 422.

By 7 & 8 G. 4. c. 29. § 46., if any clerk or servant shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master, every such offender, being convicted hereof, shall be liable, at the discretion of the court, to be transported beyond the seas, for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned for any term not exceeding three years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think it) in addition to such imprisonment.

Of embezzlements by servants, &c., see tit. *Larceny*, p. 426.

7 & 8 G. 4. c. 29.
Punishment of
servants &c.
stealing his
master's pro-
perty.

Sessions of the Peace.

I. *Of the Time and Place of holding Sessions.*

[36 E. 3. c. 12. — 12 R. 2. c. 10. — 2 H. 5. st. 1. c. 4. — 14 H. 6. c. 4. — 1 & 2 G. 4. c. 63. — 1 W. 4. c. 70. — 4 & 5 W. 4. c. 47.]

II. *Of the Mode of appointing Sessions; and who must attend.*

III. *Of the Manner of proceeding at Sessions.*

[22 G. 2. c. 46. — 59 G. 3. c. 28.]

Jurisdiction over Offences. — Felonies.

[18 E. 3. st. 2. c. 2. — 34 E. 3. c. 1.]

Traverses.

Hearing Appeals.

[5 G. 2. c. 19.]

IV. *Of the Powers and Duties of the Sessions generally.*

Of their Judgments.

Of their stating a Special Case.

Of Costs.

[8 & 9 W. 3. c. 30.]

V. *Of Adjournment, Fees, and Estreats.*

[12 R. 2. c. 10. — 14 R. 2. c. 11.]

VI. *Of Local Jurisdictions.*

[15 G. 2. c. 24. — 38 G. 3. c. 52. — 51 G. 3. c. 100. — 60 G. 3. & 1 G. 4. c. 14. — 4 & 5 W. 4. c. 27.]

VII. *Of the Central Criminal Court.*

[4 & 5 W. 4. c. 36.]

Sessions, what.

THE session of the peace is a court of record, holden before two or more justices, whereof one is of the *quorum*, for execution of the authority given them by the commission of the peace, and certain statutes and acts of parliament. *Dalt. c. 185. p. 456. Cro. Cir. C. 13.*

It is a meeting of justices for the execution of their general authority. *Lamb. 379.*

Two justices must be present.

The sessions cannot be held without the presence of two justices. *1 Blac. Com. 354. (n.)*

So, for an adjournment.

If there are not justices enough to *hold* a sessions, there are not enough to *adjourn* it legally, and every act done after such an adjournment is void. *R. v. Westington, 2 Bott, 733., 2 Nal. P. L. 437. 3d edit.*

The king may grant a commission for a district exclusively.

The king may grant commissions of the peace not only for the whole county, but for any particular district within it, exclusive of the jurisdiction of the justices of the county at large; but the latter can only be effected by a non-intromittant clause, prohibiting the county justices from interfering in that district. *R. v. Seimbury, esq. and another, 4 T. R. 456.*

I. Of the Time and Place of holding the Sessions.

Stat. 36 Ed. 3. c. 12. directs, that the justices shall hold their sessions four times in a year, viz. one session within the *Ulas* of the *Epiphany*; the second, within the second week of *Midlent*; the third, betwixt the feasts of *Pentecost* and of *St. John Baptist*; the fourth, within eight days of *St. Michael*.

But by stat. 12 R. 2. c. 10., the justices shall keep their sessions in every quarter of the year at least; and by three days, if need be; on pain of being punished according to the discretion of the king's council, at the suit of every man that will complain.

And by stat. 2 H. 5. st. 1. c. 4. § 2., the justices shall make their sessions four times by the year; that is to say, in the first week after the feast of *St. Michael*, (now, by stat. 54 G. 3. c. 84., altered and directed to be in the first week after the 11th of *October*, except in *London* and *Middlesex*.) in the first week after the *Epiphany*, in the first week after the clause of *Easter*, and in the first week after the translation of *St. Thomas* the martyr; and more often, if need be. And that the same justices hold their sessions throughout the realm of *England*, in the same weeks every year from henceforth.

But by stat. 14 H. 6. c. 4., in *Middlesex*, the justices shall keep their sessions twice in the year at least, and more often (if need be) for any riot or forcible entry.

And because of the multiplicity of business arising in this county more than in any other, it is customary to hold eight sessions every year, viz. four general quarter, and four general sessions; and the justices have therein a commission of *Oyer and Terminer*; which sessions they hold as often as they hold the sessions of the peace. And *Westminster* has a distinct commission the peace.

The strict regular exposition of stat. 2 H. 5. st. 1. c. 4. is, that the feast-day fall upon a *Sunday*, the sessions shall be held in the week following, and not the same week. 2 Hale, 49.

The time for holding the *Michaelmas* quarter sessions has been altered by 54 G. 3. c. 84., which, after reciting, "Whereas the time now appointed for holding the quarter sessions for the *Michaelmas* quarter might be altered, so as to render the attendance at the same more generally convenient than it is at present," enacts, that from and after the passing of this act, the quarter sessions for the *Michaelmas* quarter shall in every year be holden, for every county, riding, division, city, borough, and place within *England* and *Wales* and for *Berwick-upon-Tweed*, in the first week after the 11th day of *October*, instead of at the time now appointed for holding the same; and that all acts, matters, and things done, performed, and transacted at the time appointed by this act for holding the said *Michaelmas* quarter sessions, shall be as valid and binding for all intents and purposes as if the same had been done, performed, and transacted at the time heretofore appointed for the holding of such sessions, notwithstanding any former act or acts to the contrary."

§ 2. "That nothing in this act shall extend, or be construed to extend so as to alter or vary the time at which the sessions for *London* or *Middlesex* are now holden."

36 Ed. 3. c. 12.
Four sessions
in the year.

12 R. 2. c. 10.
At what time
the sessions
shall be kept.

2 H. 5. st. 1.
c. 4.

54 G. 3. c. 84.
In what weeks
to be holden.

14 H. 6. c. 4.
In *Middlesex*

Eight sessions
in the year.

Michaelmas
sessions, when
to be holden.

Stat. directory only as to the times.

It has been decided, that the above provisions of 54 G. 3. c. 84., in regard to the time of holding the *Michaelmas* quarter sessions, are directory only, and that those sessions may be legally holden at another time. *R. v. Justices of the Borough of Leicester*, 7 B. & C. 6.

An original intermediate sessions may be held under 2 H. 5.

The right of holding an original intermediate general sessions by magistrates, under the authority of 2 H. 5. st. 1. c. 4., and not merely an adjournment of a quarter sessions, was fully recognised by *Patteson J.*, on a question respecting the validity of an indictment for murder found at such intermediate sessions, being a sessions held in addition to the eight which are usually holden for *Middlesex*. *R. v. Mullaney and another*, O. B. Sept. Sess. 1853, 6 C. & P. 96.

1 W. 4. c. 70. Arrangement of times for holding the quarter sessions.

These enactments still remain unrepealed, but the times of holding the general quarter sessions are now pointed out by the recent act of 1 W. 4. c. 70. § 35., which, after reciting, "Whereas the general quarter sessions of the peace are now directed to be held in each year in the first week after the 11th day of *October*, in the first week after the *Epiphany*, in the first week after the *close of Easter*, and in the first week after the translation of *St. Thomas the Martyr*; and whereas it will be expedient that the times of holding the general quarter sessions of the peace should be altered in part:" enacts, "that in the year of our Lord 1831, and afterwards, the justices of the peace in every county, riding, or division, for which quarter sessions of the peace by law ought to be held, shall hold their general quarter sessions of the peace in the first week after the 11th day of *October*, in the first week after the 28th day of *December*, in the first week after the 31st day of *March*, and in the first week after the 24th day of *June*; and that all acts, matters, and things done, performed, and transacted at the times appointed by this act for the holding of the general quarter sessions of the peace shall be as valid and binding, in all intents and purposes, as if the same had been done, performed, and transacted at general quarter sessions of the peace holden at the times by law limited for the holding thereof before the passing of this act."

4 & 5 W. 4. c. 47. Justices at *Epiphany* sessions may name two of their body to fix the day for holding the next general quarter sessions.

By 4 & 5 W. 4. c. 47., it is declared and enacted, "That in every county, riding, or division for which general quarter sessions ought to be held, it shall be lawful for the justices assembled in the general quarter sessions in the week next after the 28th day of *December* in every year to name (if they shall see occasion so to do) two justices of the peace, who shall be empowered, as and as may be after the time for holding the spring assizes shall be appointed, to fix the day for holding the next general quarter sessions of the peace for such county, riding, or division, at such time shall not be earlier than the 7th day of *March* or later than the 22d day of *April*, and to give notice of the day so fixed by advertisement in such newspapers as shall be directed by the justices so assembled; and in every such case the general quarter sessions held on the day so fixed and notified shall be valid, and it shall not be necessary to hold any sessions of the peace for such county, riding, or division in the week next after the 31st day of *March*, any thing in the said recited act to the contrary notwithstanding: Provided always, that in every county, riding, and division where no other day shall be fixed in the mean-

Proviso.

rein-before mentioned, the justices of the peace shall hold their general quarter sessions of the peace in the week next after the 31st day of *March*, as by the said recited act they are required." 4 & 5 W. 4. c. 47.

It is very plain, that the quarter sessions are variously holden in several counties, some at one day and some at another; yet it hath been ruled, that these are each of them good quarter sessions within the several acts that relate to quarter sessions; for these acts, especially the 2 H. 5., are only directory, and in the affirmative; and, therefore, though the sessions are held on another day, according to the general direction of the 12 R. 2., yet they are quarter sessions. 2 Hale, 50.

It sometimes happeneth that, on the day appointed for holding the sessions, a sufficient number of justices do not appear. And the question arises, What is to be done in such a case? It seemeth to be generally understood that the sessions for that quarter of the year is irrecoverably lost. But the matter seemeth not altogether so desperate: for there are obvious remedies; by the use of which it may be possible to recover the sessions in the very identical week next after any of the respective holidays above mentioned; by the latter, at all events, a sessions may be held. As to the former case, there cannot be time, indeed, within that week, to summon a sessions, *de novo*; but neither is it absolutely necessary: a session may be holden without a previous summons; and the justices there may adjourn to another day, and issue their precept to the sheriff against the day of adjournment. To which purpose, Mr. Lambard (380.) saith thus: "Albeit that the sessions be commonly, and most orderly, summoned by a precept in writing; yet it is not altogether of necessity (for the making of a lawful sessions) to have it so: for if impotent justices of the peace do get men to serve, and thereupon do hold a sessions, without any precept before directed, all judgments made before them by twelve lawful men shall be of force in law; but no man shall lose any thing for his default of appearance there, because no man had notice of their sitting." Thus far as to saving the original sessions week; for how many adjournments soever shall be holden afterwards in that quarter of the year, all shall refer to the first commencement of the sessions; and thereby some processes or recognizances may be saved, which may possibly run for appearance at the sessions to be holden in the week next after any of the holidays above mentioned.

But the general (and better) form of such instruments is otherwise. And certainly, though a session shall not be holden within the week after such a feast day, it doth not follow, that therefore it cannot be holden in any of the twelve weeks after. Undoubtedly any two justices, one whereof is of the *quorum*, by the words of the commission of the peace, may issue their precept to the sheriff to summon a session, for the general execution of their authority. And so far is the statute from saying, that if a sessions be not holden in the week next after such respective feasts as aforesaid, such session shall be void, the very same statute directs, that the justices shall hold their sessions *more often, if need be*; and greater need cannot be than when the former meeting of the justices hath been frustrated. 2 Haw. B. § 41.

Are variously held in different counties.

Stat. 2 H. 5. directory only.

When a sufficient number of justices do not appear at the time appointed.

A session may be then held without a precept.

Or a session on a subsequent precept.

Difference between *general*, *quarter*, and *special sessions*.

Mr. *Lambard* seems to make no distinction between general and quarter sessions, but to take them as synonymous terms. But it seems the better opinion, that quarter sessions are a species only of the general sessions, and that such sessions only are properly called *general quarter sessions*, which are holden in the four quarters of the year in pursuance of the statute of the 2 H. 5.; and that any other sessions, holden at any other time for the general execution of the justices' authority, which by the said statute they are authorised to hold oftener than at the times therein specified, if need be, may properly be called *general sessions*, and that those holden on a special occasion for the execution of some particular branch of their authority, may properly be called *special sessions*.(a) 2 Haw. c. 8. § 47.

Queries and opinion as to the power of justices to hold an original general sessions, or adjourned quarter sessions, for the trial of prisoners.

(a) The crowded state of our gaols, consequent on the late alarming increase of crime, having, in the opinion of the magistrates of one of our populous manufacturing counties, rendered a more speedy trial of offenders at quarter sessions indispensably necessary; and it having been suggested from high authority, that the justices of the peace are empowered to hold a general sessions whenever they think fit, at which they may exercise all those parts of their jurisdiction which are not expressly limited to the quarter sessions; the following queries were submitted by the secretary of state for the home department to the law officers of the crown, viz. —

"Whether, either by the commission of the peace or by statute, the justices are empowered to hold a general sessions, or an adjournment of the quarter sessions for the trial of prisoners, at such times and places as they may think proper, and for that purpose to summon jurors and compel the attendance of prosecution and witnesses; and if empowered so to do, whether it would be advisable to hold such sessions?"

The following answer, which the editor has great pleasure in communicating, was received: —

"The stat. 36 Ed. 3. c. 12. directs, that in the commission there shall be a clause, that the justices hold their sessions four times a year, naming the periods. The form of this commission is not now followed, for there is no direction contained in the present commission as to the periods of the year at which the sessions are to be holden. This variation from the form so directed, has probably arisen from the time at which sessions are to be holden having been prescribed by act of parliament; namely, by the stats. 12 R. 2. c. 10. and 2 H. 5. st. 1. c. 4. These statutes are *directory* as to holding sessions once in every quarter of the year, and thence called the quarter sessions; but do not restrict the justices to the holding of four sessions only in the year, because the words are, 'or oftener if need be.'

"The words of these statutes, therefore, and the terms of the commission of the peace, authorise the justices to hold a general sessions of the peace at other and different times than at the four periods of the year which are prescribed by statute for holding the general quarter sessions. *Ld. Hale*, in his *H. P. C.* vol. ii. c. 7., recognises the *general sessions* as well as the *quarter sessions*. He says, the public sessions are of two kinds; viz. the general quarter sessions, and general sessions that are not quarter sessions.

"The same doctrine is laid down by Mr. Serjeant *Hawkins*, and by *Lambard*. b. 4. c. 2.

"There are, however, dicta in several settlement cases, in which the court express an opinion that the words 'oftener if need be,' in the statutes of 2 H. 5. and 12 R. 2. only authorise adjournments of quarter sessions, and not the holding of other original general sessions. On considering the cases in which such dicta occur, it does not appear to us that they militate against the power of holding original general sessions as distinct from quarter sessions; for in those cases the question was, whether an appeal had been lodged and heard at the next sessions: and as the quarter sessions at which the appeals had been lodged had been suffered to expire, and the sessions at which they were heard was an original sessions, and not holden by adjournment, and no adjournment of the appeal had been made, the court were of opinion the sessions had no jurisdiction to decide

There is no determination by any statute of any particular place for the sessions to be kept, so it be within the county. And a place within the county be incorporated, and have justices its own, yet the same remains part of the county, and the justices of the county may notwithstanding hold their sessions there, though it may be that they shall not intermeddle with matters arising there, save only such as shall happen in their sessions, or in relation thereunto. *Dalt. c. 185. p. 456.*

By 28 G. 3. c. 49. § 4., "It shall and may be lawful for any justice or justices of the peace, acting for any county at large, to act as such at any place within any city, town, or other precinct, being a county of itself, and situate within, surrounded by, or adjoining to any such county at large; and all and every such orders and acts, matters and things, done by such justice or justices of the peace for the said county at large, within such city, town, or other precinct, shall be as valid and effectual in the law as if the same had been done within the said county at large, to all intents and purposes whatsoever: Provided always, that nothing in this act contained shall extend or give power to the justices of

Place where the sessions shall be holden.

28 G. 3. c. 49. In what cases justices for counties may act within any city being a county of itself.

In the appeal, and therefore they are not authorities to shew that justices may hold general sessions of the peace distinct from quarter sessions. But if the general sessions of the peace were to be assembled, pending a continuation of the general quarter sessions of the peace by adjournment, we are of opinion such general sessions would supersede and put an end to the general quarter sessions, no adjournment thereof could be holden after the general sessions. But we are also of opinion that it will not be necessary for the justices to resort to a general sessions of the peace, as distinct from the quarter sessions, to effect their object in trying offences which may be committed between the time of holding the general quarter sessions and the day to which they are adjourned. In the county of Stafford such trials are frequently had. At the general quarter sessions of the peace, a day of adjournment is fixed by the justices, such a day having generally been agreed upon before, and notice is given to all the magistrates by the clerk of the peace, as well as advertised in the newspaper. The grand jury and the petit jury, before they are dismissed from their attendance, are informed that their attendance will be required at the day to which the court intend to adjourn, and they are again summoned for that purpose by the sheriff, and no inconvenience is caused by this mode of proceeding. As to the commitment of prisoners, they are committed till discharged by due course of law; and under such commitments are brought by the gaoler to the sessions at the day to which they have been summoned for the trial of such offences. If the accused are admitted to bail, the recognizances, as well as the recognizances of the persons bound over to prosecute or give evidence, are taken, conditioned to appear at the general quarter sessions to be holden by adjournment on such a day; and in this county the justices make several adjournments for these purposes. *And this, we are of opinion, will be the best and proper mode of proceeding for the justices of the county of Stafford; — will effect all the purposes of a general sessions, and be free from any doubt as to the power of holding general sessions, and from the inconvenience of a general sessions superseding or putting an end to any adjournment of the quarter sessions.* Magistrates at large being informed of this course of proceeding, will of course make their commitments and take recognizances so as to answer the exigencies of each case, according to the time when the offences are committed, and the adjournment of the sessions for the purpose of trying them; and as to summoning of witnesses who have not entered into recognizances to appear, power is the same to summon them for the day of the adjournment as it is for the original day of holding the general quarter sessions.

We are therefore of opinion it will be advisable for the justices to hold the general quarter sessions by adjournment, for the trial of felonies and other offences triable at a general quarter sessions.

" S. SHEPHERD.
" R. GIFFORD."

Serjeants' Inn, 9th June, 1819.

28 G. 3. c. 49.

the peace for any county at large, not being justices for such city, town, or other precinct, or any constable or other officer acting under them, to act or intermeddle in any matters or things arising within any such city, town, or precinct, in any manner whatsoever."

1 & 2 G. 4. c. 63.

Justices acting for any county at large, &c. may act, as such, in places having exclusive jurisdiction within or adjoining such county.

The stat. 1 & 2 G. 4. c. 63., after reciting 28 G. 3., and also reciting, that doubts have been entertained, whether justices of the peace for counties at large are thereby empowered to act for such counties at large, within any city, town, or other precinct having exclusive jurisdiction, but not being a county of itself, enacts, "That it shall and may be lawful for any justice or justices of the peace acting for any county at large, or for any riding or division of a county in which there are several and distinct commissions of the peace, to act as a justice or justices for such county at large, riding, or division, in sessions or otherwise, at any place within any city, town, or other precinct having exclusive jurisdiction, but not being a county of itself, and situate within, surrounded by, or adjoining to any such county at large, riding, or division; and that all and every such act and acts, matters, and things which shall be done, or which may heretofore have been done, by such justice or justices of the peace for the said county at large, riding, or division, within such city, town, or other precinct, shall be as valid and effectual in the law as if the same had been done within the said county, riding, or division, to all intents and purposes whatsoever: Provided always, that nothing in this act contained shall extend to give power to the justices of the peace for any county at large, riding, or division, not being justices for such city, town, or other precinct, or any constable or other officer acting under them, to act or intermeddle in any matters or things arising within any such city, town, or precinct in any manner whatsoever."

II. Of the Mode of appointing Sessions, and who must attend.

Precept to summon the sessions by two justices.

It seems that any two such justices may direct their precept under their teste to the sheriff for the summons of the sessions, thereby commanding him to return a grand jury before them, or the fellow justices, at a certain day and place, and to give notice to stewards, constables, and bailiffs of liberties to be present and do their duties at such day and place, and to proclaim in proper places throughout his bailiwick that such sessions will be holden at such day and place, and to attend there himself to do his duty. 2 H. c. 8. § 42.

Such precept shall bear teste or be dated fifteen days before the return, and ought forthwith to be delivered to the sheriff at the end he may have sufficient time to proclaim the sessions, to summon and return the several juries, and to warn all officers and others that have business there, to attend. *Nels. Introduced.* 33.

Cannot be superseded by other justices.

And it is said that such a precept by any two justices cannot be superseded by any of their fellows, but only by writ out of chancery. 2 Haw. c. 8. § 43.

But it is not sufficient that the precept run under the name of the *custos rotulorum* alone; for he hath no more authority in the

half than any one of his fellow-justices ; and the words of the commission are, that the sheriff shall cause a jury to appear at such days and places as the said justices, or such two or more of them aforesaid, shall appoint. *Lamb. 382.*

Mr. *Lambard* puts a case from Mr. *Marrow*,—that if two or more justices appoint the sessions to be holden in one town, and many more appoint a sessions in another town the same day, and holds they may be so held, and that the presentments in both are good ; but that appearance at one is a discharge of service at the other. But it may be well questioned whether they are not both void ; for they make two courts of that which ought to be entire and but one ; for it doth not appear that the justices are required or enabled to hold more than one sessions at time ; and so their authority being equal, and seeing no preference can be made by the priority of time, or nature of the service, they may be taken to be both void. However, the justices, by whose forwardness such division happens, or on whom such miscarriage is chargeable, are punishable for the same by information and fine, or being put out of the commission, as the cause all require. *Dalt. c. 185. p. 457.*

Indeed, it is of infinite importance that the proceedings of magistrates should not only be substantially good, but also that they should be decorous. Wherefore, where two sets of magistrates have concurrent jurisdictions, and one appoint a meeting to grant licences, their jurisdiction attaches so as to exclude the others pointing a subsequent meeting ; but they may all meet together the first day. But if after such appointment the other set of magistrates meet on a subsequent day, and grant other licences, their proceeding is illegal, and the subject of an indictment. *R. T. Sainsbury, esq. and another, 4 T. R. 451.*

The persons who ought to appear at these sessions are as follows :

1) The *justices of the peace* : these without doubt are compelled to appear at the sessions ; for without their appearance the sessions cannot be holden. *Dalt. c. 185. p. 457.*

But a justice ought not to join in an order at sessions wherein himself is concerned, nor ought his name to be in the caption. An order was quashed for that reason. *2 Salk. 607.*

2) The *custos rotulorum*, who hath custody of the rolls of sessions, ought (by the commission) to be there by himself or his deputy, who is the clerk of the peace. *Dalt. c. 185. p. 458.*

3) The *sheriff* also, by virtue of the commission, by himself or deputy ; to receive the fines, or return jurors, to execute process, and what else to his office doth appertain. *Id.*

4) All *coroners*. *Id.*

5) The *constables of hundreds* (that is, high constables), and all other officers to whom any warrant hath been directed, in order to the return thereof. *Id.*

6) All *bailiffs of hundreds and liberties*, in respect they are bound to give an account of all sessions process. *Id.*

7) The *gaoler* ; to bring thither his prisoners, and to receive them as may be committed. *Id.*

8) The *keeper of the house of correction*, to give in a calendar an account of persons in his custody. *Id.*

Two places cannot be appointed. *Semb.*

Proceedings of justices should be decorous.

Persons who are to appear there.

Justices.

Justices being interested.

Custos rotulorum.

Sheriff.

Coroners.

High constables.

Bailiffs.

Gaoler.

Keeper of the house of correction.

Persons returned by the sheriff.

Or by recognizance.

Freedom of access to the sessions, and exemption from arrest.

Person arrested in going or returning may be discharged.

So, in attendance on an arbitration,

or commissioners of bankrupt.

The time not measured strictly.

(9) All persons returned by the sheriff, by virtue of the aforesaid precept. And the jurors not appearing according to their summons are punishable by loss of issues, which usually make part of the estreats of sessions. *Dalt. c. 185. p. 458.*

(10) All persons returned by *recognizance* to answer, or to prosecute and give evidence. *Id.*

All persons may freely attend at the sessions for the advancement of public justice, and for the service of the king. And to this end they are (as it were) invited thither by a certain freedom of access, and by protection from common arrest; a thing that is incident to each court of record, and without which justice would be greatly hindered. So that if a man come voluntarily to the sessions, either to prefer a bill of indictment, or to give information against another, or to tender a fine upon an indictment touching himself; or do come compelled to make appearance for saving his recognizance, and be arrested by the sheriff upon common and original process in his coming thither, or during his tarrying there, it seemeth (Mr. *Lambard* says) that (upon examination of the matter under his oath) he shall be discharged thereof by the privilege of this court, even as it is used in the higher courts at *Westminster*. *Lamb. 402.*

But Mr. *Hawkins* puts it more doubtfully, saying, it is questioned whether the sessions, as also all courts of record, may not discharge any person arrested during his journeying to or from such courts, or necessary attendance there, by process from any other court. However, it seems to be agreed that any such court may discharge a person who shall be so arrested in the face of it. *2 Haw. c. 1. § 18.*

But now no doubt can be entertained on the subject; and this privilege is so incident to the duty of attendance on judicial proceedings, that it has been construed to extend to the case of a party to a cause attending an arbitrator to be examined under an order of *nisi prius* made a rule of court. *Spence v. Stuart, ben. 3 East, 89.*

On general principles, this privilege from arrest, *exando, quando, et redeundo*, applies to the case of every person in necessary attendance on a court of justice; and for this purpose the sitting of commissioners of bankrupt or of an arbitrator is deemed. *8 T. R. 534.*

And it seemeth to have been agreed in the argument upon *Col. Pitt's* case, *2 Str. 987.* (which was an arrest in his return from parliament), that not only in the high court of parliament, but also in the inferior courts, the parties to the suit, and also the witnesses, are protected in going, continuing, and returning. This returning hath never been very nicely scanned, so as to require a man to go the direct road. Neither is the law so strict in point of time as to require a person to set out immediately after the trial is over; and for that was cited the case of *Hatch v. Blair*. *T. 13 An.* She had a trial at *Winchester* assizes, which was over on *Friday* at four in the afternoon; she stayed there till after dinner on *Saturday*; and in the evening at seven was arrested going home to *Portsmouth*, which is 20 miles: and the court held, that she ought to be discharged, her protection not being expired, and a little deviation of loitering would not alter it.

But where a man is arrested by process out of the courts at Westminster, it doth not seem that the justices of the peace (unless the arrest is made in the sessions) have power to discharge him; but, on application to the court from which the process issued, that court probably may discharge him, and punish the person who made the arrest.

III. Manner of proceeding at Sessions.

The manner of proceeding at the sessions is as follows:—First, the justices being met, the cryer makes the following proclamation, *Oyez, oyez, oyez, all manner of persons who have any thing to do at the general quarter sessions of the peace for this county, be near, and give your attendance.*

He then calls upon the sheriff thus:—*Sheriff of this county, return the several precepts to you directed, and returnable here this day, that his majesty's justices may proceed thereon; which is cordially done.*

The clerk of the peace then calls the high constables, bailiffs, &c.

The grand jury are next called and sworn.

The king's proclamation against vice, &c. is then read.

There are likewise divers acts of parliament which are directed to be read in the sessions, viz. the 5 *El. c. 1.* against popery, — the Riot Act, 1 *G. 1. c. 5.* — the Black Act, 9 *G. 1. c. 22.* — the 4 & 12 *W. 3. c. 15.* about ale measures. The 4 & 5 *W. 3. c. 24.*, the 8 *W. 3. c. 32.*, 3 & 4 *Ann. c. 18.*, and 3 *G. 2. c. 25.*, concerning juries, are to be read in Midsummer sessions yearly. And the 3 *G. 2. c. 24.*, against bribery and corruption in the election of members of parliament, is to be read at every Easter sessions. But the reading of these acts is now generally discontinued.

Proclamation is then made to keep silence while the charge is given to the grand jury.

By stat. 25 *C. 2. c. 2. § 2.*, the qualification oaths for offices must be taken between the hours of 9 and 12 in the forenoon.

By stat. 22 *G. 2. c. 46. § 12.*, no person shall act as solicitor, attorney, or agent, or sue out any process at any general or quarter sessions, either with respect to matters of a criminal or a civil nature, unless he is admitted and enrolled according to law, on pain of 50*l.*, to him who shall sue in 12 months, with treble costs; and if any attorney shall permit any person to make use of his name in the said court, he shall in like manner forfeit 50*l.*

§ 14. And no clerk of the peace, under-sheriff, or their deputies, shall act as solicitor, attorney, or agent, or sue out any process at such sessions, on the like pain of 50*l.*

The business of the sessions is then proceeded in according to the rules of the courts of the respective counties, and the despatch of which is now greatly facilitated by stat. 59 *G. 3. c. 28.* To empower Magistrates to divide the Court of Quarter Sessions."

That act directs, "that whenever and as often as any court of quarter session or general session of the peace shall be assembled for the despatch of business thereunto belonging, the justices then present may on the first day of their being so assembled take into their consideration the state of the business which may be brought before them at such quarter session or general

Manner of proceeding in sessions.

Grand jury sworn.

Acts to be read.

2 *G. 2. c. 24.*

Charge to grand jury.

25 *C. 2. c. 2.*
Qualification oaths in offices.

22 *G. 2. c. 46.*
Who shall act in the sessions as solicitor.

59 *G. 3. c. 28.*

Courts of quarter sessions or general sessions of the peace may appoint two or more justices to form

59 G. 3. c. 28.

a court to sit
apart from
them.

session; and if it shall appear to them that such business, if heard and determined by the whole court, is likely to occupy more than three days, including the day of their being so assembled, it shall and may be lawful for the said justices to appoint two or more justices, one of whom shall be of the *quorum*, to sit apart from themselves in some place in or near the court, there to hear and determine such business as shall be referred to them, whilst others of the justices are at the same time proceeding in the despatch of the other business of the same court; and that the proceedings so had by and before such two or more justices so sitting apart shall be as good and effectual in the law to all intents and purposes as if the same were had before the court assembled and sitting as usual in its ordinary place of sitting, and shall be enrolled and recorded accordingly."

Regulations
made for the
apportionment
of business
need not be re-
newed at each
succeeding ses-
sion.

§ 2. provides and enacts, "That when two or more justices shall have sat apart in manner before directed by this act, and orders, rules, and regulations shall have been made for the apportionment of business, such orders, rules, and regulations shall remain and continue in force as long as shall be thought expedient, without the necessity of renewing such orders, rules, and regulations at each succeeding session, to the intent that the same may become public and better known to all professional and other persons engaged in or in any manner interested in the business of such quarter session."

Clerk of the
peace to appoint
a person to re-
cord the pro-
ceedings of
such separate
court.

§ 3. enacts, "That the clerk of the peace or his deputy (wherever two or more justices shall sit apart at any quarter session) shall be authorised and required to appoint a fit and sufficient person to record the proceeding so had before the justices sitting apart; and such proceedings shall be delivered over to the clerk of the peace, or his deputy, and shall be equally deemed to be a part of the records of such session, as if the same proceedings had been recorded by the clerk of the peace himself; and it shall be lawful for the justices assembled at the quarter session to make an order upon the treasurer of the county to pay to the clerk of the peace such sum or sums of money as they shall deem a fit and reasonable remuneration to the clerk of the peace for such purpose as aforesaid; and it shall be lawful for such justices to appoint an additional cryer, and to grant him such remuneration for his care and pains as they shall deem reasonable, which shall in like manner be paid by the treasurer of the county."

Jurisdiction over Offences. — Felonies.

The power of the sessions to try felonies and other offences is derived originally from the following statutes, on which the commissions of the justices of the peace are framed:—

18 Ed. 3. st. 2.
c. 2.

18 Edw. 3. st. 2. c. 2. — "Item, that two or three of the best of reputation in the counties shall be assigned keepers of the peace by the king's commission; and, at what time need shall be, the same, with other wise and learned in the law, shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same counties, and to inflict punishment reasonably, according to law and reason, and the manner of the deed."

34 *Edw. 3. c. 1.* — “First, that in every county of *England* shall be assigned, for the keeping of the peace, one lord, and with him three or four of the most worthy in the county, with some learned in the law, and they shall have power to restrain the offenders, rioters, and all other barrators, and to pursue, arrest, take, and chastise them, according to their trespass or offence; and to cause them to be imprisoned and duly punished, according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretions and good advisement; and also to inform them, and to inquire of all those that have been pillors and robbers in the parts beyond the sea, and be now come again, and go wandering, and will not labour as they were wont in times past, and to take and arrest all those that they may find by indictment, or by suspicion, and to put them in prison; and to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprize of their good behaviour towards the king and his people, and the other duly to punish, to the intent that the people be not by such rioters or rebels troubled or endamaged, nor the peace blemished, nor merchants nor other passing by the highways of the realm disturbed, nor put in the peril which may happen of such offenders. And also to hear and determine at the king's suit all manner of felonies and trespasses done in the same county according to the laws and customs aforesaid; and that writs of *oyer* and *determiner* be granted according to the statutes thereof made, and that the justices which shall be thereto assigned be named by the court, and not by the writ. And the king will, that all general inquiries before this time granted within any seigniorities, for the mischiefs and oppressions which have been done to the people by such inquiries, shall cease utterly and be repealed; and that fines which are to be made before justices for a trespass done by any person, be reasonable and just, having regard to the quantity of the trespass, and the uses for which they be made.”

For the form of commission grounded on the above statutes, see *Justices of Peace*, § II.

The court of quarter sessions has, by the express terms of their commission, jurisdiction over all felonies, and it appears now to be the uniform practice throughout *England*, to try all simple offences in this court, murders, burglaries, and all capital offences being usually reserved for a more solemn investigation at the assizes: but the sessions appear to have jurisdiction over even capital offences of this nature; though, in consequence of the caution expressed in the commission, not to proceed to judgment in cases of difficulty, they do not ordinarily proceed to try them; but if the sessions do proceed to judgment in cases of difficulty, their judgment is not void, but is effectual till reversed by a real error by a superior tribunal. *Lamb. 50. 2 Hale, 46.*

The general words in the commission of the peace comprehend trespasses: and the word “*trespasses*” in the commission (subject to certain exceptions) not only includes direct breaches of the peace, but also all such offences as have a tendency thereto; and that ground conspiracies have been holden to be cognizable by the sessions: not as actual breaches of the peace, but as tending thereto.

Who shall be justices of the peace, and what authority they shall have.

Justices of peace may hear and determine felonies and trespasses.

Trial for petit larceny and other offences.

Not justices of oyer and terminer, as the term is used in statutes.

Sessions cannot try forgery or perjury.

Aliter as to libel.

Sessions cannot try usury.

Sessions may try conspiracy, though not forgery, perjury, or usury.

Sessions may try the offence of soliciting a servant to rob his master.

Indictment found at sessions may be tried at the assizes.

Arraignment. Humanity towards the prisoner.

Although justices of peace have a clause in their commission *ad audiendum et terminandum* felonies, &c., yet justices of peace come not under the name of justices of oyer and terminer within those acts of parliament that mention justices of oyer, for under this description are specially designated the justices of assize, to whom the commissions of oyer and terminer are directed on the circuits. 2 Hale, 23.

It is settled that justices of the peace have no jurisdiction over forgery or perjury at the C. L. 2 Haw. c. 8. § 28.

But libels and such like, having a direct and immediate tendency to cause breaches of the peace, have been adjudged indictable before the sessions. *Ibid*.

Upon writ of error it was held, that the court of quarter sessions have no jurisdiction to try an indictment for usury, and such judgment was founded on the construction of the statute of usury. 12 Car. 1. c. 13. *Regina v. Smith*, 2 Ld. R. 1144.

It was ruled on a motion for arrest of judgment that the quarter sessions have jurisdiction to try the offence of conspiracy; and *per* Ld. Mansfield, "The cases of perjury, forgery, and usury stand upon their own special grounds, and it has been determined that the justices have no jurisdiction there. This offence of conspiracy is a trespass; and trespasses are indictable at sessions, though not committed *vi et armis*; they tend to a breach of the peace as much as cheats or libels, which are established to be within the jurisdiction of sessions. As, therefore, there is no authority to the contrary, I think that the justices have a jurisdiction here." *R. v. Rispal*, 1 Bla. R. 369.

It was also held that the offence of soliciting a servant to steal his master's goods is a misdemeanor which may be indicted and tried at the sessions: and, *per* Ld. Kenyon C. J., "I am clearly of opinion that is indictable at the sessions, as falling in with the class of offences which, being violations of the law of the land, have a tendency, as it is said, to a breach of the peace, and are therefore cognizable by that jurisdiction: to this general rule there are, indeed, two exceptions, viz. forgery and perjury: why excepted I know not; but having been expressly so adjudged, I will not break through the rules of law. *R. v. Higgins*, 2 East, 5. See acc. 2 Haw. c. 8. § 38.

Indictments found before sessions of the peace may be tried by the judges at the assizes. 2 Haw. c. 6. § 2.

Two bills having been found against the prisoner, one for an escape, the other for having assisted in the escape of another prisoner, the court ordered him to be committed to the county gaol for trial at the next assizes, and the two indictments were transmitted there under a certificate from the deputy clerk of the peace. *Wood B.*, doubting of the regularity of the proceeding, discharged the prisoner by proclamation; but, on referring the question to the judges, they held that he ought to have been tried at the assizes upon the indictments found at the sessions. *R. v. Wetherell*, C. C. R. 381.

Mr. Hawkins observes, that every person at the time of his arraignment ought to be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt, and the misfortune of his present circumstances; and

herefore ought not to be brought to the bar in a contumelious manner, as with his hands tied together, or any other mark of ignominy and reproach; nor even with fetters on his feet, unless there be some danger of a rescous or escape. 2 Haw. c. 28. § 1.

And the court ought to exhort him to answer without fear, and to acquaint him that he shall have justice done to him. 2 Inst. 316.

After the delivery of the bills of indictment in court by the grand jury, one of the prisoners is put to the bar, and the clerk of the peace says to him, *A. B., hold up your hand.* Holding up the hand.

It is not necessary that he hold up his hand at the bar, or be commanded so to do; for this is only a ceremony, for making known the person of the prisoner to the court, and if he answer that he is the same person, it is all one. 2 Haw. c. 28. § 2.

You stand indicted by the name of A. B., late of, &c. for that you, &c. [reciting the indictment]. Are you guilty or not guilty of this felony? If he say not guilty, he shall be deemed by such plea to have put himself upon the country for trial, without further form. 7 & 8 G. 4. c. 28. § 1. And the clerk of the peace then writes over his name *po. se.*, and so proceeds with the other prisoners, until he shall have arraigned a sufficient number, when he calls the jury thus:—*You good men who are impannelled to try the issue joined between our sovereign lord the king and the prisoners at the bar, answer to your names.* Jury called over.

When the jurors have appeared, the clerk of the peace calls to the bar all the prisoners who have pleaded not guilty, and says to them, *These good men who shall be next called, are those who are to pass between our sovereign lord the king and you, upon your respective trials. If, therefore, you, or either of you, will challenge them, or any of them, you must challenge them as they come to the book to be sworn, before they are sworn, and you shall be heard.* Jury challenged.

The clerk of the peace then calls the jury severally, and the cryer swears them as follows:—*You shall well and truly try, and true deliverance make between our sovereign lord the king and the prisoner at the bar, whom you shall have in charge, and a true verdict give according to the evidence; So help you God.* Jury sworn.

The cryer then counts the jurors as the clerk of the peace reads their names, and asks them if they are all sworn. All the prisoners, except one to be tried, are then put from the bar, and the clerk of the peace charges the jury as follows:—*The prisoner at the bar stands indicted by the name of A. B. (reading the indictment, as upon the arraignment): upon this indictment he has been arraigned, upon his arraignment has pleaded not guilty, and for his trial has put himself upon God and his country, which country you are. Your charge, therefore, is to inquire whether he be guilty of the felony whereof he stands indicted, or not guilty, and to hearken to the evidence.* Jury counted.

It is established as a rule of clear law, that where a jury is sworn and charged in a capital case, they cannot be discharged till they have given a verdict, except in certain special cases. 2 Haw. P. C. 47. § 1. and n. *ib.* See case of the Kinlochs, *Fost.* 16. *et seq.* Jury charged.

In a prosecution for a common-law forgery, it was held by all the judges, that though the jury be charged and sworn, yet a juror may be drawn or the jury dismissed. *Ferrar's case*, *Sir T. Ray*, 4. cit. *Fost.* 31. Jury sworn and charged in capital case, must give a verdict generally. *Atter* in misdemeanour.

So in case of a madman put on his trial.

If a person in a state of lunacy pleads, and puts himself on his trial, and it appears to the court, on the trial, that he is mad, the judge, in discretion, may discharge the jury of him. 1 Hale, 35.

So, in high treason, for prisoner's benefit, on motion of his counsel, &c.

In a case of high treason, it was held that the court might discharge the jury upon motion of the prisoner's counsel, and at his own request, and with the consent of the attorney-general, before evidence given, in order to let the prisoner into a defence which could not otherwise have been received. *Kinloch's case*, *Fost.* 16. *et seq.*

So, where prisoner is suddenly seized with illness.

During the trial of a woman for stealing from a dwelling house to the value of 40s., it appeared that she was taken with the pangs of labour, and thereupon the court remanded her to prison, to be taken care of, and discharged the jury of her. *Case of Elizabeth Meadows*, *Fost.* 76.

Witnesses sworn.

The witnesses, as well for the king as the prisoner, are then sworn thus:—*The evidence you shall give to the court and jury, sworn, between our sovereign lord the king and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth; So help you God.*

Verdict.

When the jury shall have agreed, the clerk of the peace asks them, *Are you agreed on your verdict? Do you find the prisoner guilty of this felony whereof he stands indicted, or not guilty?* The verdict having been given, he records it, and says, *Hear ye to your verdict as the court recordeth it: you say A. B. is guilty of the felony whereof he stands indicted; this is your verdict, and so ye say all.*

Confession.

If he answer that he is guilty, then the confession is recorded, and no more done till judgment. *Dalt.* c. 185. p. 459.

Standing mute.

If he make no answer at all, and will not plead, the court may enter a plea of "not guilty," and proceed accordingly. 7 & 8 G. 4. c. 28. § 2. See tit. *Mute*.

Pleading. *Auterfoits acquit*.

The plea of *auterfoits acquit* cannot be pleaded, unless the facts charged in the second indictment would have sustained the first indictment. *R. v. Vandercom and Abbott*, *O. B.* 1796, 2 East. P. C. 519.

Time for pleading in abatement, &c.

If the prisoner has any matter to plead, either in abatement or bar of the indictment, as *misnomer*, *auterfoits acquit*, *auterfoits convict*, a pardon, &c., he shall plead it upon arraignment, without answering to the felony. 2 Hale, 219.

Prisoner's counsel.

On indictments of treason (a) or felony, the prisoner shall not have counsel allowed to him, unless a point of law arise, properly debated; nor a copy (a) of the indictment. 2 Haw. c. 39. §§ 2 & 13.

But in offences under felony, a defendant may be heard by his counsel. *Wood's Inst.* b. 4. c. 5.

And of late years the judges never scruple to allow the prisoner's counsel to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact. 4 Blac. Com. 356.

Court to be of counsel with him.

And at this day it is the practice never to object to the allowance of counsel, if the prisoner can procure them. If there be none other, the court is to be of counsel with the prisoner, and ought to advise him for his good, and not take advantages too strictly against him. *Dalt.* c. 185. p. 460.

(a) But as to high treason, causing corruption of blood, see 7 W. 3. c. 3. tit. *Treason*.

Upon the trial of issues which do not turn upon the question of guilty or not guilty, but upon collateral facts, prisoners under a capital charge, whether for treason or felony, always were entitled to the full assistance of counsel. *Fost.* 232—242.

Collateral issues.

If the jury cannot agree on their verdict at the bar, a bailiff must be sworn to keep the jury, thus: — *You shall swear that you will keep this jury without meat, drink, fire, or candle; you shall suffer none to speak to them, neither shall you speak to them yourself, but only to ask them whether they are agreed; So help you God.* *Dalt. c.* 185. p. 460.

Oath of bailiff to keep the jury.

The jury coming back, the prisoner is brought to the bar; the names of the jury are called over, and the verdict taken as before. *Dalt. c.* 185. p. 460.

Verdict.

Sentence is then passed.

Judgment.

In a case at the quarter sessions, where it appeared that, after the evidence was closed in a trial for larceny, one of the jury separated himself from the rest without the permission of the court, and held conversation with a person, who was not on the jury, upon the subject of the trial, and concerning the verdict that was to be given; the court, after verdict of guilty, quashed such verdict for the reasons above stated, and tried the prisoners over again at a subsequent sessions; when, after a second conviction, sentence was pronounced. On writ of error to K. B., it was objected, 1st, That there ought to have been a new arraignment and plea; and, 2dly, That the sessions could not grant a new trial. The court, however, supported the judgment, saying, that the first verdict was either good or bad: if good, the second trial may be considered a nullity; if the first verdict were bad, the prisoners had already put themselves on the country, and might well be tried at the next sessions; and the second trial could not be considered in the nature of a new trial, the first trial being a mis-trial, and therefore a nullity. *R. v. Fowler and Sexton*, 4 B. & A. 273.

Juryman holding converse with a stranger.

Verdict quashed.

Second trial and sentence on former arraignment and plea.

A court of gaol delivery may prohibit publication of the proceedings pending a trial. *R. v. Clement*, 4 B. & A. 218.

Publication of proceedings.

"No lawyer can doubt the power of every court to fine for contempt." *Per Abbott C. J., R. v. Davison*, 4 B. & A. 334.

Power to fine.

Of the Trial of Traverses.

After the felonies may be called the persons bound by recognizance at the last sessions, to prosecute their traverses at the present sessions; for if a person indicted for an assault or misdemeanor do appear, and plead not guilty, and traverse the indictment, he shall enter into recognizance to prosecute his traverse at the next quarter sessions. For in *Bumpsted's case*, *Cro. Car.* 448., the whole court was of opinion, that justices of the peace may not inquire, try, and determine civil offences, in one and the same day; for the party ought to have a convenient time to provide for the trial.

Traverses tried.

Persons in custody for a misdemeanor are not in general tried until after the felonies.

Misdemeanors in custody.

Before a defendant can be tried on any traverse, he must procure from the clerk of the peace a record of the proceedings, and *ven. fa.*, which he must get returned by the under-sheriff, and he must afterwards enter his traverse with the clerk of the peace.

Entry of traverse.

Misdemeanors not in custody.

Where a defendant is not in custody, he cannot be tried at the same session at which the bill for an assault or misdemeanor shall have been found, unless by the consent of the prosecutor, or under stat. 60 G. 3. & 1 G. 4. c. 4., for which see tit. *Witness, post.*

Defendant must personally appear.

And on the trial of a traverse, the defendant must appear in the court, at the bar, in his proper person; and then the indictment is read to the jury: and the prosecutor and his witnesses are called to give evidence, and are heard; and if the defendant be found guilty, the court sets a fine upon him adequate to the offence, or other punishment, as the law directs.

Defendant agreeing with prosecutor in cases of assault.

In cases of assault, the court frequently recommends the defendant to talk with the prosecutor, that is, to make him amends for the injury done him; and if the prosecutor come and acknowledge a satisfaction received, the court will set a small fine on the defendant. *Vide 4 Bl. Com.* 363, 364.

Sometimes the prosecutor and defendant agree before the defendant pleads to the indictment; and then the defendant comes into court in his proper person, and pleads guilty to the indictment; and upon proving, by a subscribing witness, a general release executed by the prosecutor, the defendant submits to a small fine, such as the court is pleased to impose. *Cro. Cir. C.* 21.

Pleading guilty in trying cases.

There are frequent prosecutions at the sessions for trying assaults; in which case it is advisable for a defendant not to put himself to the expense of trying the indictment, but to give notice to the prosecutor that he intends to plead guilty to the indictment, in which case the prosecutor attends the court with his witnesses, and gives evidence of the nature of the offence; and then the court proceeds to fine the defendant: but the court will admit the defendant to call such witnesses as he desires, and will examine them by way of mitigation. *Cro. Cir. C.* 22.

Proceeding in hearing Appeals, &c.

Notice.

Upon the hearing of appeals, the first step in all cases after the appeal is called on is, that the appellant should prove his notice, unless it be admitted. *2 Nol. P. L.* 439. 3d ed.

Notice need not necessarily be in writing.

The notice of appeal is the only instrument which brings the appeal before the court of quarter sessions; and if required to be in writing, it should be accurately drawn. Where a statute requires reasonable notice to be given, it does not necessarily mean that the notice should be in writing, but only that as to time and number of days it should be reasonable. *Per Abbott C. J., R. v. Justices of Surry, 5 B. & A.* 539. tit. *Appeal (Notice)*, in another vol.

Which party is to begin.

In appeals against orders of removal, the respondent begins the appellant must produce the pauper, and also the original orders of removal. But it is the safest practice to subpoena paupers as witnesses, where they are to be used as such.

Order of removal.

If only a copy of the order is served, the appellants should give notice to the removing parish to produce the original at the hearing.

If the pauper cannot be found, and the order appear upon the face of it to have been made on his examination upon oath, the appellant begins. *2 Nol. P. L.* 440. n. (4.) 3d ed.

Upon an appeal against an order of filiation, the respondents are to begin by supporting their order. *R. v. Knill*, 12 *East*, 50.

If a party appeal against a poor-rate, on the ground that he has not rateable property in the parish, the respondents must first establish their case. *R. v. Newbury*, *M.* 32 *G. 3.*, 4 *T. R.* 475.

Heywood, *amicus curiæ*, said, that at the *Yorkshire* quarter sessions, when the appellant objected to his being rated at all, it is the practice for the respondents to begin; but if he object to the quantum of the rate, then the *onus* lay on him.

Ld. Kenyon C. J. said, that "in writs of error and appeals to the house of lords, where each party is in possession of all the evidence on both sides, the party who impeaches the decision always begins; but in a case of this kind, where it is an *ex parte* proceeding, and where the appeal comes on to be heard naked and destitute of all evidence before the court, those who have done the act ought to establish the propriety of it by evidence." *T. R.* 476.

Where the appellant disputed not only the rateability of the property, but also the amount of his charge, it was held not sufficient for the parish officers to shew that he had some rateable property, but they must shew some probable ground for the amount at which they charge the party in the rate; and *per Ld. Ellenborough*,—"The mischief would be enormous if a small occupier may be rated at 1000*l.*, and left to struggle his way out of that charge as he can." *R. v. Topham*, 12 *East*, 546.

In a subsequent case, where appellant gave notice of appeal, on the ground that he was over-rated, and the sessions dismissed the appeal, because the appellant refused to begin by establishing objection to the rate, pursuant to the practice of the sessions, the court of *K. B.* refused to interfere by *mandamus* to reverse the order of proceeding at the quarter sessions, it not appearing that any injustice was created by it; and it was said that *R. v. Topham* was decided upon the special circumstances of that case. *R. v. Justices of Suffolk*, 6 *M. & S.* 57.

By stat. 5 *G. 2. c.* 19., upon all appeals to be made to the sessions against judgments or orders, the justices shall cause any defect of form in such original judgment or orders, to be rectified and amended, and then shall proceed upon the merits.

Form is such matter of course as the clerk may supply and amend, without any information of the party. The power given by stat. 5 *G. 2. c.* 19. is confined entirely to the amendment of defects or mistakes of form, which appear upon the face of the order. 2 *Nol. P. L.* 451. 3d ed. See *R. v. Inhab. of Great Bedwin*, *Err. S. C.* 163., *et per Lord Kenyon C. J.*, *R. v. Chilters Coton*, *T. R.* 178.

Filiation.

Poor-rate.

Appeal against being rated, and also against amount.

Rule of sessions that appellant should begin; *K. B.* will not in general interfere.

5 *G. 2. c.* 19. Errors in form to be amended.

Form, what it is.

IV. Of the Powers and Duties of the Sessions generally.

Where authority is given to two justices to do any act, the sessions may do it in all cases, except where appeal is directed to the sessions. *Per Holt C. J.*, 1 *Ld. Raym.* 426.

But the sessions cannot suppress a licensed alehouse, unless for disorder. *R. v. Randall*, 2 *Salk.* 470.

The sessions may do what two justices may.

Sessions to proceed by indictment.

If jurisdiction be given to the sessions to hear and determine, and doth not say by information, this shall be by indictment, and not upon information. *Dalt. c. 191. p. 469.*

Where a power is given to a jurisdiction, which does not ordinarily entertain actions, bills, or plaints, in general terms to inquire of, hear and determine the offence, it must be understood to mean by the common-law mode of proceeding, viz. by indictment or presentment. *Shipman q. t. v. Herbert, 4 T. R. 109.*

Whether they may issue a *capias utlagatum*.

The sessions may proceed to outlawry in cases of indictments found before them; and that by the common law: and in cases of popular actions, by stat. 21 J. 1. c. 4. But they cannot issue a *capias utlagatum*, but must return the record of the outlawry into the K. B., and there process of *capias utlagatum* shall issue. 2 *Hale, 52. Lamb. 521. Dalt. c. 193. p. 473.*

But they that have power to award process of outlawry have also a power to award a *capias utlagatum*, as incident to their authority and jurisdiction. 12 *Rep. 103.*

Whether they may award an attachment.

The sessions cannot award an attachment for contempt in not complying with their orders; but the ordinary and proper method is by indictment. *R. v. Bartlett, 2 Sess. Ca. 176.*

Need not give their reasons.

The sessions are not obliged to give any reason of their judgment in the orders they make, no more than any other of the courts of law. 2 *Salk. 607.*

Orders may be altered the same sessions.

The sessions is all as one day, and the justices may alter their judgments at any time whilst it continues. *Per Holt C. J., 2 Salk. 606. 2 Nol. P. L. 448. 3d ed. 1 Str. 383.*

Justices in sessions equally divided.

R. v. the Just. of Westmoreland, 2 Sess. Ca. 193. Order of two justices of the borough for removing a poor family; appeal to the sessions of the county, at which the justices were equally divided: so no determination was made, nor the appeal adjourned. A *mandamus* was directed to all the justices of the county in general to proceed on the appeal. And it was said that the justices ought in this case to have adjourned the appeal, or continued it over to a subsequent sessions, till, by the coming of more justices, it might have been determined.

Where they are equally divided in opinion, that is a sufficient warrant for the clerk of the peace to enter an adjournment, and it is his duty so to do. *Bodmin v. Warligen, 2 Bott, 733. 2 Nol. P. L. 436. 3d ed.*

Power to adjourn an appeal properly lodged.

An inclosure act gave the parties aggrieved a right of appeal to any quarter sessions to be holden for the county of Wales "within four calendar months after the cause of complaint shall have arisen;" and enacted, "that the justices at the said general quarter sessions are hereby required to hear and determine the matter of every such appeal," &c. *Per Ld. Ellenborough C. J.* hold, without any doubt, that the court who are to try the appeal have an incidental authority to adjourn it when once properly lodged, if it be necessary for the advancement or convenience of justice: and the sessions are to judge of the proper occasion for doing so. But the act of the party himself in preferring his appeal, must be within the limited time." *R. v. Justs. of Wm. H. 51 G. 3., 13 East, 352.*

R. v. Houldgrave, H. 58 G. 3., 1 B. & A. 312. The justices of sessions have no power to order a per-centage on money raised for the repairs of bridges within a certain hundred, to be paid by the

bridge-master to the clerk of the peace in lieu of all fees for all court business done in regard to the bridges and roads; they can only direct a compensation for business done, but not substitute an average computation.

R. v. George Williams, Esq., M. 60 G. 3., 3 B. & A. 215. At the annual general sessions of the peace for the county of Lancaster, holden at Preston, on the 25th June 1818, the court of quarter sessions allowed the treasurer's accounts, on the debtorside of which was the following item:—"To the clerk of the peace—his fees on rolls issued in April, July, and October 1817, and in January 1818, 35,589*l.* 17*s.*, at 1*d.* per pound, 148*l.* 5*s.* 8*d.*" The order of sessions having been removed into this court by *certiorari*, *Parke* obtained a rule *nisi* for quashing so much of it as related to the above item, on an affidavit stating, that such allowance had been made, not upon an estimate of the labour of the clerk of the peace, but on a calculation of poundage on the sums created by the rolls issued. In answer to this, the affidavits stated an order of sessions, dated 4th December 1815, which was as follows:—"That the clerk of the peace be allowed one penny a the pound on all sums raised by virtue of the said new assessment, in lieu of his usual fees heretofore taken for making the rates and for the rolls, exclusive of all charges and expenses in printing and preparing the said rolls, which he is hereby directed to charge in his annual accounts." On shewing cause it was contended, that stat. 55 G. 3. c. 51. gave a jurisdiction, in cases like this, to the magistrates; for § 16. enabled them to make compensation to all their officers, and their jurisdiction was not denied in *R. v. Houldgrave*, 1 B. & A. 312; but there the order was before the court, and it appeared that the justices had made a vicious computation. *R. v. Inhab. of Essex*, 4 T. R. 591. was also cited. *Contra* it was argued, that the 55 G. 3. c. 51. § 16. gave no jurisdiction to the magistrates to make a compensation to the clerk of the peace; for the officers enumerated are all of an inferior description; and the general words at the end must be construed with reference to the officers enumerated. Besides, at all events, the order of December 1815 was bad on the face of it; for it was a general order, and prospective, and the justices have no power to make a prospective order: if so, the treasurer ought not to have obeyed it. *Abbott C. J.* This case has come before the court rather in an imperfect manner. It appears, however, to stand thus:—By an order, made June 25th 1818, the treasurer's accounts for the county of Lancaster were allowed at the annual general sessions, by the magistrates there assembled. That order has been brought up into this court by *certiorari*, and a motion has been made to quash such part of the order as allows the sum of 148*l.* 5*s.* 8*d.* to the treasurer. That motion is supported by an affidavit, stating, that the allowance was made, not upon any calculation of the work done by the clerk of the peace, but by a poundage upon the sums levied under the rate. On the other side, an order of sessions, dated 4th December 1815, is produced, by which this poundage was allowed; and, supposing that order to have been made by a competent tribunal, I might, perhaps, think that that order ought to have been removed into this court before we could proceed to quash the part of the present order before referred to, inasmuch as the treasurer would be warranted

The sessions have no jurisdiction to make a prospective order for a compensation thereafter to be made to the clerk of the peace, by way of poundage on rates raised; and therefore, where a county treasurer, in obedience to such an order made the payment, and that payment was afterwards, by an order of sessions, allowed in his accounts, the court of K. B. quashed so much of the order of sessions as allowed that item.

Rex v. Williams, Esq.

in making such payment, in obedience to the order of *December* 1815. But I am of opinion that the sessions have no jurisdiction to make a prospective order of this sort, for an allowance to the clerk of the peace by way of poundage. And if that order was made by a tribunal which had no such jurisdiction, the payment by the treasurer was without authority, and ought not to be allowed in his accounts. It has been ingeniously put in argument, that the order in 1818, after the work had been done by the clerk of the peace, may be considered as an original order, by the court making him a proportionate allowance for his trouble. But I think that it is impossible so to consider it. In the first place, it is not the ordinary course of proceeding to make such an original order at the time of examining the treasurer's accounts. The magistrates, upon that occasion, only examine whether he has properly given credit for the sums received by him, and that the sums stated to be paid by him are properly vouched. In the second place, it is to be observed, that the voucher for this individual payment, which is here returned with the order of sessions, shews most manifestly that this sum was paid by virtue of the order of *December* 1815. It is impossible, therefore, to consider the order of *June* 1818 as an original and substantive order; or, indeed, as any thing else than an order following an account expressly founded on the order of *December* 1815, which, it appears, was made by a court wholly without jurisdiction. I am, therefore, of opinion, that that part of the order of sessions, making allowance to the clerk of the peace, should be quashed. *Bayley J.* and *Holroyd J.* concurred. — Order of sessions quashed.

How far the sessions hath power over its own members.

It seemeth certain that the sessions hath no authority to amerce any justice for his non-attendance at the sessions, as the judges of assize may for the absence of any such justice at the gaol delivery: for it is a general rule that *inter pares non est potestas*, it being reasonable rather to refer the punishment of persons in a judicial office, in relation to their behaviour in such office, to other judges of a superior station, than to those of the same rank with themselves. And therefore it seems to have been holden, that if a justice at the sessions who is not of the *quorum*, shall use such expressions towards another who is of the *quorum*, for which, if he were a private person, he might be committed or bound to his good behaviour, yet the sessions hath no authority to commit him, or to bind him to his good behaviour; and yet it seems to be agreed that if a justice give just cause to any person to demand the surety of the peace against him, he may be compelled by any other justice to find such security; for the public peace requires an immediate remedy in all such cases. 2 *Haw. c. 8. § 46.*

Whether justices be punishable for what is done in sessions.

Generally, it is said, that the justices are not punishable for what they do in sessions. *Staunf.* 173. Unless there be some manifest act of oppression, or wilful abuse of power. 2 *Barnard.* 249, 250. See *R. v. Seton*, 7 *T. R.* 374. In which case *Ld. Kenyon C. J.* said, "I believe there are instances in which a criminal information has been granted against magistrates acting in sessions."

No information against justices acting in sessions, unless in very flagrant cases.

R. v. the Just. of Seaford, 1 *Bla. Rep.* 332. It was moved for an information against four persons who were churchwardens and overseers of the poor of *Seaford*, and also the only justices of the peace of the said borough, for refusing to put a substantial householder upon the poor-rate (which is a necessary requisite towards

giving a vote for members of parliament), and upon appeal, refusing to amend the rate, or give relief in sessions. But as they were acting in a court of record, with powers entrusted to them by the constitution, the court said it must be a very strong case indeed, with *flagrant* proofs of their having acted from corrupt motives, that will warrant a rule for an information; and therefore refused to grant a rule to shew cause.

Of the Judgments at Sessions.

In *R. v. Harding*, 2 Salk. 477., it is delivered as the resolution of the court, that a judge of *nisi prius*, by consent of parties, may make a rule to refer a cause; but the sessions cannot do so, though by consent. They may refer a thing to another to examine, and make report to them for their determination, but cannot refer a thing to be determined by the other.

Whether the sessions can refer a matter.

But in *R. v. the Justs. of Northampton*, Cald. 30., on a motion to quash an order of sessions quashing a poor-rate, on the ground that the rate was by the sessions referred to two justices out of sessions, and that the sessions afterwards adopted their opinion, without exercising their own judgment; Ld. Mansfield said, "If they did this of their own accord, without the consent of the parties, it cannot be supported: they are not warranted to delegate their authority: but, if they acted with the consent of the parties, I think they have done very right; and we will never suffer the party who consented to the reference to come here to set it aside; and I think it sufficient if the attorneys consented, and attended at the reference. The case was sent back to the sessions to certify whether it was referred by consent; and afterwards the order was affirmed."

Matter may be referred by consent, and the award adopted by the sessions.

A bill of exceptions will not lie to the justices in sessions on an appeal; for, as observed by Ld. Hardwicke, in the common case of bills of exceptions tendered to the judges, the jury alone are the proper persons who would be to decide whether they believe the evidence or not; the judges have nothing to do with the belief of the evidence; they are not to determine on its credibility, but on the consequence of law arising from it. But the justices at sessions are judges of the fact as well as law; they are jury as well as judges; it is in their breast only whether to believe or disbelieve the evidence; and who is to take upon himself to say what portion of the evidence they do believe, and what they do not? Suppose six of the justices believe the evidence, and two of them do not believe it; are the two to conclude the six as to the belief of the fact? When the justices specially state the fact, it is the act of the whole court; but here only two out of the whole number have sealed the bill of exceptions. *R. v. Preston*, Burr. S. C. 77.

Bill of exceptions will not lie to justices in sessions.

Case of *Foxham Tithing*, Wilts, 2 Salk. 607. A justice cannot, upon general principles, vote in a case in which he is himself interested. Where a justice was surveyor of the highways, and he joined in making an order in a matter concerning his office, which came before the sessions, and his name appeared in the caption, Holt C. J. held that it ought not to be so, and the order was quashed.

Justice cannot vote when interested.

On the trial of an appeal against an order of removal, eight justices voted for confirming, and seven for quashing the order; but, of the eight, one was interested, as being rated in the re-

Acc.

spondent parish; the sessions confirmed the order, and on a case stating these facts, *B. R.* quashed the order of sessions, and ordered them to enter continuances, and decide the appeal at the next sessions. *R. v. Yarpole*, 4 *T. R.* 71.

Or do any judicial act.

So, formerly, the circumstances of a magistrate being chargeable to the poor-rate rendered him incompetent to join in the removal of a pauper: and *per cur.*, it is a judicial act, and the party interested is tacitly excepted: no practice can ever overturn so fundamental a rule of justice, as that a party interested cannot be a judge. *Great Charte v. Kennington*, 2 *Str.* 1173.

But by statute he may remove, &c.

But now by 16 *G. 2. c. 18.*, justices, though rated or chargeable, may act in regard to the execution of poor-laws and parochial ratings. See *R. v. Justices of Essex*, 5 *M. & S.* 513. tit. *Poor*, in another vol.

It is now established, that if the sessions have heard and given judgment on an appeal, the court of *B. R.* will not interfere to review it, unless upon a case stated.

Judgment of sessions given by mistake, *K. B.* will not interfere.

An order having been confirmed by a majority of one only, one of the magistrates forming the majority withdrew his vote, according to the practice of that sessions, on finding that the order had been signed by him: the numbers were then equal, and the appeal ought to have been adjourned, but by mistake the order was quashed. These facts being stated on affidavits, the court of *B. R.* refused a *mandamus* to enter continuances, on the ground that they would not interfere with a judgment of the sessions, by looking to matter *dehors* the record, though they might have interposed if no judgment had been pronounced; and that the error ought to have been noticed and corrected at the sessions. *R. v. Justices of Leicestershire*, 1 *M. & S.* 442.

But *K. B.* will notice an error at sessions where a *certiorari* has been issued improperly.

However, where the question before the sessions was, whether a case should be granted, and the court had refused it; but afterwards, when several of the justices had gone away, it was allowed by three to two, one of the three being interested; after *certiorari* issued to bring the case up, *B. R.*, on these facts appearing by affidavit, quashed such writ *quia improvide emanavit*. *R. v. Godridge*, 5 *B. & C.* 459.

B. R. will not interfere on account of rejection of witnesses.

Where it appeared that the sessions had refused to hear witnesses in reply tendered on the part of the respondent, and quashed the order; on motion for *mandamus* to enter continuances and rehear, it was refused, for that after the sessions had decided, even though they may have done wrong, *B. R.* will not interfere unless there be a case; and *per Holroyd J.*, "If they had heard only one side, it would have been no hearing, and a *mandamus* should have gone, but that this was merely a question on their practice. *R. v. Justices of Caernarvon*, 4 *B. & A.* 86.

Nor for adjourning where the order ought to have been quashed.

On an appeal against an order, the court, consisting of four justices only, were equally divided, but it appeared that one of those who voted for the respondents was interested in that parish: the sessions however adjourned the appeal: on affidavit and motion for *certiorari* to bring up the orders and quash them, it was refused, on the ground that even if it were assumed that the judgment was erroneous, the court of *B. R.* had not jurisdiction as a court of error to review the judgments of sessions. *R. v. Justices of Monmouthshire*, 8 *B. & C.* 137.

But *K. B.* will

Where a court of quarter sessions, having entered upon the

hearing of an appeal against the overseers' accounts, afterwards dismissed it, upon the ground that one overseer could not appeal against the accounts of the other; the court of K. B. granted a *mandamus* to enter continuances, &c., on the ground that an erroneous preliminary objection had prevailed, and that the appeal had not in fact been heard. *R. v. Justices of Gloucestershire*, 1 B. & Ad. 1.

But where, on the hearing of an appeal against an order of removal, the quarter sessions refused to admit certain evidence that had been offered, and dismissed the appeal, declining to grant a case, and a motion was made in K. B. for a *mandamus*, because the evidence was improperly rejected; the court held that, even assuming the justices to have been wrong, K. B. could not interfere where the justices had heard and decided the appeal, and had not sent up a case. *R. v. Frieston*, 5 B. & Ad. 597.

A local inclosure act required ten days' notice to be given for an appeal, and such appeal having been regularly preferred, it was respited. At a subsequent sessions the justices dismissed the appeal, on account of there not having been ten days' notice given of such respited appeal; as to which, neither the act nor the sessions practice gave any directions. Under these circumstances the court of K. B. granted a *mandamus*. *R. v. Justices of W. Riding of Yorkshire*, 5 B. & Ad. 667.

The justices at sessions may alter their judgment during the continuance of the sessions. *St. Andrew's Holborn v. St. Clement Danes*, 2 Salk. 660.

Rex v. the Just. of Salop, 2 B. & A. 694. A rule *nisi* had been obtained for a *mandamus* to the sessions to enter continuances, and hear the appeal of *John Rogers*, against the conviction of a magistrate, under stat. 52 G. 3. c. 93. sched. L. rule 12. The defendant was convicted in the penalty of 10l. for using greyhounds for the purpose of killing a hare, not having taken out a certificate. Immediately upon his conviction he entered into the recognizance required by the act, to prosecute his appeal against it. At the next sessions he accordingly entered his appeal, and it was respited by the court. At the following sessions he again appeared for the purpose of trying the appeal; but it being objected that there had not been eight days' notice given to the convicting magistrate, as required by the rule of the sessions, the magistrates dismissed the appeal, and confirmed the conviction. On moving for the rule *nisi*, the case of *Rex v. the Justices of Leeds*, 4 T. R. 583., was relied on, and it was contended, that the entering into the recognizance before the magistrate dispensed with the necessity of giving the usual notice to him of trying the appeal. After cause shewn against the rule, *Abbott C. J.* said, it was, perhaps, sufficient for the party to entitle himself to enter his appeal at the *January* sessions, that he had given the security required by the act, although no notice of appeal had been given by him; but when once he had entered his appeal, he was bound to conform to the practice of the sessions. It was therefore necessary for him to have given the usual notice of trying his respited appeal at the *Easter* sessions; and not having done so, the magistrates were authorised to dismiss the appeal altogether. *R. D.* with costs.

interfere if the case has not been heard.

Case heard and decided, K. B. will not interfere, though evidence has been improperly rejected.

Mandamus granted where sessions had improperly required appellant to have given notice.

Where a statute gives a party aggrieved a right of appeal on giving security to a specified amount, he may enter and re-spite his appeal at the next sessions after having given such security, without notice to the other side; but after the appeal has been respited, if he does not give the usual notice of trying it, the sessions will be authorised to dismiss it altogether.

Conviction

erroneously quashed by sessions for defect on the face of it.

on the face of it, without going into the merits; and on removal, by *certiorari*, K. B. was of opinion that the form of the conviction was sufficient, they quashed the order of sessions, but sent it back to be heard upon the merits. *R. v. Ridgway*, 5 B. & Ad. 537.

Of stating a Special Case.

Sessions not to be compelled grant a case.

The sessions cannot be compelled to state a special case. Nor will the court permit them to raise a *general question*, by omitting to state particular circumstances belonging to the case. But if the sessions order a special case to be made, and before it is settled the sessions is inadvertently adjourned, the court of K. B. will grant a *mandamus* to compel them to proceed in the appeal. *R. v. Oulton*, 2 Bott. 73. *R. v. Francis Hill*, 1 Bott. 280. *R. v. Justs. of Sussex*, 2 Bott. 751.

Nor ought there to be a case, unless there is serious doubt.

"The magistrates ought not to be induced to send up cases for our opinion, if they have no doubt upon the question in their own minds, in order to avoid incurring unnecessary expenses." *Per Bayley J., R. v. Inhab. of Darley Abbey*, 14 East, 285.

Cases sent down to be re-stated.

The sessions should not grant cases unless they entertain serious doubts. *Per Bayley J., R. v. Burbach*, 1 M. & S. 376.

The court will not send a case down to the sessions to be re-stated on a mere formal objection, if enough appear to enable them to decide according to the merits of the case. *R. v. Lett. of Middlesex*, 1 T. R. 41.

If a special case be sent back to be re-stated, the sessions should proceed as if it were an entirely new business; for it is in the nature of a new trial; wherefore they have no right to take any notice of what passed before. *R. v. Page*, 2 Bott. 743.

But the sessions, in order to re-state a case in which the evidence had been set out, and not the facts, need not hear new evidence. *R. v. Bray*, 2 Bott. 743. *Burr. S. C. 684.*

However, the court will send back a special case, in order that it may be amended as to a particular fact, which was before omitted, by new evidence. *R. v. Hitcham, Burr. S. C. 489.*

Cases to state facts, not evidence.

Special orders of sessions are considered in the nature of special verdicts, which are not to state the evidence of the fact, but the fact itself. *R. v. Martley, Burr. S. C. 120. 2 Bott. 741.*

Case on appeal against convictions.

It has been held that the sessions may state a case for the opinion of B. R. on appeals against convictions. *R. v. Allen*, 15 East, 333.

Aliter on trial of indictments.

But on a prosecution for the non-repair of a bridge, it was held a great irregularity to state a case on the trial of an indictment, and that the court would take no notice of it. *R. v. Selver*, 13 East, 95.

Of Costs.

8 & 9 W. 3. c. 30.

Justices, on appeal to them concerning the settlement of any poor person, to award costs.

Stat. 8 & 9 W. 3. c. 30. § 3., for the more effectual preventing of vexatious removals and frivolous appeals, enacts, that the justices of the peace of any county or riding, in their general or quarter sessions of the peace, upon any appeal before them there to be had, for and concerning the settlement of any poor person, or upon any proof before them there to be made, of notice of any such appeal to have been given by the proper officer to the

burchwardens or overseers of the poor of any parish or place (though they did not afterwards prosecute such appeal), shall, at the same quarter-sessions, award and order to the party for whom and in whose behalf such appeal shall be determined, or to whom such notice did appear to have been given, as aforesaid, such costs and charges in the law as by the said justices in their discretion shall be thought most reasonable and just, to be paid by the burchwardens, overseers of the poor, or any other person, against whom such appeal shall be determined, or by the person that did give such notice as aforesaid; and if the person ordered to pay such costs shall happen to live in any county, riding, city, or town corporate, or elsewhere, out of the jurisdiction of the said court, it shall and may be lawful for any justice of the peace of the county, riding, city, liberty, or town corporate, wherein such person shall inhabit, and every such justice is hereby required, upon request to him for that purpose to be made, and a true copy of the order for the payment of such costs produced, and proved by some credible witness upon oath, by warrant under his hand and seal to cause the money mentioned in that order to be levied by distress and sale of the goods of the person that is ordered and ought to pay the same; and if no such distress can or may be had, to commit such person to the common gaol of that county or liberty, there to remain by the space of 20 days.

The words of the statute seem imperative upon the magistrates, to allow some costs where an appeal is heard, or notice of appeal has been given against an order of removal. 2 *Nol. P. L.* 473. 3d ed.

R. v. Justices of Nottingham, 5 G. 1., 2 *Bott.* 756. A *mandamus* was directed to the justices to give costs to the party in whose favour the appeal had been determined. But upon the return, the court held it reasonable for them to have the power of judging whether costs should be allowed or not, and quashed the writ of *mandamus*.

The sessions cannot order costs on the mere adjournment of an appeal, without hearing it. *R. v. Stanfield*, *Burr. S. C.* 205. 2 *Bott.* 756.

As the justices have a discretionary power over the amount, it is customary to give 40s., unless the case has been accompanied with circumstances of vexation or fraud. 2 *Nol. P. L.* 474. 3d ed.

And by stat. 9 G. 1. c. 7. § 9, it is enacted, that after 24th June 1723, if the justices of the peace shall, at their quarter sessions, upon an appeal before them there had concerning the settlement of any poor persons, determine in favour of the appellant, that such poor person or persons was or were unduly removed, that then the said justices shall, at the same quarter sessions, order and award to such appellant so much money as shall appear to the said justices to have been reasonably paid by the parish or other place, on whose behalf such appeal was made for or towards the relief of such poor person or persons, between the time of such undue removal and the determination of such appeal; the said money so awarded to be recovered in the same manner as costs and charges upon an appeal are prescribed to be recovered by the said statute made in the 9th year of his late majesty king William the third, intituled *An act for supplying some defects in the laws for the relief of the poor of this kingdom*.

Person ordered to pay costs living out of the jurisdiction; justice of the county, &c. where such person inhabits, may cause the money to be levied;

if no distress, offender to be committed to gaol.

The allowance of costs upon an appeal from an order of removal is discretionary in the sessions.

9 G. 1. c. 7. Justices, how to relieve the appellant on undue removals.

8 & 9 W. 3. c. 30.

Sessions must allow costs of maintenance.

Stat. 9 G. 1. c. 7. is imperative upon the quarter sessions to allow the expenses and charges of maintenance to the appellant, where the appeal is decided for him. *St. Mary's Nottingham v. Kirklington*, E. 3 G. 3. 2 Sess. Cas. 67. 2 Bott. 756. 2 Nd. P. L. 476. 3d edit.

As to the power to allow costs in criminal cases, see tit. Costs.

V. Of Adjournment, Fees, and Estreats.

Adjournment of the sessions, style of.

Where the sessions is adjourned, the style of the sessions ought not to run, *at such a sessions held by adjournment*; but the original meeting of the sessions ought to be set forth, and that it was continued from thence to such further time by adjournment. 2 Str. 832. 865. See also *R. v. Walker*, 2 Sess. Ca. 21.

Adjournment cannot be beyond the following quarter sessions.

But such adjournment ought not to be beyond the time of meeting of the next quarter sessions. As in the case of *R. v. Grince*, T. 4 G. 1., an indictment was found before the justices for the county of *Lincoln* against a constable for refusing to obey an order of the justices; and the defendant was tried, convicted, and had judgment given against him, at a general sessions held the 3d day of *May* (which was after the *Easter* sessions began) by the adjournment of the *Epiphany* sessions; but by the court of K.B. the judgment was reversed, because the justices cannot continue one general sessions to a day subsequent to the time appointed by stat. 2 H. 5. c. 4. for the holding another original sessions. 19 Vin. Abr. 358.

12 R. 2. c. 10. Wages of the justices and estreats.

By stat. 12 R. 2. c. 10., the justices shall take for their wages 4s. the day for the time of their sessions, and their clerk 2s. of the fines and amerciaments arising and coming of the same sessions, by the hands of the sheriffs. And the lords of franchises shall be contributory to the said wages, after the rate of their part of fines and amerciaments.

14 R. 2. c. 11.

But by stat. 14 R. 2. c. 11., no duke, earl, baron, or banneret shall take any wages.

Estreats.

And the estreats of the justices shall be doubled, and the one part delivered by them to the sheriff, to levy the money thereof rising, and thereof to pay the justices their wages by the hand of the sheriff, by indenture betwixt them thereof to be made.

Fees in sessions.

The fees in sessions for traversing, trying, or discharging indictments, discharging recognizances of the peace and good behaviour, and the like, do vary according to the custom of the country; and in that case the custom of the place is to be observed. *Dalt. c. 41.* See tit. Clerk of the Peace, in another volume.

Nonpayment not a cause of commitment.

By *Holt C. J.*, the court cannot commit for nonpayment of fees: for if there be right there is remedy; and *indebitatus assumpsit* will lie, if the fee be certain; if uncertain, *quantum meruit*. 2 *Ld. Raym.* 703.

Allowances to constables.

With regard to the allowances to constables and others by justices in sessions, *vide* tit. Constable.

VI. Of Local Jurisdictions.

Local jurisdiction.

Many cities and boroughs are authorised by charter or prescription to exercise local jurisdiction, in some cases concurrent with, in others exclusive of, the general jurisdiction of the magis-

ties of the county ; concerning which, in their various relations, there have been several decisions in the courts at *Westminster*, and several legislative enactments have passed for the better regulation of their proceedings, and of the powers vested in such local magistrates.

Lord *Hale*, treating on this subject, says, if the king by charter grant to a corporation that the mayor, and recorder, or other, shall be justices within the same, yet if there be no words of exclusion, the justices of the county have a concurrent jurisdiction : but if this franchise of being justices be granted, so that the justices of the county shall not intermeddle (*se non intromittant*), then, though a subsequent commission be granted in the county at large, it seems they have no jurisdiction in this corporation or town ; but it is questionable, whether an indictment in the franchise be void, or only a contempt in the justices. 2 *Hale*, 47.

In *Talbot v. Hubble*, 2 *Str.* 1154., the question was, whether, the city of *New Sarum* had an exclusive commission of the peace, the justices of the county of *Wilts* could, by virtue of statute. 1 C. 2. c. 23. and 15 C. 2. c. 2., act in excise matters within the city. This case was argued three times at the bar, and this term (T. 14 G. 2.) Lord C. J. delivered the resolution of the court : 1. That the crown might grant to any city to have justices of their own within themselves, and exclude the county justices from intermeddling in the ordinary business of a justice of the peace. 2. That in such case, the act of the county justices would be void, and not to be considered only as a breach of the franchise. 3. That though the 12 C. 2. gives the jurisdiction in the excise matters to the justices of the peace residing near the place where the forfeiture shall be made or offence committed, yet it never was the design of the legislature to make any alteration in the respective jurisdictions of the justices, but only to extend the excise jurisdiction of justices of counties, cities, and places, with respect to their several local jurisdictions within such places.

And in *Blankley v. Winstanley*, 3 *T. R.* 279., it was adjudged that a charter granting jurisdiction to borough magistrates over a district not within the borough, does not exclude the county justices from having a concurrent jurisdiction, without express words in the charter ; and though such charter contain words of reference to former charters in which exclusive jurisdiction is given to the borough justices within the borough, and add that they shall have jurisdiction within the new district *in tam amplo modo et forma, &c.*, yet if there be in the latter charter a saving clause of the rights of the crown and of all other persons, the borough magistrates have only a concurrent jurisdiction with the county justices.

In truth, the exclusion of county justices from acting in particular districts has always been watched with a jealous eye ; and nothing but express words are sufficient to exclude them. 3 *T. R.* 287., per Lord *Kenyon*, C. J.

By charter, the mayor and some of the aldermen of *London* have jurisdiction in *Southwark* : but as the charter contains no *non intromittant* clause as to the justices of the county of *Surrey*, the latter have a concurrent jurisdiction with the former. *R. v. T. Sainsbury, esq. and another*, 4 *T. R.* 451.

Nothing less than express words of exclusion will confer an exclusive jurisdiction.

Crown may grant exclusive jurisdiction.

In which case act of county magistrate would be void.

County magistrates not excluded without express words.

Liability to
county rates.

A charter granted a jurisdiction to borough justices within a borough, in exclusion of the county justices, and likewise gave them jurisdiction over a place beyond the limits of the borough, but not in exclusion of the county justices: Held, that the latter might assess such place to the county rates. *Bates v. Winstanley*, 4 M. & S. 429.

The city of *Bath*, in which the justices have a separate jurisdiction for some purposes, but not for all, and who commit felons to the county gaol for trial at the assizes, and thereby burthen the county, is not a liberty or franchise having a separate jurisdiction; and is consequently liable to the *Somersetshire* county rate. *R. v. Clarke*, 5 B. & A. 665.

15 G. 2. c. 24.
Justices of
liberty, &c.
may commit
offenders to
house of cor-
rection, &c. of
the county, &c.
in which such
liberty, &c.
situate.

By stat. 15 G. 2. c. 24., when any person liable by law to be committed to the house of correction shall be apprehended within any liberty, city, or town corporate, whose inhabitants are contributory to the support and maintenance of the house or houses of correction of the county, riding, or division in which such liberty, city, or town corporate is situate, it shall and may be lawful for the justices of the peace of such liberty, city, or town corporate to commit such person to the house of correction of the county, riding, or division in which such liberty, city, or town corporate is situate; which person so committed shall and may be received, detained, dealt with, and ordered, and be set and kept to hard labour, or conveyed and sent away, or discharged and be subject and liable to the same correction and punishment, to all intents and purposes, as if committed by any justice or justices of peace of the same county, riding, or division.

Borough con-
tributory to
county rate.

Borough ses-
sions may im-
prison in the
county house of
correction.

Where the justices of the borough of *Liverpool* had immemorially held quarter sessions for the trial of offenders, though not an exclusive jurisdiction, and the borough was contributory to the county rate, an indictment was preferred against the keeper of the county house of correction, for refusing to receive a prisoner convicted of petit larceny at the borough sessions, and sentenced to be imprisoned in the house of correction for three months: on case stated the court held, on referring to 15 G. 2. c. 24., and also to 5 Ann. c. 6. and 53 G. 3. c. 162., that it was the intention of the legislature, that where a borough was contributory to the county rates, they should have the power of committing an offender of this description to the house of correction of the county for punishment; and judgment was given for the crown. *R. v. Houghton*, 5 M. & S. 300.

Aliter, on a
conviction
under local act.

But on another indictment against the same defendant, and with reference to the same borough, the court held, that the justices there could not commit an offender to the county house of correction for an act of vagrancy created by a local act applicable to that borough only. *R. v. Houghton*, 5 M. & S. 311.

So, the borough
justices may
commit for
trial at their
borough ses-
sions.

On a further case respecting the same borough the question was, Whether, where a borough justice had committed a prisoner for felony to the county house of correction, to be tried at the borough sessions, the keeper was bound to obey an order of the said sessions for delivering him up to be tried accordingly? The court gave judgment against the keeper (defendant), holding, that under 15 G. 2. c. 24., the boroughs contributing to a county rate were entitled to equal advantages from the county house of correction with the county at large, and consequently that the borough jus-

es might commit there for trial at their borough sessions. *R. v. nos*, 2 B. & A. 533.

Where it appeared, in another case, that a part only of a borough contributed to the county rate, and that the other part was exclusive, and did not so contribute, the court held, on the authority *R. v. Amos*, that for an offence committed within the part which I contribute, the borough justices might commit to the county ol, and order the prisoner to be delivered for trial at the borough sessions. *R. v. Musson*, 6 B. & C. 74.

By 38 G. 3. c. 52., reciting that, "Whereas there at present exists, in the counties of cities and of towns corporate within this kingdom, an exclusive right, that all causes and offences which arise within their particular limits should be tried by a jury of persons residing within the limits of the county of such city or town corporate; which ancient privilege, intended for other and good purposes, has in many instances been found, by experience, not to conduce to the ends of justice: and whereas it will tend to the more effectual administration of justice, in certain cases, if actions, indictments, and other proceedings, the causes of which arise within the counties of cities and towns corporate, were tried in the next adjoining counties: in order therefore to remedy this mischief for the future," it is enacted, "That from and after the passing of this act, in every action, whether the same be transitory or local, which shall be prosecuted or depending in any of his majesty's courts of record at *Westminster*, and in every indictment removed into his majesty's court of king's bench by writ of *certiorari*, and in every information filed by his majesty's attorney or solicitor general, or by the leave of the court of king's bench, and in all cases where any person or persons shall plead to or traverse any of the facts contained in the return to any writ of *mandamus*, if the venue in such action, indictment, or information, be laid in the county of any city or town corporate within that part of *Great Britain* called *England*, or if such writ of *mandamus* be directed to any person or persons, body politic and corporate, that it shall and may be lawful for the court in which such action, indictment, information, or other proceeding shall be depending, at the prayer and instance of any prosecutor or plaintiff, or of any defendant, to direct the issue or issues joined in such action, indictment, information, or proceeding, to be tried by a jury of the county next adjoining to the county of such city or town corporate, and to award proper writs of *venire* and *distringas* accordingly, if the said court shall think it fit and proper so to do."

§ 2. "It shall and may be lawful for any prosecutor or prosecutors to prefer his, her, or their bill or bills of indictment for any offence or offences committed or charged to be committed within the county of any city or town corporate, to the jury of the county next adjoining to the county of such city or town corporate, sworn and charged to inquire for the king, for the body of such adjoining county, at any sessions of oyer and terminer or general gaol delivery; and every such bill of indictment, found to be a true bill by such jury, shall be valid and effectual in law, as if the same had been found to be a true bill by any jury sworn and charged to inquire for the king for the body of the county of such city or town corporate."

Though part only of the borough be contributory to the county rate.

38 G. 3. c. 52. Preamble.

In actions in any court of record at *Westminster*, &c. if the venue be laid in the county of any city or town corporate in *England*, &c. the court may direct the issue to be tried by a jury of the county next adjoining.

Bills of indictment for offences committed within the county of any city or town corporate may be preferred to the jury of the county next adjoining.

38 G. 3. c. 52.

Indictments found by a grand jury of any city or town corporate, or inquisitions taken before the coroner, may be ordered to be filed with the proper officer of the next adjoining county, and the defendants removed to the gaol thereof, &c. at the prayer of any defendant.

The judges of the court of king's bench, &c. may cause persons in custody for offences committed within the county of any city or town corporate, to be removed into the custody of the sheriff of the next adjoining county, for trial; and direct coroners to return to the court of oyer and terminer, inquisitions, &c. on the application of any prosecutor.

§ 3. "If it shall appear to any court of oyer and terminer or general gaol delivery for the county of any city or town corporate, that any indictment found by any grand jury of the county of such city or town corporate, or any inquisition taken before the coroner or coroners of the county of such city or town corporate, or other franchise, is fit and proper to be tried by a jury of any next adjoining county, it shall and may be lawful for the said court of oyer and terminer or general gaol delivery, at the prayer of any defendant, to order such indictment or inquisition, and the several recognizances, examinations, and depositions relative to such indictments and inquisitions to be filed with the proper officer, to be by him kept among the records of the courts of oyer and terminer and general gaol delivery for such next adjoining county, and to cause the defendant or defendants in such indictment to be removed by writ of *habeas corpus* to the gaol of such next adjoining county; which writ the said court is hereby directed and authorised to issue, if such defendant or defendants be in the prison of such city or town corporate; and if he, she, or they be not in such prison, to commit such defendant or defendants to the gaol of such next adjoining county, and to cause the prosecutors and witnesses against such defendant or defendants to enter into a recognizance or recognizances to prosecute and give evidence against such defendant or defendants at the sessions of oyer and terminer and general gaol delivery for such next adjoining county; and the same proceedings and trial shall be had, and the same judgment shall be given in such last-mentioned court of oyer and terminer or general gaol delivery, as would and might be had and given in cases of indictments or inquisitions for the like offences committed within such next adjoining counties."

§ 4. "It shall and may be lawful for any of the judges of his majesty's court of king's bench, or any of the justices of oyer and terminer or general gaol delivery, for such next adjoining or other county as aforesaid, on the application of any such prosecutor or prosecutors ten days next before the holding of any sessions of oyer and terminer or general gaol delivery, for such last-mentioned county, by proper writs of *habeas corpus*, which they are hereby empowered and authorised to issue, to cause any person or persons who may be in the custody of any sheriff or sheriffs, or of the keepers of any gaol or prison, charged with any offence or offences committed within the county of any such city or town corporate, to be removed into the custody of the sheriff of such next adjoining county, in order that he, she, or they may for such offence or offences as aforesaid be tried in such last-mentioned county, and by order under the hand of any one of the said judges or justices of oyer and terminer and general gaol delivery, to direct the coroner or coroners of the county of any such city or town corporate, or other franchise, to return to the next court of oyer and terminer or general gaol delivery, to be holden for such next adjoining county, any inquisition or inquisitions, examination or deposition taken touching the death of any person or persons within the limits of his or their jurisdictions; and whenever in pursuance of this act any bill or bills of indictment shall be found by such grand jury as aforesaid, against any person or persons for any offence or offences committed or charged to be committed within

the county of any city or town corporate, that it shall and may be lawful for the said courts of oyer and terminer and general gaol delivery to issue process for apprehending the person or persons against whom such bill or bills of indictment shall be found, if not in custody, and to compel the attendance of witnesses upon the trial of such indictments, in like manner as in cases of indictments found in any such court of oyer and terminer or general gaol delivery, for offences committed within such adjoining counties."

§ 5. "Every recognizance which, after the passing of this act, shall be entered into for the prosecution of any person or persons for any offence or offences committed or charged to be committed within the county of any city or town corporate, or within any liberty or franchise, and every recognizance for the appearance, as well of witnesses to give evidence upon any bill of indictment to be preferred, or any inquisition found for any such offence or offences as aforesaid, as for the appearance of any person or persons to answer our lord the king for or concerning the same, shall be forfeited, if the prosecutor shall, ten days previous to the holding of the next court of oyer and terminer or gaol delivery in the next adjoining or other county, give notice to the person bound in such recognizance to give evidence upon such bill of indictment, or to answer our said lord the king as aforesaid, of the intention to prefer such indictment, or to remove such inquisition, in or into the next adjoining or other county, and the party bound in such recognizance shall not appear, prosecute, or give, or be ready to give evidence at such court; but if the person bound in such recognizance, after notice as aforesaid, shall appear at such court of the next adjoining or other county, prosecute, give, or be ready to give evidence on such indictment before the grand jury, and on the trial thereof, or on the trial of such inquisition, then the said recognizance shall be discharged in such and the like manner as if the person bound in such recognizance had complied with the terms thereof."

§ 6. "Provided also, that in case the person or persons who shall enter into such recognizance or recognizances as aforesaid cannot be found, and such notice as aforesaid be left at his, her, or their last place of abode, ten days previous to the holding such sessions as last aforesaid, the same shall be as good and effectual as if the same were left with the person or persons who shall enter into such recognizance or recognizances; and that no such recognizance shall be estreated or returned into the court of exchequer until the next following sessions of oyer and terminer or general gaol delivery to be holden for such next adjoining county, in order that such recognizance or recognizances may be discharged, in case the person or persons who shall have entered into the same shall shew to such court of oyer and terminer or general gaol delivery sufficient cause for discharging the same."

§ 7. "All and every person and persons before whom any such recognizance or recognizances as aforesaid shall be entered into, or by whom any examination or deposition shall be taken touching any such offence or offences as aforesaid, shall and they are hereby required to return the same to the next court of oyer and terminer and general gaol delivery for such next adjoining county as aforesaid, upon such prosecutor or prosecutors as aforesaid leaving at

38 G. S. c. 52.

Recognizances entered into for prosecution of persons for offences committed within the county of any city or town corporate, &c. to be forfeited if the parties, on notice of intention to prefer indictments in the next adjoining county, do not appear, &c.

Notice left at the abode of recognizors who cannot be found, to be effectual.

Recognizances not to be estreated until the next following sessions.

Persons before whom such recognizances shall be entered into, &c. to return them to the next court of oyer and

38 G. 3. c. 52.

terminer for the next adjoining county, upon notice of intention to prosecute at such sessions for any offence committed within the county of any city or town corporate.

After such notice, bills shall not be preferred, &c. at any sessions for the county of the city or town corporate.

Justices of oyer and terminer for the county may order the expenses of prosecution, &c. to be paid, as if the indictment had been tried in the court of the county of the city or town corporate.

York to be considered as next county to Kingston-upon-Hull, and Northumberland as next to Newcastle-upon-Tyne.

Act not to extend to certain places; nor to take away any other ancient privileges of corporations, who shall not be liable to attend as jurymen upon the trial of any cause in the county at large.

the dwelling house or other place of abode of the person or persons before whom such recognizance or recognizances shall be entered into, or by whom such examination or deposition shall be taken, ten days before the holding of any sessions of oyer and terminer or general gaol delivery for such next adjoining or other county as aforesaid, notice in writing of his, her, or their intention to prosecute such indictment or inquisition at such last-mentioned sessions of oyer and terminer or general gaol delivery for any offence or offences committed within the county of any city or town corporate; and after the delivery as aforesaid of any of the said notices, it shall not be lawful for any person or persons to prefer any bill or bills of indictment, or to return any inquisition for any offence or offences mentioned in the said recognizances, or any of them, at or to any sessions of oyer and terminer or general gaol delivery for the county of such city or town corporate."

§ 8. "In all cases of indictments and other proceedings which may be tried before his majesty's justices of oyer and terminer or general gaol delivery for any county, in pursuance of the provisions contained in this act, it shall and may be lawful for such justices to order the expenses of the prosecution, and of the witnesses, and of the several rewards payable in pursuance of the statutes in such cases made and provided on the conviction of offenders, to be paid by and to the same persons, and in the same manner as the same would be payable if such indictment had been tried in the court of oyer and terminer or general gaol delivery of the county of such city or town corporate."

§ 9. "For the purposes of this act, the county of York shall be considered as the next adjoining county to the county of the town of *Kingston-upon-Hull*; the county of *Northumberland* as the next adjoining county to the county of the town of *Newcastle-upon-Tyne*."

§ 10. "Provided always, That nothing in this act shall extend or be construed to extend to the cities of *London* and *Westminster*, or the borough of *Southwark*, or the city or county of the city of *Bristol*, or the city or county of the city of *Chester*, or to the criminal jurisdiction of the city of *Exeter* and county of the same city, unless in cases of indictment removed into his majesty's court of king's bench by writ of *certiorari*, from any court of criminal jurisdiction within the said city or county of the said city of *Exeter*."

§ 11. "Provided also, that nothing in this act shall extend or be construed to extend to take away any other rights or privileges which have been anciently granted to such corporations by royal charters or grants, and which have been immemorially held and enjoyed by such corporations; but that they shall continue in the full possession of all their other exclusive rights and privileges as much as if this act of parliament had never passed, and that they shall not be obliged to attend as jurymen upon the trial of any cause or any indictment which may be removed from the limited jurisdiction to the county at large, nor upon the trial of any other cause or any other indictment which may be tried before his majesty's justices of assize, oyer and terminer and general gaol delivery, in the next adjoining county."

§ 12. "Provided always, and be it further enacted, that nothing in this act contained shall extend or be construed to extend to enable any person to prefer any bill of indictment for any offence committed or charged to be committed within the county of any city or town corporate, to the jury of such next adjoining county aforesaid, or to remove any indictment or other criminal proceeding, except the person preferring such bill, or applying for such removal, shall enter into a recognizance before the court where such bill shall be preferred, or the court or magistrate to whom such application shall be made, as the case may be, in the sum of forty pounds, conditioned to pay the extra costs attending the prosecution of such offences in such next adjoining county, provided the court before whom the trial is had shall be of opinion that he ought to pay the same."

Prisoners were tried at the assizes for the county of *Nottingham*, and the indictment charged the offence, viz., the putting off of a urged note, to have been committed in the county of *Nottingham*; but it appeared in evidence to have been committed in the town of *Nottingham*, which is a town corporate, separated from the county at large, having an exclusive jurisdiction, and separate commissioners of oyer and terminer and gaol delivery: after conviction, the point being reserved, the judges held, that although under 38 G. 3. c. 52. the offence might be tried in the county at large, yet the offence should have been laid in the county of the town. *R. v. Mellor and another, C. C. R. 144.*

Where, for a murder committed in the town and county of *Southampton*, an indictment was preferred before the grand jury of the county of *Hants*, under 38 G. 3. c. 52. § 2., after conviction, on case reserved, the question was, whether it was necessary that the indictment should allege that the county of *Hants* was the next adjoining county to the town and county of *Southampton*. The judges held the conviction right, for that such an averment on the face of the indictment was not required; but that it might appear in the memorandum or caption of the record, [citing *Rex v. Athos*, 1 Str. 553. 8 Mod. 135. S. C.] *Rex v. Goff, C. C. R. 179.*

By 51 G. 3. c. 100., reciting § 2. and 3. of 38 G. 3. c. 52., and that no power was given in cases of conviction, in pursuance of any of the provisions in the said recited act, of ordering the execution of the sentence in the county of the city or town corporate within which the offence had been committed, and was charged to have been committed: and whereas it may be fit and expedient, that in such cases the punishment should be inflicted, and the sentences put in execution, in the respective counties of the cities or towns corporate where such offences had been so committed; "it is enacted, "that from and after the passing of this act it shall and may be lawful for the court before which any conviction shall have taken place in pursuance of the provisions of the said recited act, to order every such convict to be punished according to law, either within the county where such conviction shall have taken place, or within the county of the city or town corporate wherein such offence shall have been committed: and in cases where the court shall order such convict to be punished within the county of such city or town corporate, it shall be lawful for the court,

38 G. 3. c. 52.

Act not to authorise the preferring any bill of indictment for an offence committed within the county of any city or town corporate to the jury of the next adjoining county unless recognizance be entered into to day the extra costs.

Indictment must lay the offence to have been committed in the county of the city or town.

But need not aver that the county where it was preferred was the next adjoining county.

51 G. 3. c. 100.

In cases of conviction under recited act, the sentence may be executed in the county of the city or town corporate.

51 G. 3. c. 100.

after passing sentence upon every such convict, to order him to be delivered into the custody of the sheriff, gaoler, or other proper officer of the county of such city or town corporate; and the sheriff, gaoler, or other proper officer of the county of such city or town corporate is commanded to receive into his custody every such convict, and to execute the sentence so passed upon him in such adjoining county, as if he had been tried and had received such sentence in the county of such city or town corporate."

§ 2. "And whereas it is provided by the said in part recited act (§ 8.), that in all cases of indictments and other proceedings which may be tried before H.M.'s justices of oyer and terminer or general gaol delivery, for any county, in pursuance of the provisions contained in the said act, it should and might be lawful for such justices to order the expenses of the prosecution, and of the witnesses, and of the several rewards payable in pursuance of the statutes in such cases made and provided on the conviction of offenders, to be paid by and to the same persons and in the same manner as the same would have been payable if such indictment had been tried in the court of oyer and terminer or general gaol delivery of the county of such city or town corporate; and whereas it is just and expedient that a similar provision should be made for the payment of all other expenses which may be incurred by any such adjoining county in relation to any person who may be tried or removed for trial to such adjoining county, for any offence committed or charged to have been committed in the county of any such city or town corporate; the justices of oyer and terminer or general gaol delivery, at any sessions there holden for such county, shall order all expenses whatsoever incurred by such county in relation to any person who shall be tried in such county, or removed thither for trial, for any offence committed or charged to have been committed within the county of any such city or town corporate, as well in maintaining and supporting such person and carrying the sentence into execution, as in any other respect, to be repaid to the treasurer of such county or other person acting as treasurer of such county, or who shall be actually paid such expenses, by the same person and in the same manner as the same would have been payable if such offender or supposed offender had remained in the county of such city or town corporate, and had been tried in the court of oyer and terminer or general gaol delivery of the county of such city or town corporate; and as if the sentence with respect to such offender had been tried into execution within the county of such city or town corporate."

Providing for payment of expenses not before provided for by the county of a city or town corporate.

60 G. 3. & 1 G. 4. c. 14. Power to justices, acting in any place not being a county, to commit offenders to the gaol of the county.

Stat. 60 G. 3. & 1 G. 4. c. 14., after reciting that "whereas the trial of capital offences before justices of peace, within local or exclusive jurisdictions not being counties, may be attended with inconvenience, and it is desirable that some remedy should be provided for the same," enacts, "that the justices of the peace acting within and for any town, liberty, soke, or place, not being a county, but having an exclusive jurisdiction for the trial of felonies and misdemeanors committed within the same, shall and after the passing of this act (28th Feb. 1820) have full power within their respective limits, at their discretion, to commit any person duly charged before them, or any of them, with any capital

ffence committed within such limits, to the gaol of the county within which such town, liberty, soke, or place shall be situated, then to be tried at the next session of oyer and terminer or general gaol delivery, to be held in and for such county, in the same manner as if such offence had been committed within any other part of the same county, and as if such person had been committed by any other justice of the same county, not being within such limits."

§ 2. "In all cases where any justice or justices of the peace, under the authority of this act, shall commit any person to the county gaol, it shall be lawful for such justice or justices, and he and they is and are hereby authorised and required also to bind over all necessary parties and witnesses by recognizance, to prosecute and give evidence against such offenders at the next sessions of oyer and terminer and general gaol delivery, and to transmit such recognizance, and all depositions taken before him or them relating to the charge, to the clerk of the crown, clerk of the peace, and other proper officer, to be filed in the court of oyer and terminer and general gaol delivery for such county, to the intent that the same may be used or put in force by the judge or judges of the said court, as he or they shall deem proper, according to law."

§ 3. "In all cases of any commitments to the county gaol under the authority of this act, all the expenses to which the county may be put by reason of such commitment, together with all such expenses of the prosecution and witnesses as the judge shall be pleased to allow by virtue of any law now in force, shall be borne and paid by the said town, liberty, soke, or place within which such offence shall have been committed, in like manner and to be paid by the same means whereby such expenses would have been incurred and paid if the offender had been prosecuted and tried within the limits of such exclusive jurisdiction; and the judge or court of oyer and terminer and general gaol delivery shall have full power and authority to make such order touching such costs and expenses as such judge or court shall deem proper; and also direct by whom and in what manner such expenses shall in the first instance be paid and borne, and in what manner the same shall be repaid and raised within the limits of such exclusive jurisdiction, in case there be no treasurer or other officer within the same, who, by the custom and usage of such place, ought to pay the same in the first instance."

See 1 & 2 G. 4. c. 63. *ante*, § 1. of this tit.

By 4 & 5 W. 4. c. 27., reciting that, "whereas the justices of the peace acting in and for certain boroughs and franchises in that part of the United Kingdom called *England*, not being empowered by charter or otherwise to hear and determine felonies at the general sessions of the peace held in and for such boroughs and franchises, are by law required to send for trial at the general sessions for the county wherein such borough or franchise may be situated, every person charged with felony, whereby the administration of justice is injuriously delayed, and the expenses to which the county in such cases is liable are grievously increased;" it is enacted, "that from and after the passing of this act, the justices of the peace, and any such justice acting in and for any borough or franchise in that part of the United Kingdom called *England*, not

60 G. 3. &
1 G. 4. c. 14.

Justices authorised to bind over witnesses by recognizance, to give evidence at the sessions of oyer and terminer; and transmit depositions taken before them to the clerk of the crown, &c.

Expenses of the prosecution to be paid by the town or place within which the offence shall be committed.

4 & 5 W. 4.
c. 27.

Justices of the peace acting for boroughs may commit persons for felonies

4 & 5 W. 4.
c. 27.

trial at sessions.

Justices in boroughs, &c. having jurisdiction at sessions over certain felonies, may commit to the gaol of the county any person charged with a felony, the trial of which may legally take place at the quarter sessions, but to which the jurisdiction of the borough justices does not extend.

In places having a recorder and a fit prison the magistrates shall commit thereto for offences triable at the sessions, and shall be authorised to try the same at their quarter sessions, which quarter sessions they are required to hold.

being empowered by charter or otherwise to hear and determine felonies, shall and may commit every person charged with any such felony as the court of quarter sessions may have jurisdiction to try, to be tried at the general quarter sessions of the peace for the county, riding, or division wherein such borough or franchise shall be situate, or at any adjournment thereof; and the justices of the peace acting in and for such county, riding, or division are hereby empowered to try persons so committed at the general quarter sessions of the peace held for such county, riding, or division, or at any adjournment thereof."

§ 2. "And whereas the justices of the peace acting in and for certain boroughs and franchises in that part of the said United Kingdom called *England* have jurisdiction, at the general sessions of the peace held in and for such borough or franchise, to hear and determine divers felonies, and it is expedient that any such justice or justices should have power in certain cases to commit for trial at the general quarter sessions of the peace for the county, riding, division, or shire in which such borough or franchise may be situate, any person charged with felony which the said justices are not authorised or empowered to hear and determine at the general sessions of the peace held in and for such borough or franchise; be it therefore enacted, that from and after the passing of this act it shall and may be lawful to and for a justice or for justices of the peace acting in any of the said last-mentioned boroughs or franchises to commit to the gaol of the county, riding, division, or shire in which such borough or franchise may be situate, to be tried at the general quarter sessions of the peace in and for such county, riding, division, or shire, any person charged with a felony which the said court of quarter sessions may have jurisdiction to try, and to the trial of which the jurisdiction of the justices of such borough or franchise at the general sessions of the peace in and for such borough or franchise does not extend; and the justices of the peace acting in and for such last-mentioned county, riding, division, or shire are hereby authorised and empowered to try any such person so committed as last aforesaid at the general quarter sessions of the peace held in and for such county, riding, division, or shire."

§ 3. "In all such towns or franchises which have a recorder and a prison fit for the confinement of prisoners, the magistrates at such town or franchise shall commit to the prison of such town all persons charged with having committed within such town or franchise any felony or misdemeanor which might, if the same had been committed out of such town or franchise, and within the body of any county, have been tried by the justices of quarter sessions of such county; and the court of quarter sessions at such town or franchise shall have the same authority to inquire of, hear, determine, and punish any persons charged with such felonies or misdemeanors as the courts of quarter sessions of counties have. which quarter sessions the justices for such town or franchise are hereby required to hold."

VII. Of the Central Criminal Court.

Central criminal court.

An important act has been framed by the legislature, for establishing a new court for the trial of offences committed in the

metropolis and parts adjoining. By this act the jurisdictions of the magistrates, not only in the county of *Middlesex*, but also in the counties of *Essex*, *Kent*, and *Surrey*, are limited and regulated in many important particulars.

By 4 & 5 W. 4. c. 36., reciting that "whereas it is expedient, for the more effective and uniform administration of justice in criminal cases, that offences committed in the metropolis and certain parts adjoining thereto should be tried by justices and judges of oyer and terminer and gaol delivery in the city of *London*;" it is enacted, "that the lord mayor for the time being of the city of *London*, the lord chancellor or lord keeper of the great seal, and all the judges for the time being of his majesty's courts of king's bench, common pleas, and exchequer, the chief judge and the two other judges in bankruptcy, the judge of the admiralty, the dean of the arches, the aldermen of the city of *London*, the recorder, the common serjeant, the judges of the sheriffs' court of the city of *London* for the time being, and any person or persons who hath or shall have been lord chancellor, lord keeper, or a judge of any of his majesty's superior courts of *Westminster*, together with such others as his majesty, his heirs and successors, shall from time to time name and appoint by any general commission as herein-after stated, shall be and be taken to be the judges of a court to be called the 'Central Criminal Court,' to which his majesty, and his heirs and successors, may direct his general commission as herein-after mentioned; and which court shall have jurisdiction to hear, try, and determine all offences committed or alleged to be committed as herein-after specified."

§ 2. "It shall be lawful for his majesty, his heirs and successors, from time to time to command and cause to be issued commissions of oyer and terminer to inquire of, hear, and determine all treasons, murders, felonies, and misdemeanors committed within the city of *London* and county of *Middlesex*, and those parts of the counties of *Essex*, *Kent*, and *Surrey* within the parishes of *arking*, *East Ham*, *West Ham*, *Little Ilford*, *Low Layton*, *Valhamsdown*, *Wanstead St. Mary*, *Woodford*, and *Chingford*, in the county of *Essex*; *Charlton*, *Lee*, *Lewisham*, *Greenwich*, *Woolwich*, *Eltham*, *Plumstead*, *St. Nicholas Deptford*, that part of *St. Paul Deptford* which is within the said county of *Kent*, the perty of *Kidbrook*, and the hamlet of *Mottingham*, in the county of *Kent*; and the borough of *Southwark*, the parishes of *Battersea*, *Mermondsea*, *Camberwell*, *Christchurch*, *Clapham*, *Lambeth*, *St. Mary Newington*, *Rotherhithe*, *Streatham*, *Barnes*, *Putney*, that part of *St. Paul Deptford* which is within the said county of *Surrey*, *Tooting Graveney*, *Wandsworth*, *Merton*, *Mortlake*, *Kew*, *Richmond*, *Wimbledon*, the *Clink Liberty*, and the district of *Lambeth Palace*, in the county of *Surrey*; and also commissions of gaol delivery to deliver his majesty's gaol of *Newgate* of the prisoners therein charged with any of the offences aforesaid, committed within the limits aforesaid; and it shall be lawful for the justices and judges of the central criminal court aforesaid, or any two or more of them, to inquire of, hear, determine, and judge all such treasons, murders, felonies, and misdemeanors, and all treasons, murders, felonies, and misdemeanors which might be inquired of, heard, and determined under any commission of

4 & 5 W. 4
c. 36.

The lord mayor of *London*, the lord chancellor, the judges, the aldermen, recorder, and common serjeant of *London*, and such others as his majesty may appoint, to be judges of a court to be called the "Central Criminal Court."

His majesty may issue a commission of oyer and terminer and gaol delivery for *London* and *Middlesex*, and certain parts of *Essex*, *Kent*, and *Surrey*.

4 & 5 W. 4.
c. 36.

oyer and terminer for the city of *London* or county of *Middlesex*, or commission of gaol delivery to deliver the gaol of *Newgate*, or which, in case the parts of the counties of *Essex*, *Kent*, and *Surrey* respectively comprised within the limits aforesaid had been counties of themselves, might have been inquired of, heard, and determined under commissions of oyer and terminer and gaol delivery for such counties, and to deliver the said gaol of *Newgate* at such times and places in the said city or the suburbs thereof as by the said commissions shall be appointed, or as the said justices and judges by virtue and in pursuance thereof, or any two or more of them, shall appoint, and to award and issue all precepts and process, and use and exercise all powers and authorities belonging to justices of oyer and terminer and gaol delivery: Provided always, that such court shall have power and jurisdiction to proceed on every such commission so issued as aforesaid, and act under such commission, until a new commission shall be issued."

New district to be considered as one county, and venue to be "Central Criminal Court to wit," &c.

§ 3. "The district situated within the limits of the jurisdiction herein-before established shall be deemed and taken to be, in all cases tried before the said justices and judges, one county for all purposes of venue, local description, trial, judgment, and execution, not herein specially provided for; and in all indictments and presentments preferred and tried before the said justices and judges the venue laid in the margin shall be as follows, 'Central Criminal Court to wit;' and all offences which in other indictments would be laid to have been committed in the county where the trial is had, and all material facts which would be in other indictments averred to have taken place in the county where the trial is had, shall, in indictments prepared and tried in the said court, be laid to have been committed and averred to have taken place 'within the jurisdiction of the said court.'"

Power to summon juries from London or from the counties, or from both indiscriminately, to try all offences cognizable by the act.

§ 4. "The sheriffs of the city of *London*, and of the counties of *Middlesex*, *Essex*, *Kent*, and *Surrey* respectively, shall execute and obey all precepts and process which the said justices and judges shall award, issue, and direct unto them respectively, and shall, whenever required and commanded, summon and return from the said city of *London* and county of *Middlesex*, and from the parts of the said counties of *Essex*, *Kent*, and *Surrey* within the limits of this act, a competent number of persons qualified according to law to inquire of, present, and try all offences and other matters cognizable by the said justices and judges; and the persons so returned, whether taken wholly from the city of *London* or the said counties, or taken indiscriminately from the said city and the said counties, shall have authority to inquire of, present, hear, try, and determine all such offences and other matters, and all issues and all matters of fact arising out of such trials or relating thereto, notwithstanding that such persons are not inhabitants of the city, county, or place where such offences or other matters may be committed or arise; and any person having served upon any grand jury or petty jury summoned and returned from the said counties of *Essex*, *Kent*, and *Surrey*, under the authority of this act, shall henceforth be exempt for and during twelve calendar months next after such service from serving upon any jury in any court (except the sessions of the peace) to be holden for the county in which such juror shall reside."

As to jurors residing within the limits of the act in *Essex*, *Kent*, and *Surrey*.

§ 5. "And whereas, for the more convenient distribution of prisoners, as well before trial as after, and also for rendering more effectual the punishment of imprisonment, it may be expedient that power should be given to appoint from time to time in what places of confinement within the limits of this act such prisoners shall be kept in custody; be it therefore further enacted, that it shall be lawful for his majesty, by and with the advice of his privy council, from time to time to order and direct in what gaol, house of correction, or other prison, being within the limits of this act, any person or persons charged with or convicted of offences committed or alleged to have been committed within the limits of this act shall be imprisoned or kept in custody; and that when and so often as his majesty, by and with the advice of his privy council, shall be pleased to give such orders and directions, the said justices and judges of oyer and terminer and gaol delivery, and all justices of the peace, coroners, and other magistrates acting within the limits of this act, shall commit all persons charged or convicted before them to such gaol, house of correction, or other prison as in such orders or directions shall be expressed and commanded, any law, usage, or custom to the contrary notwithstanding: Provided nevertheless, and it is hereby declared, that the city, county, or place in which the offence of such person or persons was committed or alleged to have been committed shall be liable to and charged with the expense of supporting and maintaining such prisoner during his imprisonment in such gaol, house of correction, or other prison, at and after such rate as his majesty, by and with the advice of his privy council, shall order and direct, and shall be paid by the treasurer of the said city, county, or place in which such offence was committed or alleged to have been committed: Provided nevertheless, that the county of *Middlesex* and city of *Westminster* and liberty of the *Tower of London* shall not be liable to any charge for the support and maintenance of any prisoner charged with any offence in the said county, city, or liberty, who shall be committed to his majesty's gaol of *Newgate*."

§ 6. "The general penitentiary at *Milbank* shall be considered one of the prisons in which his majesty by virtue of this act may, with the advice of his privy council, direct any persons charged or convicted of offences within the limits of this act to be imprisoned and kept in custody."

§ 7. "It shall be lawful for his majesty, by an order in writing to be notified in writing by one of his majesty's principal secretaries of state, to direct that persons who may be sentenced to imprisonment by any court or competent authority for any offence committed beyond the limits of this act, and who, having been examined by an experienced surgeon or apothecary, shall appear to be free from any putrid or infectious distemper, and fit to be removed, shall be removed to the penitentiary at *Milbank*, there to be imprisoned for and during their respective terms of imprisonment."

§ 8. "All provisions and regulations expressed and contained in all acts made for the government of the general penitentiary at *Milbank*, and all powers given by such acts for the confinement, employment, and management of convicts removed thereto in

4 & 5 W. 4.
c. 36.

His majesty, by order in council, to appoint the places of confinement for prisoners.

Expenses to be borne by the county, &c. in which offence was committed.

Penitentiary at *Milbank* to be one of the prisons under this act.

Persons sentenced to imprisonment beyond the limits of this act may be removed to the penitentiary at *Milbank*.

Regulations in all penitentiary acts shall apply to prisoners

4 & 5 W. 4.
c. 36.

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New district to be considered as one county, and venue to be "Central Criminal Court to wit," &c.

§ 3. "The district situated within the limits of the jurisdiction herein-before established shall be deemed and taken to be, in all cases tried before the said justices and judges, one county for all purposes of venue, local description, trial, judgment, and execution, not herein specially provided for; and in all indictments and presentments preferred and tried before the said justices and judges the venue laid in the margin shall be as follows, 'Central Criminal Court to wit;' and all offences which in other indictments would be laid to have been committed in the county where the trial is had, and all material facts which would be in other indictments averred to have taken place in the county where the trial is had, shall, in indictments prepared and tried in the said court, be laid to have been committed and averred to have taken place 'within the jurisdiction of the said court.'"

Power to summon juries from London or from the counties, or from both indiscriminately, to try all offences cognizable by the act.

§ 4. "The sheriffs of the city of *London*, and of the counties of *Middlesex*, *Essex*, *Kent*, and *Surrey* respectively, shall execute and obey all precepts and process which the said justices and judges shall award, issue, and direct unto them respectively, and shall, whenever required and commanded, summon and return from the said city of *London* and county of *Middlesex*, and from the parts of the said counties of *Essex*, *Kent*, and *Surrey* within the limits of this act, a competent number of persons qualified according to law to inquire of, present, and try all offences and other matters cognizable by the said justices and judges; and the persons so returned, whether taken wholly from the city of *London* or the said counties, or taken indiscriminately from the said city and the said counties, shall have authority to inquire of, present, hear, try, and determine all such offences and other matters, and all issues and all matters of fact arising out of such trials or references thereto, notwithstanding that such persons are not inhabitants of the city, county, or place where such offences or other matters may be committed or arise; and any person having served upon any grand jury or petty jury summoned and returned from the said counties of *Essex*, *Kent*, and *Surrey*, under the authority of this act, shall henceforth be exempt for and during twelve calendar months next after such service from serving upon any jury in any court (except the sessions of the peace) to be holden for the county in which such juror shall reside."

As to jurors residing within the limits of the act in *Essex*, *Kent*, and *Surrey*.

§ 5. "And whereas, for the more convenient distribution of prisoners, as well before trial as after, and also for rendering more effectual the punishment of imprisonment, it may be expedient that power should be given to appoint from time to time in what places of confinement within the limits of this act such prisoners shall be kept in custody; be it therefore further enacted, at it shall be lawful for his majesty, by and with the advice of his privy council, from time to time to order and direct in what gaol, house of correction, or other prison, being within the limits of this act, any person or persons charged with or convicted of offences committed or alleged to have been committed within the limits of this act shall be imprisoned or kept in custody; and at when and so often as his majesty, by and with the advice of his privy council, shall be pleased to give such orders and directions, the said justices and judges of oyer and terminer and gaol delivery, and all justices of the peace, coroners, and other magistrates acting within the limits of this act, shall commit all persons charged or convicted before them to such gaol, house of correction, or other prison as in such orders or directions shall be expressed and commanded, any law, usage, or custom to the contrary notwithstanding: Provided nevertheless, and it is hereby declared, at the city, county, or place in which the offence of such person or persons was committed or alleged to have been committed shall be liable to and charged with the expense of supporting and maintaining such prisoner during his imprisonment in such gaol, house of correction, or other prison, at and after such rate as his majesty, by and with the advice of his privy council, shall order and direct, and shall be paid by the treasurer of the said city, county, or place in which such offence was committed or alleged to have been committed: Provided nevertheless, that the county of *Middlesex* and city of *Westminster* and liberty of the *Tower of London* shall not be liable to any charge for the support and maintenance of any prisoner charged with any offence in the said county, city, or liberty, who shall be committed to his majesty's gaol of *Newgate*."

§ 6. "The general penitentiary at *Milbank* shall be considered one of the prisons in which his majesty by virtue of this act may, with the advice of his privy council, direct any persons charged or convicted of offences within the limits of this act to be imprisoned and kept in custody."

§ 7. "It shall be lawful for his majesty, by an order in writing to be notified in writing by one of his majesty's principal secretaries of state, to direct that persons who may be sentenced to imprisonment by any court or competent authority for any offence committed beyond the limits of this act, and who, having been examined by an experienced surgeon or apothecary, shall appear to be free from any putrid or infectious distemper, and fit to be moved, shall be removed to the penitentiary at *Milbank*, there to be imprisoned for and during their respective terms of imprisonment."

§ 8. "All provisions and regulations expressed and contained in all acts made for the government of the general penitentiary at *Milbank*, and all powers given by such acts for the confinement, employment, and management of convicts removed thereto in

4 & 5 W. 4.
c. 36.

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4 & 5 W. 4.
c. 36.

confined there
by the author-
ity of this act.

Commitments,
to what prison
by the justices
and judges of
oyer and term-
iner, &c.

Sheriffs of
London may
execute judg-
ments.

Justices and
coroners in
Essex and
Kent to com-
mit offenders
to Newgate,
and justices and
coroners in
Surrey to com-
mit offenders to
Horsemonger
lane, and cer-
tify examina-
tions to the
court.

Justices and
coroners to
specify that
persons are
committed
under this act,
and to take
examinations,
&c. as required
under 7 G. 4.
c. 64.

pursuance of such acts, shall be applicable and made available in respect of all persons who may be removed or sent to such penitentiary in pursuance of any order in council made by the authority of this act, as fully, to all intents and purposes, as if the said regulations, provisions, and powers were expressed and given by this act."

§ 9. "It shall be lawful to and for the said justices and judges of oyer and terminer and of gaol delivery, or any two or more of them, to commit any person or persons who shall be brought before them charged with any offence cognizable by such justices and judges under and by virtue of this act, or who shall be convicted or attainted before them, to such gaol, house of correction, or other prison as may be specified in any order of council to be made by virtue of this act, or if no such order shall have been made, then to the common gaol, house of correction, or other prison of the city, county, or place to which such offender might have been committed if this act had not passed, or to his majesty's gaol of *Newgate*, there to remain until discharged by due course of law, or in execution of his or their respective judgments; and in case of such commitment to the said gaol of *Newgate*, execution of such judgments shall and may be had and done upon such person or persons by the sheriffs of the said city of *London* in the same way and as fully to all intents and purposes as if the offence of which such person or persons was or were convicted had been committed in the said city of *London*."

§ 10. "Until his majesty shall be pleased, by and with the advice of his privy council, to order and direct in what gaol, house of correction, or other prison, persons charged with or convicted of offences committed or alleged to have been committed within the limits of this act shall be imprisoned or kept in custody, it shall be lawful for any justice of the peace or coroner acting in and for the said counties of *Essex* or *Kent*, so far as relates to the said seven parishes lying within their respective counties, to commit any person or persons charged with any of the offences aforesaid cognizable by the said justices and judges of oyer and terminer and gaol delivery by virtue of this act to his majesty's gaol of *Newgate*; and also for any justice of the peace or coroner acting in and for the said county of *Surrey*, so far as relates to the several parishes above mentioned lying within the said county of *Surrey*, to commit any person charged with any of the offences aforesaid cognizable by the justices and judges of oyer and terminer and gaol delivery by virtue of this act to his majesty's gaol of *Horsemonger Lane* or *Newington* in and for the county of *Surrey*."

§ 11. "Every justice or coroner acting within the limits of this act shall specify in the commitment that the person or persons charged are committed under the authority of this act; and such justice or coroner shall in all such cases take the like examinations, informations, bailments, and recognizances, and certify the same to the said justices of oyer and terminer and gaol delivery, as they are required by an act passed in the seventh year of the reign of his late majesty king *George* the fourth, intituled *An act for improving the administration of criminal justice in England*; and any justice of the peace or coroner, in default of so doing, shall be liable to the same fines and penalties, to be imposed by the

said justices and judges of oyer and terminer and gaol delivery in the same manner as is mentioned in the said act; and when any person or persons shall be committed to his majesty's gaol for the county of *Surrey* for any offence cognizable by the said justices and judges of oyer and terminer and gaol delivery by virtue of this act, by a commitment specifying that such person or persons is or are committed under the authority of this act, the sheriff of the said county of *Surrey*, or the keeper of the gaol for the said county, shall, six days at least before the sitting of the next court of oyer and terminer and gaol delivery appointed under the authority of this act, or at such other time as the said justices and judges of oyer and terminer and gaol delivery, or any two or more of them, shall from time to time direct, cause such person and persons, with their commitments and detainers, to be safely removed from the gaol of the said county of *Surrey*, without his issuing of any writ of *habeas corpus*, or other writ, to the said gaol of *Newgate*, there to remain until delivered by due course of law."

§ 12. "It shall be lawful for any two of the said justices and judges of oyer and terminer and of gaol delivery to order and direct the costs and expenses of prosecutors and witnesses, in all cases where prosecutors and witnesses may be by law entitled hereto, to be paid by the treasurer of the county in which the offence of any person prosecuted would have been tried but for this act; and every such treasurer or some known agent shall attend the said justices and judges of oyer and terminer and gaol delivery during the sitting of the court, to pay all such orders."

§ 13. "No bill of indictment for any misdemeanor (other than perjury or subornation of perjury) which can or may be presented to the grand jury at any sessions of the peace for the said city of *Westminster* and borough of *Southwark*, and counties of *Middlesex*, *Essex*, *Kent*, and *Surrey*, respectively, in which such misdemeanor was committed or alleged to have been committed, shall be presented to the grand jury to be summoned under the authority of this act, unless the prosecutor or other person presenting such indictment shall have been bound by recognizance to prosecute or give evidence at the sessions to be held under the authority of this act against the person or persons accused of such misdemeanor, or unless such person or persons accused shall have been committed to or detained in custody, or shall be bound by recognizance to appear at the said sessions to be held under the authority of this act."

§ 14. "It shall be lawful for the court of the lord mayor and aldermen of the city of *London*, having the government and ordering of the said gaol of *Newgate*, to enter into agreement with the justices of the peace for the said counties of *Essex*, *Kent*, and *Surrey*, for the support and maintenance in the said gaol of *Newgate* of any prisoner or prisoners so committed or removed thereto under the authority of this act; and the sum to be paid for the support and maintenance of such prisoner or prisoners in the said gaol of *Newgate*, and for their removal therefrom, shall be after such rate and in such manner as shall be settled and agreed by and between a committee of the said aldermen to be appointed from time to time by the said court of aldermen and a joint or

4 & 5 W. 4.
c. 36.

Power to remove prisoners from county gaol of *Surrey* to *Newgate*.

Power to order payment of expenses to prosecutors and witnesses.

Treasurer of county, or his agent, to attend the court, to pay orders.

No bill of indictment to be presented to the grand jury unless the prosecutor has been bound by recognizance.

Court of the lord mayor and aldermen of *London* may contract with the justices of *Essex*, *Kent*, and *Surrey*, for the support of their prisoners in *Newgate*.

4 & 5 W. 4.
c. 36.

Notice to be given to parties entering into recognizances of change of court.

Justices of peace may deliver over indictments found at sessions to the justices of oyer and terminer and gaol delivery.

Justices to settle officers' fees, or a salary, and direct how the same shall be paid.

cases of removal from the jurisdiction of justices of the peace for the said cities of *London* or *Westminster*, the liberty of the *Tower of London*, the borough of *Southwark*, or counties of *Middlesex* and *Surrey*, two days' notice, and in case of removal from the jurisdiction of the justices of the peace for the counties of *Essex* and *Kent*, one week's notice, shall have been give either personally or by leaving the same at the place of residence as of which the parties bound by such recognizance are therein described, to appear before the court of oyer and terminer and gaol delivery instead of the said other justices: Provided also, that it shall be lawful for the court, judge, or recorder who shall grant such writ of *certiorari* or *habeas corpus*, and it is hereby required, that such court, judge, or recorder shall cause the party applying for such writ or writs, whether he be the prosecutor or party charged with such offence, to enter into a recognizance in such sum, and with or without sureties, as the court, judge, or recorder may direct, conditioned to give such notice as aforesaid to the parties bound by such recognizance to appear before the said court of oyer and terminer and gaol delivery instead of before the said other justices respectively, and to do such other things as such court, judge, or recorder shall direct."

§ 19. "It shall be lawful for the said justices of the peace acting in and for the said cities of *London* and *Westminster*, the liberty of the *Tower of London*, the borough of *Southwark*, and for the said counties of *Middlesex*, *Essex*, *Kent*, and *Surrey*, if they shall think fit, to certify, transmit, and deliver to the said justices and judges of oyer and terminer and gaol delivery, any indictment or presentment found or taken before them at their said respective general or quarter sessions of the peace, or at any adjournment thereof, for any offence or offences cognizable by the said justices and judges of oyer and terminer and gaol delivery by virtue of this act, in the same manner to all intents and purposes as the said justices of the peace might or could do if the said court of oyer and terminer and gaol delivery was holden in the county where such indictments or presentments were found or taken."

§ 20. "It shall be lawful for the said justices and judges of oyer and terminer and gaol delivery, in sessions assembled, and they are hereby authorised and required to ascertain, make, and settle a table of fees and allowances to be received and taken by the several officers of the said court, and from time to time to alter and vary the same as may to them appear just and reasonable, which said table of fees and allowances shall be hung up in the court of sessions, and a copy thereof transmitted to the clerks of the peace of the said counties of *Middlesex*, *Essex*, *Kent*, and *Surrey*; or it shall be lawful for the said justices and judges to ascertain, make, and settle a salary in lieu of such fees and allowances, to be paid to the said officers or either of them for the performance of their respective duties, as to the said justices and judges of oyer and terminer and gaol delivery shall seem reasonable and just, and to order and direct how and in what manner, and by whom such fees and allowances or salary shall be paid, and also to order and direct such portion as they shall think fit of the expense of preparing calendars and sessions papers, and of other expenses incident to this act, to be borne and paid by the treasurer of each of the said counties, and such portion shall be

said by such treasurers accordingly: Provided nevertheless, that the county of *Middlesex* shall not be liable to any portion of the expense of preparing calendars or sessions' papers, or of any other expenses incident to this act, to which the said county would not have been liable in case this act had not been passed."

§ 21. "Provided nevertheless, and be it further enacted, that nothing herein contained shall hinder or prevent, or shall be construed to hinder or prevent, the justices of the peace for the said cities of *London* and *Westminster*, the liberty of the *Tower of London*, the borough of *Southwark*, and the said counties of *Middlesex*, *Essex*, *Kent*, and *Surrey*, from holding their respective general or quarter sessions of the peace in their respective jurisdictions during the sitting of the said court of oyer and terminer and gaol delivery to be held in pursuance of this act; and that neither this act, nor the commissions of oyer and terminer and gaol delivery from time to time to be issued under the authority of this act, shall supersede, interfere with, or affect any other commission or commissions of oyer and terminer to be at any time issued by his said majesty, his heirs and successors, in the said counties of *Essex*, *Kent*, and *Surrey*, or the jurisdiction by virtue whereof, nor hinder or prevent the justices of oyer and terminer to be from time to time appointed by any commission to be issued under the authority of this act from holding their respective sessions at one and the same time, it being the true intent and meaning of this act, that the justices to be named and appointed in and by any other commissions of oyer and terminer and gaol delivery to be hereafter issued in the said counties of *Essex*, *Kent*, and *Surrey*, shall have the like power and jurisdiction to inquire, hear, and determine all offences by virtue of such commissions which they would have had if this act had not been made: Provided nevertheless, that they shall not be required or obliged to inquire of, hear, and determine, or to deliver the respective gaols or prisons of the same last-mentioned counties of any person or persons whose offence or offences is, are, can, or may be inquired of, dealt with, tried, and determined under and by virtue of the commissions of oyer and terminer and gaol delivery to be from time to time issued under the authority of this act."

§ 22. "And whereas it is expedient that persons charged with certain offences committed on the high seas and other places within the jurisdiction of the admiralty of *England* should speedily be brought to trial, it shall and may be lawful for the justices and judges of oyer and terminer and gaol delivery to be named in and appointed by the commissions to be issued under the authority of this act, or any two or more of them, to inquire of, hear, and determine any offence or offences committed or alleged to have been committed on the high seas, and other places within the jurisdiction of the admiralty of *England*, and to deliver the gaol of *Newgate* of any person or persons committed or detained therein for any offence or offences alleged to have been done and committed on the high seas aforesaid within the jurisdiction of the admiralty of *England*; and all indictments found and trials and proceedings had and taken by and before the said justices and judges of oyer and terminer and gaol delivery shall be valid and effectual to all intents and purposes whatsoever; and it shall and may be lawful for any three of the said justices and

4 & 5 W. 4.
c. 36.

Sessions of the peace not to be affected by the sessions holden in pursuance of this act.

Nor other commissions of oyer and terminer and gaol delivery.

Authorising court to try offences committed on the high seas.

4 & 5 W. 4.
c. 34.

Saving the
rights and
privileges of
London.

Public act.

judges of oyer and terminer and gaol delivery to order and direct the payment of the costs and expenses of such prosecutions in manner prescribed and directed by the before-recited act of the seventh of *George the Fourth*."

§ 23. "Provided always, that nothing in this act contained shall extend or be construed to extend to prejudice or affect the rights, interests, privileges, franchises, or authorities of the lord mayor, aldermen, and recorder of the city of *London*, or their successors, the sheriffs of the city of *London* and county of *Middlesex*, for the time being, or to prohibit, defeat, alter, or diminish any power, authority, or jurisdiction which at the time of making this act the said lord mayor, aldermen, and recorder for the time being, of the said city, did or might lawfully use or exercise; and that, notwithstanding any practice or custom of the said city of *London* to the contrary, it shall be lawful for the lord mayor's court of the city of *London* to sit on any day on which any session of the peace, oyer and terminer and gaol delivery shall be held within the said city; and that all proceedings of the said lord mayor's court that could or might have been had or taken if such sessions were not held shall and may be had and taken, any practice, custom, or law to the contrary notwithstanding."

§ 26. "This act shall be deemed and taken to be a public act: and shall be judicially taken notice of as such by all judges, justices, and others, without being specially pleaded."

Precept to summon the Sessions.

[Lamb. 381.]

County of } J. P. and K. P., esquires, justices of our sovereign lord
_____, the king, assigned to keep the peace in the county
of _____ aforesaid, and also to hear and determine divers felonies,
trespasses, and other misdemeanors committed in the said county,
and one of us of the quorum; to the sheriff of the same county,
greeting; on the behalf of our said sovereign lord the king, we
command you that you omit not, by reason of any liberty within
your county, but that you enter therein, and that you cause to come
before us, or others, justices assigned to keep the peace in the said
county, and also to hear and determine divers felonies, trespasses,
and other misdemeanors in the said county committed, on _____
the _____ day of _____ now next ensuing, at the hour of ten in the
forenoon of the same day, at _____ in the said county, twenty-four
good and lawful men of the body of the county aforesaid, then and
there to inquire, present, do, and perform all and singular such
things which, on the behalf of our said sovereign lord the king, shall
be enjoined them: also, that you make known to all coroners, keepers
of gaols and houses of correction, high constables, and bailiffs of
liberties within the county aforesaid, that they be then there to do
and fulfil those things which by reason of their offices shall be
to be done: moreover, that you cause to be proclaimed through the said
county, in proper places, the aforesaid sessions of the peace to be held
at the day and place aforesaid; and do you be then there, to do and
execute those things which belong to your office; and have you then
there as well the names of the jurors, coroners, keepers of gaols
and of houses of correction, high constables and bailiffs aforesaid,
as also this precept. Given under our seals, at A. in the county

foresaid, the _____ day of _____, in the _____ year of the reign of _____.

When the sheriff hath received this precept, he must direct several warrants to the several bailiffs of hundreds and liberties, containing in them the substance of the said precept.

The Style of the Sessions.

County of } *THE general quarter sessions of the peace holden*
_____ } *at _____ in and for the said county, on the*
_____ day of _____ in the _____ year of the reign of our
sovereign lord George the fourth, of the united kingdom of Great
Britain and Ireland king, defender of the faith, before J. P. and
J. P. esquires, and others, justices of our said sovereign lord the
king, assigned to keep the peace in the said county, and also to hear
and determine divers felonies, trespasses, and other misdemeanors in
the said county committed, and of the quorum, and so forth.

Condition of a Recognizance to appear and give Evidence at the Sessions, in case where the King is a Party.

THE condition of this recognizance is such, that if the above-bound A. W. shall personally appear at the next general quarter sessions of the peace, to be holden at _____ in and for the county of _____, and then and there give such evidence as he knoweth against _____ for having feloniously taken and carried away _____, the property of _____, and do not depart thence without leave of the said court, then this recognizance to be void.

Subpoena to give Evidence in case where the King is not Party.

*GEORGE the fourth _____ To A. W., B. W., and C. W., of _____, yeomen, greeting. We command you, and every of you, that, all business being laid aside, and all excuses ceasing, you do in your proper persons appear before our justices assigned to keep our peace in the county of _____, and also to hear and determine divers felonies, trespasses, and other misdemeanors in our said county committed, at the sessions of the peace to be holden at _____ and for the said county, on _____ the _____ day of _____, our next ensuing, at the hour of ten in the forenoon of the same day, to testify all and singular those things which you, or any of you, shall know, in a certain appeal now depending between the churchwardens and overseers of the poor of the parish of _____, appellants, and the churchwardens and overseers of the poor of the parish of _____, respondents, touching and concerning the removal of A. P. from the said parish of _____ to the said parish of _____ [or, in case where the king is a party _____ to testify the truth and give evidence on our behalf against A. O. for assaulting C. D.] And his you and every of you are in no wise to omit, under the penalty of 10*l.* for you and every of you. Witness J. P. and K. P. esquires, two of his majesty's justices of the peace for the said county, the _____ day of _____.*

Note; there may be four witnesses put in one subpoena.

A Subpcena Ticket for a Witness.

MR. A. W. *By virtue of a writ of subpcena to you and others directed, and herewith shewn unto you, you are required personally to be and appear at the next general quarter sessions of the peace to be holden at ———, in and for the county of ———, to testify the truth according to your knowledge in a certain appeal now depending between the churchwardens and overseers of the poor of the parish of ———, appellants, and the churchwardens and overseers of the poor of the parish of ———, respondents, concerning the removal of A. P. from the said parish of ——— to the said parish of ———, on the part of the said appellants; and herein you are not to fail, on pain of 10l. Dated ——— day of ——— in the ——— year ———.*

Other matters relating to the very extensive office of a magistrate may be found under their proper heads, in almost every title of this work.

Sessions, Petty and Special.

Statutes authorising petty and special sessions.

BY various statutes justices of the peace are empowered to hold petty and special sessions for especial purposes, *e. g.* by stat. 43 *Eliz. c. 2.* and 54 *G. 3. c. 91.*, to appoint overseers of the poor; stat. 13 *G. 3. c. 78.* and 55 *G. 3. c. 68.*, to appoint surveyors of the high ways; by stat. 37 *G. 3. c. 143. § 4.*, for appointing examiners of weights and balances; 9 *G. 4. c. 61.*, for licensing ale-houses, &c.

Power is now vested in magistrates at sessions to make such arrangements and alterations in the divisions, for the holding of special sessions, &c., as may suit best with general convenience.

9 *G. 4. c. 43.*

By stat. 9 *G. 4. c. 43.*, after reciting, "whereas by divers acts now in force it is enacted, that certain matters and things, in the same respectively mentioned, shall be transacted and determined within the divisions or limits within which the same shall arise, or the parties therein concerned inhabit or exercise their trade or calling, and by or before one, two, or more justices of the peace dwelling within or near to, or usually acting within, such divisions or limits respectively; and whereas the boundaries of such divisions or limits are in some instances uncertain, and in many have become inconvenient to the inhabitants within the same, from the change or increase of trade or population, or from other causes; and whereas doubts have arisen as to the authority by which such divisions or limits may from time to time be constituted, defined, or altered; and it is expedient that such doubts should be removed, and due provision made for the constituting, defining, and regulating from time to time such divisions or limits, as the convenience of the inhabitants within the same may require:" it is enacted, "that at any time or times after the *Michaelmas* quarter sessions next following the passing of this act, it shall be lawful for any two or more justices of the peace for any county, riding, or division in *England or Wales*, having a separate commission of the peace, to

Justices to forward to the clerk of the peace a statement of the

smit to the clerk of the peace a statement in writing, signed such justices, of the parishes, tithings, townships, and places in the same, which in the opinion of such justices would form either a convenient and a proper division within and for which special sessions should thenceforward be held ; or of any parishes, tithings, townships, or places, which in the opinion of such justices ought to be annexed, for the same purposes, to any other division in the said county than those or that of which at the time of making the said statement they form part ; and that every such statement shall, among other things, set forth within what existing divisions, divisions, limits or limit, the several parishes, sittings, townships, places enumerated in the same are situated or deemed to be ; also whether one or more, and what existing divisions or limits shall be altered by such proposed new divisions, or by the change of any place or places from one division to another ; and also the names of such justices of the peace as at the date of such statement are usually resident or acting as such within the boundaries of such proposed new division."

2. "That at the quarter sessions next following the receipt of any such statement, setting forth such particulars as are above enumerated, and not otherwise, the clerk of the peace shall and he is hereby required to lay the same before such justices of the peace at such sessions assembled ; and the justices of the peace for such county, riding, or division, having such separate commission of the peace, shall and they are hereby required (except in the cases herein-after provided for) to proceed, at the quarter sessions next following the laying of such statement before them as aforesaid, to the consideration thereof, and at their discretion to adopt the same wholly or in part, or to reject the same altogether, or to adjourn the determination thereupon to the next or any succeeding quarter sessions."

3. "That immediately after the quarter sessions at which such statement shall have been first laid before the justices of the peace the clerk of the peace shall cause to be published a copy of such statement in three successive numbers of one or more weekly newspapers usually published or circulated within the same county, riding, or division, and in which the advertisements of county business are usually inserted ; and at the foot of such copy shall be caused notice to be given that such statement has been laid before such justices in pursuance of the directions of this act, and that the same will be taken into consideration by the court at the next ensuing quarter sessions."

4. "That when and so often as the justices of the peace of any such county, riding, or division, having a separate commission of the peace, shall adopt wholly or in part any such statement so laid before them, and shall determine to change any parish, tithing, township, or place, from one division to another, or to constitute any new division within which special sessions shall thenceforward be holden, the said justices of the peace shall thereupon make an order for such alteration, or for the constituting and defining such new division, and in such last-mentioned order shall particularly enumerate the several parishes, tithings, townships, and places to be comprised within such new division, and shall also specify the division or divisions within which respectively any parishes, tithings, townships, and places disannexed by such order from any

9 G. 4. c. 43.

townships, places, &c. that would form a proper division for which special sessions should be held.

Statement to be laid before the justices at the next quarter sessions, who are to adopt or reject the same.

Clerk of the peace to advertise statement and other particulars in the newspapers.

If justices approve, an order to be made for constituting a new division, and the clerk of the peace to publish the same.

9 G. 4. c. 43.

No new division to be constituted unless five justices at least shall be proved to be resident therein.

New divisions to be deemed lawful divisions for holding special or petty sessions, or other meetings of justices.

Justices at sessions to cause inquiry into the extent of divisions, and alter the same, and affix names thereto.

former division, and not forming part of such new division, shall thenceforward be taken to be, and also shall affix to such new division the name of some principal and convenient parish, township, or place within the same, and also shall in either of such orders, as the case may be, particularly set down the day from which such order shall take effect; and the clerk of the peace for such county, riding, or division shall forthwith publish a copy of such order in three successive numbers of one or more such weekly newspapers as aforesaid, and shall transmit a copy of such order to every high constable within the limits of such new or altered division or divisions."

§ 5. "That nothing in this act shall be taken to authorise, and that it shall not be lawful for any justices in any court of quarter sessions to make any order constituting such new division, unless upon due proof before them made in open court upon oath, that for two years next before the making of such proof there have been, and at the time of making the same there are, at the least, five justices of the peace residing in or usually acting within the boundary line proposed to be the limits of any such new division."

§ 6. "That from and after the day so specified in such order, for the term of twenty-one years, and until further order of sessions after the expiration of that time, and subject to no alteration or revision during such term, except as herein-after provided, all matters and things which by law are now or hereafter may be required to be, or which now are usually transacted or determined within the division within which the same shall have arisen, or the parties therein concerned inhabit or exercise their trade or calling, and by or before one, two, or more justices of the peace dwelling or usually acting within the same, shall be transacted and determined, so far as the same matters and things arise within or concern the inhabitants of such new or altered division, or any of them, or the persons exercising their trade or calling therein, within the boundaries of such new or altered division; and such new or altered division shall thenceforward be, and be reputed and taken to be, for all purposes and in the construction of all statutes now in force or hereafter to be made, and containing no special provision to the contrary, a lawful division for the holding of special sessions: and all bailiffs, constables, tithingmen, surveyors, overseers of the poor and other officers, publicans, keepers of taverns, coffee-houses, and victualling-houses, and other persons, shall and they are hereby thenceforward required to give their attendance to and upon such justices of the peace at any time assembled in such special sessions within the same division, as fully and effectually as by law they had been bound to do within any division reputed or taken before the passing of this act to be a lawful and accustomed division: and justices for the purposes aforesaid."

§ 7. "That at the quarter sessions next after the laying of any such statement before the justices in such sessions assembled, it shall and may be lawful for such justices, if they shall deem it expedient and proper, not to proceed to the single consideration of such statement, but instead thereof, to cause to be made an inquiry and examination into the boundary lines, extent, and other local circumstances of all the existing and accustomed divisions for the holding of special sessions within the commission of such justices and at such or any succeeding quarter sessions, to which the exclusion of such inquiry and examination may from time to time be

adjourned, by order of sessions to regulate, alter, new-model, and subdivide all or any of such divisions, in such manner as shall appear to them proper and convenient, particularly specifying in such order the names of all such divisions, whether newly constituted, altered, or unaltered, the several parishes, tithings, townships, and places to be comprised in each, and affixing or continuing to each the name of some principal and convenient parish, township, or place within the same." 9 G. 4. c. 43.

§ 8. "That the clerk of the peace for any county, riding, or division in which such order shall have been made as last aforesaid shall forthwith publish a copy of the same in three successive numbers of one or more such weekly newspapers as aforesaid, and shall also forthwith transmit by the post a copy of the same to the churchwardens and overseers of the poor of each parish within the said county, riding, or division, to be by them affixed on the principal door of the church of such parish; and at the foot of every such copy so published or transmitted shall add a notice specifying what time such order will be enrolled as herein-after provided, and at what time and in what manner any person or persons, or body corporate, aggrieved by such order, may petition against the same, or any part thereof, as herein-after provided."

Clerk of the peace to publish a copy of such order.

§ 9. "That in every such order, some time, not earlier than the fourth quarter sessions next after the making thereof, shall be provisionally specified, on which the same shall be enrolled as herein-after provided, subject to such alteration as may thereafter be made either in the particulars of the said order, or in the time of its enrolment; and that at any court of quarter sessions preceding such time, it shall and may be lawful for any one or more person or persons, or body corporate, jointly or severally, to present a petition in writing to such court, against all or any part of such order, and to produce witnesses in support of such petition; and the justices at such court assembled shall and they are hereby required to hear and determine, in a summary way, the merits of such petition, and to amend such order so far as may, upon such hearing, appear proper and convenient: provided always, that no such petition shall be received or examined into, unless after due proof that a notice in writing, specifying the grounds thereof, which upon the hearing shall alone be inquired to, hath been served, ten clear days before the commencement of such sessions, upon one of the overseers of the poor, or the hingman or constable, or two substantial housekeepers of the parish, tithing, township, or place respectively, as the case may be, wherein such petitioner or petitioners shall be resident at the time of presenting such petition, and also lodged, twenty clear days before such commencement, at the office of the clerk of the peace, who shall and he is hereby required forthwith to transmit a copy thereof to each of the justices usually acting within or for the district or places or place named in such notice."

Order to specify time when it shall be enrolled.

Parties allowed to petition against such order.

§ 10. "That so soon as all such petitions against such order shall have been determined, and such amendments made therein as shall have appeared necessary or proper, the justices at such quarter sessions shall cause to be inserted therein some day not earlier than one month after such sessions from which the same shall take effect, and shall cause the same order to be enrolled, and the same shall remain an order of sessions, controlling any

Order to be enrolled as soon as petitions against the same have been determined, and shall not be subject to alteration for ten years.

9 G. 4. c. 43.

order or orders of sessions heretofore made for the separate constitution of any new divisions, or the partial alteration of any accustomed divisions, under the former provisions of this act, and not subject itself to revocation or alteration of any kind for the space of ten years thence next ensuing; and during such ten years no such statement shall be received or proceedings had thereon as above mentioned, but during all that time, and until further order of sessions after the expiration of that time, the several divisions, as limited, modelled, or constituted in and by such order, shall be and be taken to be, for all the purposes in this act mentioned, the lawful divisions of such county, riding, or division having such separate commission of the peace, for the meetings of justices in special sessions, under any statute now in force, hereafter to be made, and containing no special provision to the contrary; and all bailiffs, constables, tithingmen, surveyors, overseers of the poor, and other officers, publicans, keepers of taverns, coffee-houses, and victualling-houses, and other persons, shall as they are hereby required thenceforward, during the time as above limited, to give their attendance to and upon the justices of the peace at any time assembled in such special sessions, within the same divisions respectively, as fully and effectually as by law they have been bound to do within any division reputed and taken before the passing of this act to be a lawful and accustomed session for the meetings of justices for any of the purposes aforesaid.

Clerk of peace
to publish copy
of enrolment.

§ 11. "That immediately after the enrolment of such order the clerk of the peace shall and he is hereby required to cause to be published a copy of the same in three successive numbers of one or more such weekly newspapers as aforesaid, and shall and transmit one copy thereof to each justice of the peace dwelling within or usually acting within and for such county, riding, or division, having such separate commission of the peace."

Proceedings
not to be
quashed for
want of form.

§ 12. "That no order to be made, nor any proceeding to be had or taken, in pursuance of this act, shall be quashed or removed for want of form, or removed by *certiorari*, or any other writ or process whatever, into any of his majesty's courts of record at *Westminster*; any law or statute to the contrary notwithstanding."

Not to extend
to Middlesex,
&c.

§ 13. "That nothing in this act contained shall extend or be construed or taken to extend to the county of *Middlesex*, or to *Scotland* or *Ireland*."

Special Sessions,
what.

A special sessions means, a sitting convened by reasonable notice to the other magistrates of the division. *Per Bayley J.* in *the Justices of Worcestershire*, 2 B. & A. 233.

Any occasional sitting of two magistrates is not a special session within the meaning of the statute relating to the diverting and turning of highways. S. C.

Precepts for
holding.

In the above case the precepts for holding a special session for diverting a highway were issued *September 12th*, and served on the respective magistrates on the 14th, and the session was held and the order made on the 15th. The court of quarter sessions refused to confirm the order, and the matter was brought before B. R. on motion, they held that reasonable notice had not been given, and that the quarter sessions had acted irregularly. S. C. 2 B. & A. 228.

Under the provisions of 13 G. 3. c. 78. § 62. (the highway

notice of the special sessions must be executed by the high constable or by some analogous officer; and therefore, in a case where it appeared that the notices had been served by the clerk of the magistrates, it was held bad, and that the proceedings under were irregular. *R. v. Justices of Surrey*, 5 B. & C. 241.

But where the notices were signed by the high constables, but served on the magistrates by one of the magistrates' clerks under authority of the high constables, it was held sufficient. *R. v. Justices of Suffolk*, 6 B. & C. 110.

See also *R. v. the Justices of Devon*, 1 B. & A. 588.

Form of High Constable's Precept for a Petty or Special Sessions, see tit. *Highways* in general; Forms, in another volume.

Sheep. See tit. *Cattle*.

Ships.

[12 G. 3. c. 24.—1 & 2 G. 4. c. 75.—7 & 8 G. 4. c. 30.]

Y stat. 11 G. 1. c. 29. § 6. (now repealed), if any owner of, or captain, master, mariner, or other officer belonging to any ship, shall wilfully cast away, burn, or otherwise destroy the ship which he is owner, or unto which he belongeth, or in any wise act or procure the same to be done, with intent to prejudice any person that shall underwrite any policy of insurance thereon, any merchant that shall load goods thereon; he shall be guilty felony without benefit of clergy.

And if any of the said offences are committed within the body of county, they shall be tried there; if on the high seas, they shall be tried as in cases of piracy under the statute 28 Hen. 8. c. 15. tit. *Admiralty Court*.

Upon this statute *W. Codling*, the master of the ship, was indicted at the admiralty sessions, October 1802, for wilfully destroying the ship on the high seas, and *W. Macfarlane* and *Easterby*, the owners of the ship, for procuring the master on high seas to destroy the ship, with intent to defraud the underwriters. *Codling*, the master, was convicted and executed: but the owners had only given orders when on shore to the master effect this purpose, it was objected that they had committed no offence within the jurisdiction of the admiralty, and consequently were entitled to an acquittal. The jury found them guilty upon the facts; but the question of law was reserved for the consideration of the judges; who, after having heard the case twice argued, were all of opinion, that as no act had been done by the owners within the jurisdiction of the admiralty, they were not subject to its jurisdiction, and consequently that the trial was improperly held. *Case of Easterby and Macfarlane*, 1 East's P. C. Add. 671.

But see 7 G. 4. c. 64. § 9. *ante*, tit. *Accessory*, § 4.

By 7 & 8 G. 4. c. 30. § 9., if any person shall unlawfully and maliciously set fire to, or in any wise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall

11 G. 1. c. 29
§ 6. (now repealed), destruction of ship by owner, &c.

Accessories on land to destruction of ship at sea.

Setting fire to or destroying a ship, with intent, &c.

7 & 8 G. 4. c. 30. unlawfully and maliciously set fire to, cast away, or in any wise destroy any ship or vessel, with intent thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon.

Damaging ships
with intent, &c.
otherwise than
by fire, felony.

§ 10. If any person shall unlawfully and maliciously damage, otherwise than by fire, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same, or to render the same useless, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.

False signals.
Destruction of
ship or goods.

§ 11. If any person shall exhibit any false light or signal, with intent to bring any ship or vessel into danger, or shall unlawfully and maliciously do any thing tending to the immediate loss or destruction of any ship or vessel in distress, or destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, or shall by force prevent or impede any person endeavouring to save his life from such ship or vessel (whether he shall be on board, or shall have quitted the same), every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon.

Impeding
wrecked per-
sons.
Capital.

Prisoner was indicted under § 9. of the foregoing act, for setting fire to a barge, the property of *M. S.*, but there was no averment that he did it with an intent to prejudice any one: it was the opinion of *Alderson J.* and of *Gazlee J.*, that the indictment was insufficient on this account, and this point would have been reserved in the opinion of the judges, and also the point whether a barge was within the meaning of the act. But the prisoner was acquitted. *Cambr. Spring Ass. 1831, R. v. Smith, 4 Car. & P. 569.*

Setting fire to
vessel must be
averred to be
with intent to
prejudice some
one.

Barge, whether
within the act.

The indictment charged prisoner, under § 10., with damaging a vessel by beating a hole in the bottom, with intent to render it useless. It appeared that the vessel was a small pleasure-boat, about eighteen feet long. It was contended that this was not a vessel within § 10., by reference to § 17. of the same act; and *Patteson J.* would have reserved the point, but the jury acquitted the prisoner. *Patteson J.* held, there was a sufficient averment of the damage being done otherwise than by fire. *Gloucester Spring Ass. 1831. R. v. Bowyer and others, 4 Car. & P. 559.*

Pleasure boat,
whether within
the act.

Part-owner set-
ting fire to ves-
sel, to prejudice
of other part
owners.

The prisoner was indicted for setting fire to a vessel, the property of himself, and of *A. & B.*, with intent to prejudice *A. & B.* being part-owners. It appeared that the prisoner had insured the ship, and had verbally promised *A. & B.* that they should have the benefit of it. On case reserved, one of the questions was, whether as prisoner was part-owner, and there was no proof of malice, the intent to prejudice *A. & B.* was made out. The judges held the conviction right, as the intent to prejudice must be implied from the act. *E. T. 1830, R. v. Philp, 1 M. 263.*

By 12 G. 3. c. 24., after reciting that "the safety and preservation of his majesty's ships of war, arsenals, magazines, dock-yards, rope-yards, victualling-offices, military, naval, and victualling stores, and the places where such stores are kept or deposited, either within this realm, or in any of the islands, countries, forts, or places thereunto belonging, is of great importance to the welfare and security of the kingdom;" it is enacted, "that if any person or persons shall, either within this realm, or in any of the lands, countries, forts, or places thereunto belonging, wilfully and maliciously set on fire, or burn, or otherwise destroy, or cause to be set on fire, or burnt, or otherwise destroyed, or aid, procure, bet, or assist in the setting on fire, or burning, or otherwise destroying of any of his majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built, in any of his majesty's dock-yards, or building or repairing by contract in any private yards, for the use of his majesty, or any of his majesty's arsenals, magazines, dock-yards, rope-yards, victualling-offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there used, for building, repairing, or fitting out of ships or vessels; or any of his majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places where any such military, naval, or victualling stores, or other ammunition of war is, or shall be kept, placed, or deposited; that then the person or persons guilty of any such offence, being thereof convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy."

§ 2. "That any person who shall commit any of the offences fore-mentioned in any place out of this realm, may be indicted and tried for the same, either in any shire or county within this realm, in like manner and form as if such offence had been committed within the said shire or county, or in such island, country, place, where such offence shall have been actually committed, his majesty, his heirs or successors, may deem most expedient: bringing such offender to justice; any law, usage, or custom to the contrary notwithstanding."

By 1 & 2 G. 4. c. 75. § 11., "If any person or persons shall wilfully cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall do or commit any act, with intent and design to cut away, cast adrift, remove, alter, deface, sink, or destroy, or in any other way injure or conceal any buoy, buoy rope, or mark belonging to any ship or vessel, or which may be attached to any anchor or cable belonging to any ship or vessel whatever, whether distress or otherwise, such person or persons so offending shall, being convicted of such offence, be deemed and adjudged to be guilty of felony, and shall be liable to be transported for any term not exceeding seven years, or in mitigation of such punishment to be imprisoned for any number of years, at the discretion of the court in which the conviction shall be made."

See also tit. Larceny, § 6.

Persons wilfully setting on fire ships of war in any of his majesty's dock-yards, or any military, naval, or victualling stores, &c.

Capital.

Person offending out of this realm, may be tried in any shire within this realm.

Persons cutting away or defacing buoy ropes, &c. to be deemed guilty of felony, &c.

Slander.

[3 Ed. 1. c. 34. — 2 R. 2. st. 1. c. 5. — 12 R. 2. c. 11.]

I DO not find it anywhere clearly settled how far slander or scandalous words became objects of the criminal jurisdiction, and so cognizable before justices of the peace, by reason of the different circumstances in matters of so indeterminate a nature: for the same words, when spoken of different persons, and even of the same person with a different emphasis and manner of delivering them, may receive a very different interpretation.

Words directly
tending to
breach of peace.

In general, it seemeth that words which directly tend to a breach of the peace, as if one man challenge another, are cognizable before justices of the peace; for which the party may be bound to the good behaviour, and even indicted. *2 Salt. 420. 1 Keb. 931.*

Aliter as to
words of com-
mon abuse.

But if they do not tend directly to a breach of the king's peace but are matters only of private slander between party and party which no way affect the public administration of justice, as in cases where the common people are wont to call one another knaves, and rogues, and whores, and thieves, I do not find it asserted by any good authority that justices of the peace have any jurisdiction at all in such matters; but the proper remedy seems to be in one of these two ways,—either by a prosecution in the spiritual court, or by an action upon the case at the common law.

Slander of a
magistrate.

It appears that abusive words spoken of a magistrate, as such when he is not present, are not indictable: but if they are spoken while he is in the execution of his office, the party may be either committed for the contempt, or indicted. *R. v. Wrightson, 2 Sess. 698. R. v. Revel, 1 Str. 420. R. v. Pocock, 2 Str. 1157. R. v. Weltje, 2 Campb. 143.*

Scandalum
magnatum.

There is one species of slander, of which the law takes a more special notice; and that is, when it relates to the great men of the realm, concerning whom it is enacted by stats. 3 Ed. 1. c. 5. 2 R. 2. st. 1. c. 5., and 12 R. 2. c. 11., that none shall tell or publish any false news or tales, whereby discord, or occasion of discord or slander, may grow between the king and his people, or the great men of the realm; and that none shall devise, speak, or tell any false news or lies of any prelates, lords, judges, or other great men of the realm, whereof any discord or slander may arise: a pain of imprisonment until he hath brought into court the true author of the tale; if he cannot find the author, he shall be punished by advice of council.

Slander, &c. of
great men pun-
ishable.

Unless by legal
charge.

Publish any false news or tales.] But this extends only to extra-judicial slanders; for if a man charge them in due course of law, although the charge be false, yet there will lie no action: *scandalis magnatum*, neither at common law, nor by the statute. *2 Inst. 228.*

Slave Trade.

[5 G. 4. c. 113.]

BY 5 G. 4. c. 113. various enactments are made for the suppression of the slave trade.

By § 9. the dealing in slaves on the high seas is constituted piracy. See *ante* Piracy.

§ 10. enacts, "that (except in such special cases as are in and by this act permitted, or otherwise provided for) if any person shall deal or trade in, purchase, sell, barter, or transfer, or contract for the dealing or trading in, purchase, sale, barter, or transfer of slaves, or persons intended to be dealt with as slaves, or shall, otherwise than as aforesaid, carry away or remove, or contract for the carrying away or removing of slaves, or other persons, as or in order to their being dealt with as slaves; or shall import or bring, or contract for the importing or bringing, into any place whatsoever, slaves or other persons, as or in order to their being dealt with as slaves; or shall, otherwise than as aforesaid, ship, tranship, embark, receive, detain, or confine on board, or contract for the shipping, transshipping, embarking, receiving, detaining, or confining on board of any ship, vessel, or boat, slaves or other persons, for the purpose of their being carried away or removed, as or in order to their being dealt with as slaves; or shall ship, tranship, embark, receive, detain, or confine on board, or contract for the shipping, transshipping, embarking, receiving, detaining, or confining on board of any ship, vessel, or boat, slaves or other persons, for the purpose of their being imported or brought into any place whatsoever, as or in order to their being dealt with as slaves; or shall fit out, man, navigate, equip, despatch, use, employ, let, or take to freight or on hire, or contract for the fitting out, manning, navigating, equipping, despatching, using, employing, letting, or taking to freight or on hire any ship, vessel, or boat, in order to accomplish any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall knowingly and wilfully lend or advance, or become security for the loan or advance, or contract for the lending or advancing, or becoming security for the loan or advance of money, goods, or effects employed or to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall knowingly and wilfully become guarantee or security, or contract for the becoming guarantee or security for agents employed or to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or in any other manner to engage, or to (a) contract to engage, directly or indirectly therein, as a partner, agent, or otherwise; or shall knowingly and wilfully ship, tranship, lade, receive, or put on board, or contract for the shipping, transshipping, lading, receiving, or putting on board of any ship, vessel, or boat, money, goods, or effects, to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have herein-

5 G. 4. c. 113.
Persons dealing in slaves, or exporting or importing slaves;

or shipping slaves in order to exportation or importation;

Or fitting out slave-ships;

or embarking capital in the slave-trade;

or guaranteeing slave adventures;

(a) *Sic.*
or shipping goods, &c. to be employed in the slave-trade;

5 G. 4. c. 113.

or serving on board slave-ships as captain, master, &c. surgeon, &c.

or insuring slave adventures ;

or forging instruments relating to the slave laws ;

declared guilty of felony, &c.

Nothing herein shall prevent persons from purchasing slaves in any island, &c. belonging to his majesty, provided such slaves shall be employed in the same island, &c.

Process and trial.

before been declared unlawful ; or shall take the charge or command, or navigate, or enter and embark on board, or contract for the taking the charge or command, or for the navigating or entering and embarking on board of any ship, vessel, or boat, as captain, master, mate, surgeon, or supercargo, knowing that such ship, vessel, or boat, is actually employed, or is in the same voyage, or upon the same occasion, in respect of which they shall so take the charge or command, or navigate, or enter and embark, or contract so to do as aforesaid, intended to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have herein-before been declared unlawful ; or shall knowingly and wilfully insure, or contract for the insuring of any slaves, or any property or other subject-matter engaged or employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have herein-before been declared unlawful ; or shall wilfully and fraudulently forge or counterfeit any certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or any receipt (such receipts being required by this act), or any part of such certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence or decree of condemnation or restitution, or receipt as aforesaid ; or shall knowingly and wilfully utter or publish the same, knowing it to be forged or counterfeited, with intent to defraud his majesty, his heirs or successors, or any other person or persons whatsoever, or any body politic or corporate ; then and in every such case the person or persons so offending, and their procurers, counsellors, aiders, and abettors shall be and are hereby declared to be felons and shall be transported beyond seas for a term not exceeding fourteen years, or shall be confined and kept to hard labour for a term not exceeding five years, nor less than three years, at the discretion of the court before whom such offender or offenders shall be tried and convicted."

§ 13. "That nothing in this act contained shall prevent or be construed to prevent any persons from dealing or trading in purchasing, selling, bartering, or transferring, or from the contracting for the dealing or trading in, purchase, sale, barter, or transfer of any slaves or slave lawfully being within any island, colony, dominion, fort, settlement, factory, or territory belonging to or in the possession of his majesty, in case such dealing or trading, purchase, sale, barter, transfer, or contract shall be made and entered into with the true intent and purpose of employing or working such slaves or slave within such island, colony, dominion, fort, settlement, factory, or territory, in which they, he, or she may lawfully be at the time of making or entering into any such dealing or trading, purchase, sale, barter, transfer, or contract."

§ 50. "That all offences committed against this act may be inquired of, tried, determined, and dealt with, as if the same had been respectively committed within the body of the county of *Middlesex*."

Smuggling.

[3 & 4 W. 4. c. 53.]

THE various fiscal regulations which have been provided by different statutes for the prevention of frauds upon the revenue, and the particular enactments under which penalties and forfeitures of different descriptions are incurred, will be found under their proper title in another volume. The following legislative provisions relate to such offences as may be properly denominated crimes.

By 3 & 4 W. 4. c. 53. § 8., "in case any vessel or boat liable to seizure or examination under any act or law for the prevention of smuggling, shall not bring to (a) on being required so to do, on being chased by any vessel or boat in H. M.'s navy, having the proper pendant and ensign of H. M.'s ships hoisted, or by any vessel or boat duly employed for the prevention of smuggling, having proper pendant and ensign hoisted, it shall be lawful for the captain, master, or other person having the charge or command of such vessel or boat in H. M.'s navy, or employed as aforesaid, at causing a gun to be fired as a signal), to fire at or into such vessel or boat; and such captain, master, or other person acting in his aid or assistance, or by his direction, shall be and he is hereby indemnified and discharged from any indictment, penalty, or other proceeding for so doing."

§ 53. "And be it further enacted, that no person shall, after sunset and before sunrise, between the twenty-first day of *September* and the first day of *April*, or after the hour of eight in the evening and before the hour of six in the morning, at any other time in the year, make, aid, or assist in making any signal, in or on board or from any vessel or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coasts or shores, for the purpose of giving any notice to any person on board any smuggling vessel or boat, whether any person so on board of such vessel or boat be or be not within distance to notice any such signal: and if any person, contrary to the true intent and meaning of this act, make or cause to be made, or aid or assist in making, any such signal, such person offending shall be guilty of a misdemeanor; and it shall be lawful for any person to stop, arrest, and detain the person or persons so offending, and to carry and convey such person or persons so offending before any one or more of H. M.'s justices of the peace residing near the place where such offence shall be committed, who, if he sees cause, shall commit the offender to the county gaol, there to remain until the next court of oyer and terminer, great session, or gaol delivery, or until such person or persons shall be delivered by the due course of law; and it shall be necessary to prove on any indictment or information, that the vessel or boat was actually on the coast; and the offender or offenders being duly convicted thereof shall, by order of the court before whom such offender or offenders shall be convicted, either forfeit and pay the penalty or forfeiture of one hundred pounds, or at the discretion of such court, be sentenced or committed to

3 & 4 W. 4. c. 53.

Smuggling vessels not bringing to when required, by vessel or boat in navy or preventive service, may be fired into.

Making signals to smuggling vessels.

Misdemeanor.

Punishment.

(a) See *R. v. Reynolds*, post, 862.

3 & 4 W. 4. c. 53.

Proof of signal not being intended to lie on defendant.

Any person may enter upon lands to prevent signals being made.

Three or more armed persons assembled to assist in the landing of any goods, &c. or in rescuing goods seized, &c. or persons apprehended, or to prevent apprehension, or so aiding,

felony;
capital.

Persons shooting at vessel or boat in navy or revenue service, or at officer, &c. in execution of his duty,

felony,
capital.

Person found with smuggled goods in company with more than four, or with one only, armed or disguised, felony;

the common gaol or house of correction, there to be kept to hard labour for any term not exceeding one year."

§ 54. "Provided always, and be it further enacted, that in case any person be charged with or indicted for having made or caused to be made, or been aiding or assisting in making any such signal as aforesaid, the burthen of proof that such signal so charged as having been made with intent and for the purpose of giving such notice as aforesaid, was not made with such intent and for such purpose, shall be upon the defendant against whom such charge is made or such indictment is found."

§ 55. "And be it further enacted, that it shall be lawful for any person whatsoever to prevent any signal being made as aforesaid, and to enter and go into and upon any lands for that purpose, without being liable or subject to any indictment, suit, or action for the same."

§ 58. "If any persons, to the number of three or more, armed with fire-arms or other offensive weapons (a), shall, within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be (b) assembled in order to be aiding and assisting in the illegal landing, running, or carrying away of any prohibited goods, or any goods liable to any duties, which have not been paid or received, or in rescuing or taking away any such goods as aforesaid, after seizure, from the officer of the customs or other officer authorised to seize the same, or from any person or persons employed by them or assisting them, or from the place where the same shall have been lodged by them, or in rescuing any person who shall have been apprehended for any of the offences made felony by this or any act relating to the customs, or in the preventing the apprehension of any person who shall have been guilty of such offence; or in case any person to the number of three or more, so armed as aforesaid, shall, within the United Kingdom, or within the limits of any port, harbour, or creek thereof, be so aiding or assisting, every person so offending, and every person aiding, abetting, or assisting therein, shall, being thereof convicted, be adjudged guilty of felony, and suffer death as a felon."

§ 59. "If any person shall maliciously shoot at any vessel or boat belonging to his majesty's navy, or in the service of the revenue, within one hundred leagues of any part of the coast of the United Kingdom, or shall maliciously shoot at, maim, or dangerously wound any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay or any officer of the customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his office or duty, every person so offending, and every person aiding, abetting, or assisting therein, shall, being lawfully convicted, be adjudged guilty of felony, and suffer death as a felon."

§ 60. "If any person, being in company with more than one other persons, be found with any goods liable to forfeiture or in this or any other act relating to the revenue of customs or excise, or in company with one other person, within five miles of the

(a) See *Rose's case*, post 863., and the cases there following.

(b) See *Hutchinson's case*, post, 863.

oast, or of any navigable river leading therefrom, with such goods, and carrying offensive arms or weapons, or disguised in any way, every such person shall be adjudged guilty of felony, and shall, on conviction of such offence, be transported as a felon for the space of seven years."

§ 61. "If any person shall, by force or violence, assault, resist, oppose, molest, hinder, or obstruct any officer of the army, navy, marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, in the due execution of his or her office or duty, such person, being thereof convicted, shall be transported for seven years, or sentenced to be imprisoned in any house of correction or common gaol, and kept to hard labour, for any term not exceeding three years, at the discretion of the court before whom the offender shall be tried and convicted aforesaid."

§ 77. "In case any offence shall be committed upon the high seas against this or any other act relating to the customs, or any penalty or forfeiture shall be incurred upon the high seas for any breach of such act, such offence shall, for the purpose of prosecution, be deemed and taken to have been committed, and such penalties and forfeitures to have been incurred, at the place or in the United Kingdom, or the *Isle of Man*, into which the person committing such offence, or incurring such penalty or forfeiture shall be taken, brought, or carried, or in which such person shall be found; and in case such place or land is situated within any city, borough, liberty, division, franchise, or town corporate, as well any justice of the peace for such city, borough, liberty, division, franchise, or town corporate, as any justice of the peace of the county within which such city, borough, liberty, division, franchise, or town corporate is situated, shall have jurisdiction to hear and determine all cases of offences against such act so committed upon the high seas, any charter or act of parliament to the contrary notwithstanding: Provided always, that where any offence shall be committed in any place upon the water, being within any county of the United Kingdom, or where any offence exists as to the same being within any county, such offence shall, for the purposes of this act, be deemed and taken to be an offence committed upon the high seas."

On a conviction under 6 G. 4. c. 108. (a), one of the questions was, whether the convicting magistrates had jurisdiction; it was for an offence committed on the high seas, and it appeared that the vessel had been seized and detained within the jurisdiction of the justices of *Suffolk* or of *Ipswich*; but defendant was taken into *Ipswich*, by the justices of which place he was convicted: Under 4. of 6 G. 4., containing an enactment similar to that of 4 W. 4. c. 53. § 77., the court of K. B. held that the conviction was proper. *In the matter of James Nunn*, 8 B. & C. 644.

117. "All persons employed for the prevention of smuggling under the direction of the commissioners of his majesty's customs,

3 & 4 W. 4. c. 53.

Transportation seven years.

Assaulting officer of army, navy, &c. or revenue officer in execution of his duty;

transportation seven years; imprisonment and hard labour.

Offences on high seas deemed to have been committed at the place into which such offender shall be brought, or in which he is found.

Offender may be convicted in the place into which he is carried, though the ship may have been seized in another jurisdiction.

Persons employed in preventive service to be deemed duly employed,

) The stat. 6 G. 4. c. 108. has not been repealed, but most of its penal provisions are superseded by those of 3 & 4 W. 4. c. 53.

3 & 4 W. 4. c. 53.

and averment to that effect in information or suit to be sufficient, unless, &c.

Evidence of officer of army, navy, &c. and of officer of customs and excise, having acted as such, sufficient proof that he is such, unless, &c.

Officer or other person acting in his aid a competent witness though entitled, to share or reward.

Indictments or informations may be tried in any county in England, Scotland or Ireland respectively.

Revenue vessel firing on a smuggler to bring him to, proper pendant, &c. must be hoisted.

"Armed with offensive weapons," person hastily taking up a hatchet not deemed so.

or of any officer or officers in the service of the customs, shall be deemed and taken to be duly employed for the prevention of smuggling; and the averment, in any information or suit, that such party was so duly employed, shall be sufficient proof thereof, unless the defendant in such information or suit shall prove to the contrary."

§ 118. "If upon any trial a question shall arise whether any person is an officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or an officer of customs or excise, evidence of his having acted as such shall be deemed sufficient, and such person shall not be required to produce his commission or deputation, unless sufficient proof shall be given to the contrary; and every such officer, and any person acting in his aid or assistance, shall be deemed a competent witness upon the trial of any suit or information on the count of any seizure or penalty as aforesaid, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty, or to any reward upon the conviction of the party charged in such suit or information."

§ 122. "Any indictment or information for any offence against this or any other act relating to the customs shall and may be inquired of, examined, tried, and determined in any county in England, where the offence is committed in England, and in any county in Scotland where the offence is committed in Scotland, and in any county in Ireland where the offence is committed in Ireland, in such manner and form as if the offence had been committed in the said county where the said indictment or information shall be tried."

In a case under 52 G. 3. c. 143. § 11. (now repealed), contained an enactment similar to that contained in 3 & 4 W. 4. c. 53. § 59. (*supra*), the prisoner was charged with shooting at and at a vessel being in the service of the customs, &c., and also with shooting at &c. T. T., an officer of the customs, &c. (a) It appeared that the revenue vessel having fired a gun to bring to the smuggler pursuant to 56 G. 3. c. 104. § 8. (now repealed), a regular engagement ensued. By the same section it was required that the revenue vessel, in doing so, should have a pendant or ensign hoisted, of the description as H. M. should by proclamation or order in council direct. The officer had hoisted colours pursuant to orders given to him, but there was no evidence of any order in council or royal proclamation; in the case reserved it was stated, that there had been an order in council in the *Gazette*, directing the pendant or ensign to contain particulars which had not been proved. The judges were unanimous that, as the revenue vessel had not complied with what was required by the statute to make the shooting legal, the firing by the smugglers could not, in point of law, be considered malicious, and a pardon was recommended. *R. v. Reynolds*, C. C. R. 465.

In a decision on 19 G. 2. c. 34., containing similar words to those of 3 & 4 W. 4. c. 53. § 58., as to persons to the number three or more, armed with fire-arms or other offensive weapons, it was held that a person catching up a hatchet accidentally.

(a) See 3 & 4 W. 4. c. 53. § 8. *supra*.

the heat of an affray, was not so armed within the meaning of the *O. B.* 1784, *Rose's case*, 1 *Leach*, 342. n. (a). cit. 1 *Russ.* 124. In another case it was laid down by the court, that bludgeons properly so called, clubs, and any thing that was not in common use for any other purpose than a weapon, were clearly offensive weapons within the meaning of the legislature. *O. B.* 1785, *van's case*, 1 *Leach*, 342. u. (n.); cit. 1 *Russ.* 124.

In a case on 6 G. 4. c. 108. § 56., against prisoner for being armed, with others, armed with fire-arms and other offensive weapons, for aiding and assisting in the illegal landing of uncased goods, it appeared that the prisoner carried a bat (a hoop about seven feet long), as others did, for the purpose of rying the tubs: there was another party acting separately, armed with muskets. *Littledale J.* left it to the jury to say how bats were intended to be used; for though they were brought carrying away small casks, yet they might be used for offensive poses. Prisoners were acquitted. *O. B.* May, 1832, *R. v. Ikes*, 5 *Car. & P.* 326.

Where a person, not being armed himself, is in company with persons who are armed, and is active with them, he comes within enactment of the statute. *Franklin's case*, 1 *Leach*, 255. S. C. 1. 244., cit. 1 *Russ.* 124. *Acc. R. v. Smith & others*, S. P. in *the prosecution*, C. C. R. 368. See tit. *Game*.

It has been decided on 19 G. 2. c. 34. (now repealed), that the "arming," as stated in that and in other statutes, must be deliberate, and for the purpose of committing the offence described in the statute; and that therefore, where a parcel of drunken men in an ale-house hastily set about carrying away some gin which revenue officers had seized, it was doubted whether it came in the act, and the prisoners were acquitted. *Hutchinson's case*, 1 *Leach*, 343.; cit. 1 *Russ.* 125., and n. (q) *ib.*

Bludgeons, &c. may be offensive weapons.

Whether a bat, being a pole used for carrying tubs was an offensive weapon, question for jury.

Person not armed, but acting with others who are so, is within the statute.

The assembling, &c. must be for the deliberate purpose of committing the offence.

Snarers. See *Game*.

Sodomp. See *Buggery* and *Robbery*.

Spring-Guns, Man-Traps, &c.

[7 & 8 G. 4. c. 118.]

the 7 & 8 G. 4. c. 18. § 1., reciting, "whereas it is expedient to prohibit the setting of spring-guns and man-traps, and engines calculated to destroy human life, or inflict grievous harm," it is enacted, "that from and after the passing of this act, if any person shall set or place, or cause to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life, or inflict grievous bodily harm, with the intent to do the same or whereby the same may destroy or inflict grievous harm upon a trespasser or other person coming in contact with, the person so setting or placing, or causing to be so set or placed, such gun, trap, or engine as aforesaid, shall be guilty of a misdemeanor."

7 & 8 G. 4. c. 18. Persons setting or placing spring guns, man traps, &c. guilty of a misdemeanor.

Provision for traps for destroying vermin.

Persons permitting guns, traps, &c. set by others, to continue, deemed to have set the same.

Proviso for guns, traps, &c. set for the protection of dwelling-houses.

Not to affect proceedings already commenced.

Not to extend to Scotland.

§ 2. provides and enacts, "That nothing herein contained shall extend to make it illegal to set any gin or trap such as may have been or may be usually set with the intent of destroying vermin."

§ 3. enacts and declares, "That if any person shall knowingly and wilfully permit any such spring-gun, man-trap, or other engine as aforesaid, which may have been set, fixed, or left in any place then being in or afterwards coming into his or her possession or occupation, by some other person or persons, to continue so set or fixed, the person so permitting the same to continue shall be deemed to have set and fixed such gun, trap, or engine, with such intent as aforesaid."

§ 4. provides and enacts, "That nothing in this act shall be deemed or construed to make it a misdemeanor, within the meaning of this act, to set or cause to be set, or to be continued set, from sunset to sunrise, any spring-gun, man-trap, or other engine which shall be set, or caused or continued to be set, in a dwelling-house, for the protection thereof."

§ 5. provides and enacts, "That nothing in this act contained shall in any manner affect or authorise any proceedings in any civil or criminal court, touching any matter or thing done or committed previous to the passing of this act."

§ 6. provides and enacts, "That nothing in this act contained shall extend or be construed to extend to that part of the United Kingdom called *Scotland*."

Squibs. See **Fireworks**.

Stabbing. See **Homicide**.

Stock of Companies.

THE offences of making false entries or wilful alterations in books of accounts of owners of stock at the bank or *South Sea* house; or of making transfer of public stock there in any other name than the true owners; of forging a transfer of public stock or of stock of body corporate, &c., or power of attorney for transferring the same, or for receiving dividends thereon; of transferring stock, or receiving dividends by false personation; of false personating the owner of stock, and endeavouring to make transfer, or to receive dividends; of forging the attestation to a power of attorney for transfer of stock or receipt of dividend; of making out dividend warrant for a greater or less sum than is due, &c., are provided for by 1 W. 4. c. 66. See tit. *Forgery*, p. 256., *et seq.*

Stocking Frames.

[28 G. 3. c. 55.]

Y stat. 28 G. 3. c. 55. § 1., if any framework-knitter, who shall rent or take by the hire any stocking-frame, either with or without any machine or engine thereto annexed, or therewith to be employed, shall refuse to yield up and re-deliver the same with machine or frame to the person of whom he shall so rent it, without 14 days' previous notice, he shall, on conviction by the oath and solemn affirmation of the owner or employer of such frame, or by any other witness, before one justice where the offence is committed, or where the person so charged shall inhabit, for every offence forfeit 20s. to the poor; and if not immediately paid, such frame, &c. delivered up to the owner within six days after conviction, such justice shall commit such offender to gaol or other public prison to hard labour for any time not exceeding one month nor less than one calendar month.

2. 3. If any person so renting or taking to hire any stocking-frame, with or without such machine as aforesaid, shall sell or unlawfully dispose thereof, or the machine, &c. therewith let, without the consent of the owner; or shall wilfully and knowingly give or purchase any such so sold or unlawfully disposed of as aforesaid, contrary to the true intent and meaning of this act; any such offender, being convicted upon indictment, shall suffer any imprisonment in the gaol or house of correction for not more than three nor exceeding twelve calendar months.

See 7 & 8 G. 4. c. 30. § 3. *ante*, tit. *Malicious Injuries*, § 2. 49., and *R. v. Tacey, ib.*

28 G. 3. c. 55.
Framework-knitters hiring frames, and refusing to return them on notice.

Persons so hiring frames and selling them.

Stolen Goods. See *Search-warrant and Restitution.*

Stores.

[9 & 10 W. 3. c. 41. — 1 G. 1. stat. 2. c. 25. — 9 G. 1. c. 8. — 17 G. 2. c. 40. — 9 G. 3. c. 30. — 12 G. 3. c. 24. — 39 & 40 G. 3. c. 89. — 49 G. 3. c. 122. — 54 G. 3. c. 60. — 54 G. 3. c. 159. — 55 G. 3. c. 127. — 56 G. 3. c. 80. — 4 G. 4. c. 53.]

Vide stat. 1 & 2 G. 4. c. 75. § 16, 17. *post*, tit. '*Arrest*.'

stat. 4 G. 4. c. 53., after reciting that by stat. 22 C. 2. c. 5. the benefit of clergy is taken away from persons convicted of robbing or embezzling any of H. M.'s sails, cordage, or any other stores of H. M.'s naval stores, to the value of 20s.; provided that it shall be lawful for the judges to grant a reprieve for the staying of the execution of such offenders, and to cause them to be transported for the space of seven years, and kept to hard labour; and also enacting that it is expedient that a lesser degree of punishment than

4 G. 4. c. 53.

46 G. 4. c. 53.

So much of stat.
22 C. 2. c. 5.
as takes away
benefit of clergy
from persons
convicted of
stealing naval
or military
stores, repealed,
and offenders
liable to trans-
portation or im-
prisonment.

9 G. 3. c. 30.

Who may act
as justices.

1 G. 1. st. 2.
c. 25.

Summary ju-
risdiction in
cases of small
embezzlements,
&c.

Counterfeiting
the hand of the
treasurer, &c.

9 & 10 W. 3.
c. 41.

No warlike or
naval stores,
except for the
king's use, shall
be made with
the king's
marks.

that of death should be provided for the offences from which the benefit of clergy is so taken away as aforesaid, and that the same punishment should be extended in manner after mentioned: it is enacted, that so much of the said recited act as takes away the benefit of clergy from the persons convicted of the offences before mentioned, shall be repealed; and that from and after the passing of this act, every person who shall be lawfully convicted of stealing or embezzling H. M.'s ammunition, sails, cordage, or naval or military stores, or of procuring, counselling, aiding, or abetting any such offender, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding seven years.

By stat. 9 G. 3. c. 30. § 5., the treasurer, comptroller, surveyor, clerk of the acts, or any commissioner of the navy, may act as justices, in causing the offenders to be apprehended, committed, and prosecuted for the same.

By stat. 1 G. 1. st. 2. c. 25. § 3., any of the principal officers or commissioners of the navy may issue warrants to search for naval stores, as justices may in cases of felony, and punish the offender by fine not exceeding 20s., or imprisonment not exceeding one week, the value of the goods not exceeding 20s.; and if the offence requires a higher punishment, may commit him to the next gaol or to the custody of their messenger till he finds sureties to appear in the exchequer, or other court where the king shall question him for the same within one year, on process duly served for that purpose on such offender.

§ 6. And every person who shall counterfeit the hand of the treasurer, comptroller, surveyor, clerk of the acts, or of any commissioner of the navy, or the hand of the signing or vouching officer of H. M.'s navy, ships, or yards, to any bill, ticket, or paper by virtue whereof H. M.'s naval treasure may be disposed of, knowingly produce the same, he may be committed to prison: the said officers and commissioners, or any of them, until he is surety to appear at the next assizes or quarter sessions, to be there proceeded against according to law.

By stat. 9 & 10 W. 3. c. 41. it is enacted, "That it shall not be lawful for any person or persons whatsoever, other than persons authorised by contracting with the king's principal officers or commissioners of the navy, ordnance, or victualling-office, for H. M.'s use, to make any stores of war or naval stores whatsoever with the marks usually used to and marked upon H. M.'s warlike and naval or ordnance stores; viz. any cordage of three inches and upwards, wrought with a white thread laid the contrary way; or any smaller cordage, viz. from three inches downwards with a twine in lieu of a white thread, laid to the contrary as aforesaid; or any canvass wrought or unwrought, with a red streak in the middle; or any other stores with the broad mark by stamp, brand, or otherwise; upon pain that every such person or persons who shall make such goods so marked as aforesaid, in being a contractor with H. M.'s principal officers or commissioners of the navy, ordnance, or victuallers for H. M.'s use, or employed by such contractor for that purpose as aforesaid, shall for every such offence forfeit such goods and 200*l*., together with the cost

prosecution, one moiety to the king, the other to the informer, be recovered by action of debt," &c.

By § 2., "Such person or persons in whose custody, possession, or keeping such goods or stores marked as aforesaid shall be found, not being employed as aforesaid; and such person or persons who shall conceal such goods or stores marked as aforesaid, being indicted and convicted of such concealment, or of the having such goods found in his custody, possession, or keeping, shall forfeit such goods and 200*l.*, together with the costs of prosecution, one moiety to the king, and the other to the informer, to be recovered as aforesaid; and shall also suffer imprisonment till payment and performance of the said forfeiture; unless such person shall upon his trial produce a certificate under the hand of three or more of the king's officers or commissioners of the navy, ordnance, or victuallers, expressing the numbers, quantities, or weights of such goods as he or she shall then be indicted for, and the occasion and reason of such goods coming to his hands or possession." *Vide Cole's case, post, 873.*

In addition to which, by stat. 9 G. 1. c. 8. § 3., "Every person fully convicted of having in his custody any timber, thick stuff, plank, marked with the broad arrow, by stamp, brand, or otherwise, or of concealing any timber, &c. so marked, shall suffer, forfeit, and pay as for having, keeping, or concealing any other like, naval, or ordnance stores, contrary to the said act" of 10 W. 3. c. 41.

By stat. 9 G. 1. c. 8. § 4., the court may mitigate the penalty inflicted by the st. 9 & 10 W. 3. as they shall see cause, and commit the offender so convicted to the common gaol of the county or place where the offence shall be committed, until payment of the penalty and forfeiture, or punish such offender corporally by causing him to be publicly whipped, OR (a) committed to some public workhouse, there to be kept to hard labour for three months, or a less time, as to such judge in his discretion shall seem meet.

stat. 17 G. 2. c. 40. § 10., after reciting doubts whether the two statutes 9 & 10 W. 3. c. 41. and 9 G. 1. c. 8. gave jurisdiction to justices of assize, justices of peace, &c. to try such offences, acts and declares, that "justices of assize and justices of the peace at the general quarter sessions for any county, city, &c. may hear and determine such offences, &c., and may impose any penalty not exceeding 200*l.*, and mitigate the penalty, &c., and commit the offender to the common gaol of the county until payment, or in lieu thereof may punish such offender corporally, by causing him to be publicly whipped, AND committed to some house of correction or public workhouse, there to be kept to hard labour for three months, or less time, as to such judge, &c. in his discretion shall seem meet."

In the case of *R. v. Bland*, 5 T. R. 370., the defendant's counsel contended that, as their client could pay the penalty, the court had authority to inflict corporal punishment. But the court said that the words of the statutes were in the disjunctive, enabling them either to impose a penalty, or to punish the offender corporally:

9 & 10 W. 3. c. 41.

Persons in whose custody such marked stores are found, and who shall conceal the same, shall forfeit such goods and 200*l.* and be imprisoned till payment.

Extended to timber, &c. by 9 G. 1. c. 8.

Corporal punishment or imprisonment.

17 G. 2. c. 40. Offence may be tried at assizes or sessions.

Punishment.

Court may inflict corporal punishment, though defendant offer to pay the penalty.

In stat. 9 G. 1. c. 8. § 4. it is OR committed. In 17 G. 2. c. 40. § 10. AND committed.

and that this construction had already been put on the statutes in several instances, particularly in the case of *R. v. Newell*, *M.* 33 G. 3. And this appearing to the court to be a gross case, they sentenced the defendant to *Clerkenwell* prison for three months, there to be kept to hard labour, and during that time to be publicly whipped on *Clerkenwell Green* for the space of 100 yards.

May award costs.

Though there was no instance prior to *Trin.* term, 46 G. 3. in which the defendant had been ordered to pay the costs, the court of K. B. adjudged the defendant (*A. Chapple*) to pay the penalty of 200*l.*, together with the costs. 5 *T. R.* 371. n.

39 & 40 G. 3. c. 89.

Persons (other than contractors) receiving or having stores of war in their possession.

By stat. 39 & 40 G. 3. c. 89. § 1., every person (not being a contractor, or employed as by 9 & 10 W. 3. c. 41. is mentioned) who shall willingly or knowingly sell or deliver, or cause to be sold or delivered, or shall knowingly receive, or have in his custody, possession, or keeping, any stores of war, or naval ordnance, or victualling stores, or any goods whatsoever marked as in the said recited act is expressed, or any canvass, marked either with a blue streak in the middle, or with a blue streak in a serpentine form, or any bawper, otherwise called *buntin*, wrought with one or more streaks of raised tape, the same being in a raw or unconverted state, or being new, or not more than one third worn; and such person who shall conceal any such stores or goods marked as aforesaid shall be deemed a receiver of stolen goods, knowing them to have been stolen, and shall, on conviction, be transported for fourteen years; unless he shall upon his trial produce a certificate under the hands of three or more of the principal officers or commissioners of the navy, ordnance, or victualling, expressing the number, quantity, or weight of such stores or goods, and the reason of the same coming into his possession. 2 *East*, *P. C.* 760. 2 *Russ.* 267.

Further punishment of persons convicted of offences against 9 & 10 W. 3.

§ 2. And every person (except as aforesaid), in whose custody shall be found any canvass or buntin marked or wrought as aforesaid, not being new, nor more than one third worn, and all persons who shall be convicted of any offence contrary to so much of the said act of 9 & 10 W. 3. as relates to the making or having in possession, or concealing any such stores, besides forfeiting such stores and the sum of 200*l.* as therein specified, shall be punished by pillory (a), whipping, and imprisonment, or by any of the said ways, in such manner and for such time as to the justices or justices before whom such offender shall be convicted may seem meet: Provided that such judge or justices may mitigate such penalty of 200*l.*, as they shall think fit.

How far 9 & 10 W. 3. shall extend to contractors.

§ 3. provides, that nothing in the said act of 9 & 10 W. 3. this act contained shall extend to exempt from the operation of this act any contractor or person employed as aforesaid, except only so far as concerns stores marked as aforesaid, which shall *bond fide* provided, made up, or manufactured by such person, and which shall not have been before delivered into H. M.'s service, unless, having been so delivered, they shall have been sold or returned to such person by the said commissioners.

Defacing marks.

§ 4. And if any person shall wilfully and fraudulently deface, beat out, take out, cut out, deface, obliterate, or erase, wholly or in part, any of the marks mentioned in the said act of 9 & 10 W. 3. or this act, denoting such stores to be the property of H. M. or cause any other person to do so, for the purpose of concealing

H. M.'s property therein, he shall be deemed guilty of felony, and shall be transported for fourteen years.

§ 5. If any person, convicted of any offence against this act, or which he shall not have been transported, or contrary to the aid act of 9 & 10 W. 3. shall be guilty of a second offence, which should not otherwise as the first offence subject him to transportation, he shall, on conviction for such second offence, be transported for fourteen years.

§ 7. And the court before whom any offender shall be convicted for offences punishable with transportation, may mitigate the same by causing such person to be set on the pillory (a), publicly whipped, fined, or imprisoned, or by all or any of the said ways, as such court shall think fit. One moiety of all such fines shall go to H. M., and the other to the informer; and the court may also order such offender to be imprisoned until such fine be paid.

By stat. 54 G. 3. c. 60., the provisions, matters, and things, in respect to the making, selling, delivering, receiving, having in possession, and concealing any cordage wrought either with a white thread laid the contrary way, or with a twine laid the contrary way, contained in stats. 9 & 10 W. 3. c. 41. and 39 & 40 G. 3. c. 89., or in any other act or acts of parliament, shall extend to the making, selling, delivering, receiving, having in possession, and concealing any cordage wrought with one or more worsted threads, provided this shall not repeal any of the statutes now in force, in respect to cordage wrought either with a white thread laid the contrary way, or with a twine laid the contrary way.

By stat. 54 G. 3. c. 159. § 10., all persons, except such as are lawfully licensed thereto by a commissioner of H. M.'s navy, are prohibited from *creeping* or *sweeping* for anchors, cables, ropes, or yarns, or other stores, lost or supposed to be lost in harbours, &c. within certain prescribed limits, under a penalty of 10*l*. *R. v. Bridges*, 8 East, 53. The defendant was brought up to receive judgment after conviction on stat. 9 & 10 W. 3. c. 41. § 2.

unlawfully having in his possession naval stores, &c., and judgment was about to be pronounced that he should be imprisoned in the house of correction for the county of Surrey, and there kept to hard labour for three calendar months, and once during that time publicly whipped. This would have been warranted by stat. G. 2. c. 40. § 10. reciting stats. 9 & 10 W. 3. c. 41. and 9 G. 1. c. 1., but a doubt occurring how far the power of sentencing to hard labour was taken away by the subsequent stat. 39 & 40 G. 3. c. 89. § 2., the court, upon further consideration, and comparing the different provisions of these statutes, were of opinion that the power of sentencing to hard labour was taken away by the latter statute, and therefore pronounced judgment that the defendant should be imprisoned in the house of correction for the county of Surrey for three calendar months, and be once during that time publicly whipped.

By stat. 12 G. 3. c. 24., if any person shall, either in this realm or in any place thereto belonging, wilfully and maliciously set on fire, burn, or otherwise destroy, or cause or aid therein, any of

39 & 40 G. 3. c. 89.

Persons convicted of a second offence to be transported.

Punishments may be mitigated.

54 G. 3. c. 60. Provisions of 9 & 10 W. 3. c. 41. and 39 & 40 G. 3. c. 89. extended to cordage worked with worsted threads.

Persons prohibited from sweeping harbours for lost stores.

Punishment under the stat.; hard labour.

12 G. 3. c. 24. Burning or destroying stores.

(c) This punishment is abolished, except in certain cases, by stat. 56 G. 3. c. 3.; see tit. Pillory.

H. M.'s military, naval, or victualling stores, or other ammunition of war, or any place where any such stores or ammunition shall be placed or kept, he, his aiders and abettors, shall be guilty of felony without benefit of clergy. And they who commit such offence out of the realm may be tried either where the offence was committed, or in any county within this realm. 2 *East's P. C.* 1094.

Stealing stores
larceny at C. L.

Thorne's case,
Exeter Spr.
ass. 1800.

Though the statute (31 *El. c. 4.*) only speaks of embezzling or stealing stores to the value of 20s., still any of the officers who have a bare charge of the stores in the king's warehouses, or a mere authority to deliver them out, may be guilty of felony at common law in stealing them to any amount from such places of deposit. Accordingly, in *Thorne's case*, 2 *East's P. C.* 622, where it appeared that the prisoner was foreman of one of the storehouses in *Plymouth* dock containing naval stores, and had given security in 200*l.* for the faithful discharge of his duty, and was entrusted with the receiving and delivering out again of the stores in the absence of the clerk, whose proper duty it was when present; and that certain kersey was cut off by him from a bale in the store and delivered by him to an accomplice to be taken out of the yard, though the value was under 20s., he was by the direction of the court convicted of larceny at common law in stealing the kersey.

Under the statutes for protecting the king's stores, the king's mark denotes the original ownership; and there the *onus probandi* lies on the party to account satisfactorily for his possession according to the regulations prescribed, otherwise the bare fact of possession concludes him. But even here the presumption of *malus animus* from the bare fact of possession may be rebutted by circumstances, as in the following case:—A widow woman was indicted before Mr. Justice *Foster*, *Fost. Append.* 439. edit. of 1792. 2 *East's P. C.* 765., upon the western circuit, on stat. 9 & 10 *W. 3. c. 41.* for having in her custody divers pieces of canvass, marked with the king's mark, in the manner described in the act, she not being a person employed by the commissioners of the navy to make the same for the king's use. The canvass was marked as charged in the indictment, and was clearly proved to be such as was made for the use of the navy, and to have been found in the defendant's custody. The defendant did not attempt to show that she was within any exception of the act, as being a person employed to make canvass for the use of the navy; nor did she offer to produce any certificate from any officer of the crown touching the occasion and reason of such canvass coming into her possession. Her defence was, that when there happened to be in H. M.'s stores a considerable quantity of old sails, no longer fit for that use, it had been customary for the persons entrusted with the stores to make a public sale of them in lots, larger or smaller as best suited the purpose of the buyers; and that the canvass produced in evidence, which happened to have been made up since, some for table linen and some for sheeting, had been common use in the defendant's family a considerable time before her husband's death, and upon his death came to the defendant and had been used in the same public manner by her to the satisfaction of the prosecution. This was proved by some of the sailors and by the woman who had frequently washed the linen.

One became possessed on the death of her husband of canvass stores, which had been purchased by him in his lifetime at a public sale, and had been many years made up into household furniture, but no evidence was given of any certificate of such sale being lawful, as required by stat. 9 & 10 *W. 3.*, or of any excuse allowed by the act; yet the possession being by act of law, without fraud, held not within the penalty of the statute.

rt of evidence was strongly opposed by the counsel for the own, who insisted, that, as the act allows of but one excuse, a defendant, unless she could avail herself of that, could not sort to any other : that if the canvass were really bought of a commissioners, or of persons acting under them, there ought have been a certificate taken at the time of the purchase ; and the second section admits of no other excuse. But the lge was of opinion, that though the clause of the statute, which ects the sale of these things, had not pointed out any other y for indemnifying the buyer than the certificate ; and though e second section seemed to exclude any other excuse for those whose custody they should be found ; yet still the circum- nces attending every case which might seem to fall within the ought to be taken into consideration ; otherwise a law calcu- ed for wise purposes might, by too rigid a construction of it, be de a handle for oppression. There was no room to say, that e canvass came into the possession of the defendant by any act er own. It was brought into family use in the lifetime of her band, and it continued so to the time of his death ; and by act law it came to her. Things of that kind had been frequently osed to public sale ; and though the act pointed out an ex- elient for the indemnity of the buyers, yet probably few buyers, ecially where small quantities had been purchased at one sale, used the caution suggested to them by the act. And if the endant's husband really bought the linen at a public sale, but lected to take a certificate, or did not preserve it, it would be trary to natural justice, after such a length of time, to punish for his neglect. He therefore thought the evidence given by defendant proper to be left to the jury ; and directed them, if, upon the whole evidence, they were of opinion, that the ndant came to the possession of the linen without any fraud isbehaviour on her part, they should acquit her ; and she was ordingly acquitted. *Anon. Fost. 439.*

a *R. v. Banks*, 1 *Esp.* 144., which was the case of an informa- upon stats. 9 & 10 *W. 3. c. 41.* and 17 *G. 2. c. 40. § 10.*, *Ld. yon C. J.* said, that though in prosecutions under these statutes as sufficient for the crown to prove the finding of the stores e king's mark in the defendant's possession, to call upon to account for that possession and the manner of his coming hem, so as to throw the *onus* upon the defendant of proving he had legally become possessed of them ; yet, that the de- ant had other means of shewing that he had lawfully become essed of them than by the production of the certificate from navy board : as for example, he might shew that he had bought a from another person who was in the practice of buying es at the navy sale ; and who, therefore, might fairly be pre- ed to have had the regular certificate, but who, when he sold to the defendant, could not, consistent with his own safety, with the certificate he had obtained of his having been the aser of the whole lot.

y stat. 39 & 40 *G. 3. c. 89. § 25.* it is enacted, that the com- ioners of the navy, ordnance, or victualling, may sell and dis- of marked stores, as before the making of the act, and that ons buying them of the commissioners may keep them without rring any penalty, upon producing a certificate under the

A defendant, against whom the possession of stores is proved, may discharge himself by other evidence than that of a navy board certificate.

39 & 40 *G. 3. c. 89.* Commissioners of the navy, &c. may sell marked stores

and the buyer be protected by a certificate.

hand and seal of three or more of the commissioners, that they bought the stores from them, or a certificate from such persons as shall appear to have bought the stores from the commissioners, that such stores were stores or part of stores bought of the commissioners. In these certificates the quantity of the stores are to be expressed, and the time when and where bought of the commissioners; and the commissioners, or any three of them, and also the persons selling the stores, are directed, from time to time, to give such certificate to the buyers desiring the same.

55 G. 3. c. 127. Recited acts of 9 & 10 W. 3. c. 41. 9 G. 1. c. 8. 17 G. 2. c. 40. and 39 & 40 G. 3. c. 89., so far as relate to naval stores, shall extend to, all public stores &c. and to all persons not authorised intermeddling therewith.

By 55 G. 3. c. 127. reciting the several statutes from 9 & 10 W. 3. c. 41. to 53 G. 3. c. 126. (which last-mentioned act, by reason of divers omissions and imperfections, is repealed), it is enacted, that from thenceforth "not only the said recited acts of 9 & 10 W. 3. but also the several acts of 9 G. 1. c. 8., 17 G. 2. c. 40., and 39 & 40 G. 3. c. 89., so far as the same severally relate to H. M.'s naval ordnance, and victualling stores therein respectively mentioned, and all the pains, penalties, forfeitures, regulations, restrictions, powers, provisions, clauses, matters, and things therein respectively contained, relating to H. M.'s naval, ordnance, and victualling stores therein respectively mentioned, shall extend and be construed to extend to *all public stores whatsoever* under the care, superintendence, or controul of any officer or persons in the service of H. M., his heirs or successors, or employed in any public department or office (marked as therein is specified), and to all and every person and persons not authorised by the proper officer or officers, person or persons, in H. M.'s service, in that behalf to do, using any such marks, or making any goods marked with such marks or any of them, and to all and every person and persons in whose custody, possession, or keeping any such public stores so marked as aforesaid shall be found, or who shall wilfully or knowingly receive, or have in his, her, or their custody, possession, or keeping, or who shall conceal any such public stores so marked as aforesaid, unless such person or persons shall, upon his, her, or their trial, produce a certificate under the hand or hands of the proper officer or officers, person or persons, in H. M.'s service authorised to grant the same, of such and the like nature as the certificate in the said recited acts of 9 & 10 W. 3. and 40 G. 3. is mentioned; and to all and every person and persons who shall wilfully and fraudulently destroy, beat out, take out, cut, or deface, obliterate, or erase, wholly or in part, any of the said marks, or cause, procure, employ, or direct any other person or persons so to do, for the purpose of concealing the property of H. M. &c. therein, as fully and effectually, to all intents and purposes, as if the same pains, penalties, &c. were here re-enacted.

56 Geo. 3. c. 80. Principal officers and commissioners of the navy at foreign stations may grant certificates of stores sold by them.

By the 56 G. 3. c. 80., it is enacted, "That from and after the passing of this act it shall and may be lawful to and for all and every, or any one of the principal officers and commissioners of H. M.'s navy, resident on any foreign station, to grant certificates under his or their respective hand or hands, for any such stores or goods which shall hereafter be sold by or by the order of any such principal officer or commissioner, at any such foreign station of such and the same, or the like tenor and effect; and that the same certificates so to be granted as aforesaid, shall be in all places of such and the same force and effect as certificates under the hands of three or more of the principal officers and com-

oners of the navy in *England* are of, for any such stores or goods sold by or by the order of the said commissioners in *England*."

By the Mutiny Act (4 *W. 4. c. 6. § 8.*) every paymaster, &c. or person employed in the ordnance or commissariat department, or in the care or distribution of money, &c. or stores, who shall embezzle or fraudulently misapply, &c. any money, provisions, &c. or other military stores, may be tried by a general court martial, who may adjudge him to be transported as a felon, for life, or for any term of years, or to suffer fine, imprisonment, &c.

An indictment, *Winchester, March 1801, cor. Le Blanc J. East's P. C. 767.*, charged that *Thomas Cole*, on the 28th *January 1801*, unlawfully, willingly, and knowingly did receive and have in his custody, possession, and keeping, certain naval stores of the king, being all marked with the broad arrow, he not being contractor, &c. against the statute, &c. The jury found the prisoner guilty; but said they did not find that he received the stores after the 28th *July 1800*, but only that he had them in his possession after that day. Judgment was thereupon respited to take the opinion of the judges, a majority of whom inclined to think, that the statute was to be construed in the disjunctive, and the word *or* (receive or have) not to be taken as *and*; but because of the disagreement of some, and that the case was not likely to recur again, the prisoner, on the finding of the jury, was recommended to mercy. It seemed, however, to be agreed that the case was not within stat. 9 & 10 *W. 3. c. 41.*, because the goods were not charged to have been found in the prisoner's possession.

By stat. 49 *G. 3. c. 122. § 17.*, all persons who shall trade or deal in buying and selling anchors, cables, sails, or old junk, old iron, or marine stores of any kind or description, shall have their names, with the words "dealer in marine stores," painted distinctly in letters of not less than six inches in length upon the front of all their storehouses, warehouses, and other deposits for such goods; on pain of forfeiting, on conviction by oath of one witness, or confession before any justice or magistrate of any jurisdiction where such storehouse, &c. shall be, a sum not exceeding 20*l.* nor less than 10*l.*, half to the informer, and half to the poor where the offence shall be committed. And such dealers or traders shall not cut up any cable or part of a cable, exceeding five fathoms in length, or uncant, untwine, or unlay the same into junk or paper stuff, without a permit from some neighbouring justice or magistrate; which permit shall not be granted unless upon affidavit that had been *bond fide* purchased and without fraud by such person, and without any knowledge or suspicion on his part that the same had been or were dishonestly come by; and in which affidavit shall be specified the particular quality and description of such cable, the name of the seller; and the affidavit shall be set forth at length on the permit, on pain of forfeiting for the first offence not exceeding 20*l.* nor less than 10*l.*; for every second or further offence exceeding 50*l.* nor less than 20*l.*, to be recovered before a justice, one half to the informer and the other half to the poor.

By § 18., all such dealers in marine stores shall keep a book, in which shall be regular entries of all such old marine stores bought or sold from time to time, containing an account when bought, and of the names and abodes of the sellers. And before any person obtaining such permit shall cut up the same, there shall be

4 *W. 4. c. 6.*
(Mutiny Act).
Embezzlement
of military
stores.
Trial by general court martial.
Cole's case.

Difference between receiving and having in possession.

49 *G. 3. c. 122.*
Dealers in marine stores shall have their names painted on their storehouses.

Penalty 20*l.*
See also stat. 1 & 2 *G. 4. c. 75. § 16.*
post, tit. Wreck.

Such dealers shall not cut up cables without a permit from a magistrate, to be granted on affidavit, &c.

Dealers shall keep an account of old stores bought by them. Shall advertise before cutting up of cordage.

49 G. 3. c. 122. published, one week at least before, an advertisement in some public newspaper printed nearest to the storehouse, &c. notifying that such party had obtained such permit for cutting up such cable, of such kind and quality, and specifying where the articles are deposited; whereupon all persons who may have just cause to suspect that such articles are the property of such person, and shall have verified such suspicion on oath before some justice or magistrate, near the said storehouse, &c., may by warrant thereupon granted require of such dealer the production and examination of such book of entries, and inspection of the cables described in the permit; and in case such dealer shall neglect or refuse to produce to such person such book, or to keep such book, or to permit such inspection or examination, or neglect so to publish one such advertisement as aforesaid, he shall forfeit for the first offence not more than 20*l.* nor less than 10*l.*, for every further offence, not exceeding 50*l.* nor less than 20*l.*, one half on conviction before any justice or magistrate residing near, as aforesaid, to go to the informer, and half to the poor where the offence shall be committed; and if the said penalties by this act imposed together with the charges incident to the conviction, be not immediately paid, they may be levied by warrant of distress and sale under hand and seal of such justice or magistrate; and if there be no sufficient distress found, the offender may be committed by such justice, &c. to gaol; in case of any first offence, for six calendar months, and in case of any second or further offence, for 12 calendar months, unless the penalty and charges shall be sooner paid.

Inspection of such accounts may be demanded by parties interested.

Penalties on dealers for neglect.

For the power of appeal, see *this statute*, § 21. *et seq.*

Subornation. See tit. Perjury.

Surety for the Peace.

Surety of the peace.

OUT of the *Latin* word *pax*, the Normans formed their peace, and we (out of that) our *peace*. *Lamb. 5.*

Surety of the peace is the acknowledging of a recognizance or bond to the king, taken by a competent judge of record, for keeping the peace. *Dalt. c. 116.*

Justices of the peace may take.

And this surety of the peace every justice of the peace may take and command by a twofold authority:—1. As a minister, commanded thereto by a higher authority; as when a writ of *ne cavet*, directed out of the chancery or K. B., is delivered to him: 2. As a judge, and by virtue of his office, derived from his commission. *Dalt. c. 116.*

Concerning which I will shew,

- I. *For what Cause Surety of the Peace shall be granted.*
- II. *At whose Request it shall be granted.*
- III. *Against whom it shall be granted.*
- IV. *In what Manner it shall be granted.*

[21 J. 1. c. 8.]

- V. *How the Peace-Warrant may be superseded.*
 VI. *How the Peace-Warrant shall be executed.*
 VII. *What ought to be the Form of a Recognizance of the Peace.*
 VIII. *How such Recognizance shall be certified.*
 IX. *How such Recognizance may be forfeited.*
 [3 H. 7. c. 1.]
 X. *How the Recognizance, being forfeited, shall be proceeded on.*
 XI. *How such Recognizance may be discharged.*

I. **For what Cause Surety of the Peace shall be granted.**

By the commission of the peace, justices of peace have power to come before them, or any one of them, all those who are of the king's people concerning their bodies, or the firing of their houses, have used threats, to find sufficient security for the peace, or their good behaviour towards the king and his people; if they shall refuse to find such security, to cause them to be committed to the king's prisons to be safely kept, until they shall find such security.

For what cause to be granted.

Upon which Mr. *Hawkins* observes, that it seemeth clear that where a person has just cause to fear that another will burn his house, or do him a corporal hurt, as by killing or beating him, or by procuring others to do him such mischief, he may demand the surety of the peace against such person, and that every person is bound to grant it, upon the party's giving satisfaction upon oath that he is actually under such fear, and that he has just cause to be so, by reason of the other's having threatened to beat him, or laid in wait for that purpose; and that the law doth not require it out of malice or for vexation. 1 *Haw.* 1. § 6.

Fear of corporal hurt, or burning his house.

Where the defendant was bound over by a magistrate to keep the peace, in consequence of words used and a letter written to the complainant, in which defendant spoke of there being a rod in the house, from which complainant must expect to receive a castigation, a motion was made to remove the recognizance and information for the purpose of discharging the recognizance or reducing the amount of it, on the ground that there was no threat of bodily injury, and that the language used was metaphorical only; but the court held that the magistrate having proceeded on a sufficient information on oath, and having exercised his judgment and discretion, the court could not interfere. *R. v. Tregarthen*, 5 B. 1. 678.

Magistrate is to exercise his discretion, and king's bench will not interfere where the information is regular.

It seems also the better opinion that he who is threatened to be imprisoned by another, has a right to demand the surety of the peace; for every unlawful imprisonment is an assault and wrong to a person of a man. And the objection that one wrongfully imprisoned may recover damages in an action, and therefore needs not the surety of the peace, is as strong in the case of battery as imprisonment; and yet there is no doubt, but that one threatened

Being threatened with imprisonment

to be beaten may demand the surety of the peace. 1 *Haw. c. 60. § 7.*

And although the fact from which the fear arises be pardoned, the court will receive it as a ground upon which to grant the security. *R. v. Mendez, 1 Str. 473.*

Aliter where demanded through malice or vexation.

But if the justice shall perceive that surety is demanded merely of malice, or for vexation only, without any just cause or fear, it seemeth he may safely deny it. *Dalt. c. 116.*

Also, if a man will require the peace, because he is *at variance* or in *suit* with his neighbour, it shall not be granted. *Dalt. c. 116.*

Fear of harm to his servants or cattle. Not sufficient ground.

Also Mr. *Lambard* says, he takes it to be somewhat clear that a justice may not by the commission award a precept of the peace in behalf of a man that will require it, because he feareth that he will do harm to his *servants or cattle.* *Lamb. 83.*

But special writ out of chancery.

And Mr. *Dalton* says, where a man is in fear that another will hurt his servants, or his cattle or other goods, the surety of the peace shall not be granted by the justice. But in this case *Escherbert* saith, the party may have a special writ out of the chancery directed to the sheriff, that he shall cause such person to find surety, that he shall do no hurt or damage to the other man in his body or to his servants or goods; and if he will not find surety, that then he shall arrest and detain him in prison until he shall find surety. *Dalt. c. 116.*

The reason why a man may not have sureties of the peace against another, for that he feareth he will do harm to his *servants* seemeth to be, because it should be the *servant's* fear in such case and not the *master's*; and the servant's own oath before the justice is necessary. And as to his *goods*, it seemeth clear that no sureties of the peace ought to be granted in that case; for the recognizance of the peace when taken is only that the party shall keep the peace towards the king and all his liege people.

Threatening a man's wife or child, sufficient, *semb.*

But Mr. *Dalton* says, that if a man shall threaten to hurt his *wife or child*, he thinks he may crave the peace at the justice's hands, by the words of the commission, and that the justice ought to grant it. *Dalt. c. 116.*

Must be a fear of present or future danger, not past.

Note also, the surety of the peace shall not be granted where there is a fear of some present or future danger, and not merely for a battery or trespass that is past, or for any breach of the peace that is past; for this surety of the peace is only for the security of such as are in fear: but the party wronged may press the offender by indictment; and the justice, if he see cause, may bind over the affrayer. *Dalt. c. 11.* That is, he may bind him over to answer unto the indictment.

II. At whose Request it shall be granted

May be demanded by any person.

As to this, Mr. *Hawkins* says, it seems to be agreed at this time that all persons whatsoever, under the king's protection, *beside the sane memory*, whether they be natural and good subjects, or *attainted of treason*, &c. have a right to demand surety of the peace. And it is certain a *wife* may demand it against her husband threatening to beat her outrageously, and that a husband may have it against his wife. 1 *Haw. c. 60. § 2. Crump.*

Wife against husband, and vice versa.

Upon which Mr. *Crompton* observeth, that if the wife is a

use cannot find sureties she shall be committed; and so, says he, man may be rid of a shrew. *Crompt.* 118.

And if the marriage be disputed, the court will order the recognizance to be worded so as not to admit the fact. And it is directed to be as follows: "*To keep the peace towards our sovereign lord the king, and all his liege people, and particularly towards Hannah Penn, who hath exhibited articles of the peace against him, the said James Bambridge, by the name of Hannah Bambridge, wife of him the said James, and that he shall not depart out of court without leave,*" &c. *R. v. Bambridge*, 2 Str. 1231.

And Mr. Dalton says, an infant under the age of 14 years may demand this surety, and it shall be granted to him. *Dalt. c.* 117. But as to a person of *non-sane memory*, Mr. Dalton says, this surety shall neither be granted against him nor to him upon his request; but yet if there shall be cause, the justice ought to provide for his safety. *Dalt. c.* 117. p. 271.

Infant under fourteen.

Alien, as to non-sane person.

III. Against whom it shall be granted.

There seems to be no doubt but that it ought, upon a just cause complaint, to be granted by any justice of the peace against a person whomsoever, under the degree of nobility, being of full memory, whether he be a magistrate or private person, and whether he be of full age, or under age. But infants and females ought to find security by their friends, and not to be bound themselves. And the safest way of proceeding against a peer, is complaint to the court of chancery or K. B. 1 *Haw. c.* 60. § 3. A peer or peeress cannot be bound over in any other place than courts of K. B. or chancery. 4 *Blac. Com.* 253.

A peeress may demand surety of the peace against her husband, in the cases of the Marquis of Carmarthen, *Fort.* 359.—Lord Hale, 2 Str. 1202. 13 *East*, 171.(n).—Earl of Stanjord, *Cas. temp. Edw.* 74.—Earl Ferrers, 1 *Burr.* 631. 703.—Lady Strathmore, 1 T. R. 696.—Lord Howard, 11 *Mod.* 109.

It is said, the fear of one cannot be the fear of another, and therefore every recognizance must be separate. *Pult.* 18. But in 23 G. 2., the court of K. B. allowed three women to file joint articles of the peace against three men. *R. v. Nettle*, &c. 1 *Haw. c.* 60. § 5. (n. 2.) 7th edit.

Against whom.

Infant, females coverts.

Peers to be bound only in K. B. or chancery.

Peeress against her husband.

Articles by three women.

IV. In what Manner it shall be granted.

It seemeth certain that, if the person to be bound be in the presence of the justice, he may be immediately committed, unless he have sureties; and from hence it follows *a fortiori*, that he may be commanded by word of mouth to find sureties, and committed in disobedience; but it is said that if he be absent, he cannot be committed without a warrant from some justice in order to find sureties, and that such warrant ought to be under seal, and to state the cause for which it is granted, and at whose suit, and that it may be directed to any indifferent person. 1 *Haw. c.* 60. § 9.

A justice cannot enjoin another to keep the peace under a writ. 3 *Com. Dig.* 370. Nor commit for not finding security; if the party has been required and refuse so to do. *Per*

Manner of granting sureties.

Warrant necessary if the party be absent.

Party cannot be committed unless he re-

fuse to find
sureties.

Pratt C.J., R. v. Wilks, E. 3 G. 9. 1 Haw. c. 60. note to § 9. 7th edit. Bac. Abr., Surety of Peace, F.

The court will not receive articles of the peace if the parties live at a distance in the country, unless they have previously made application to a justice in the neighbourhood. *R. v. Wale, 2 Burr. 780.* On an affidavit of the defendant, being 70 years of age, and unable to travel, a *mandamus* was granted to three justices in *Brecon* to take security on articles of the peace exhibited in the K. B. *R. v. Lewis, 2 Str. 835.* And where articles of the peace were exhibited, and it appeared that the facts charged were done at *Portsmouth*, the court ordered an indorsement to be made upon the attachment of the peace, authorising and directing any justice in that county to take the security there, specifying the particular sums wherein the principals and also their sureties should be bound. *Margaret Hutt's case, 2 Burr. 1039. 1 Blac. Rep. 233. S. C.*

Warrant to
bring up the
party.

The justice may make the warrant to bring the party before himself or some other justice, or he may make it to bring the party before himself only; for he that maketh the warrant for the case hath the best knowledge of the matter, and therefore he is the fittest to do justice in the case. *5 Rep. 59.*

21 J. 1. c. 8.
Process out of
the chancery or
K. B.

As to granting process of the peace or good behaviour out of the chancery or the K. B., it is enacted by stat. 21 J. 1. c. 8. that it shall not be granted but upon motion in open court, and declaration in writing, and upon oath to be exhibited by the party desiring such process, of the causes for which such process shall be granted; the motion and declaration to be mentioned on the back of the writ. And if it shall afterwards appear that the causes are untrue, the court may order costs to the party grieved, and commit the offender till paid.

Truth of the
articles not to
be controverted
by defendants.

The court will not permit the truth of the allegations in the articles to be controverted by the defendant, but will order security to be taken immediately, if no objections arise on the face of the articles. *Ld. Vane's case, 2 Str. 1202.*

Court may
grant a review
where they see
cause of sus-
picion.

Where *R. P.* exhibited articles of the peace against *Sir Thomas Allen* and others in K. B., and before the recognizances were entered, *R. P.* presented a petition reciting and explaining some of the articles, a rule *nisi* was then granted to review the articles and affidavits were made contradicting the facts stated in them. The court, on the whole, committed *R. P.* for perjury, and directed that the proceedings on the articles should stay. *R. v. Sir T. Allen and others. Bac. Abr., Surety of the Peace. S. C. 2 Burr. 806.*

In another case, where articles of the peace were exhibited against a married woman and three others, a rule was made for reviewing the articles, upon affidavits, which stated that the defendants did not know such a person as the articulant, and she suggested that it was a fresh plan of the woman's husband to oppress her; no cause being shewn, the articles were ordered to be taken off the file. *R. v. Bennett and others, Bac. Abr. ibid.*

Defendant not
allowed to con-
tradict the
articles.

In the case of *R. v. Doherty, 15 East, 171.*, articles of the peace had been exhibited against the defendant by his wife; process issued thereon to enforce appearance: when he appeared in court with his sureties, he tendered affidavits in contradiction of the facts sworn to in the articles, for the purpose of discharging them.

But Lord *Ellenborough* C. J. said, the court were satisfied they could not receive affidavits on the part of the defendant to contradict the truth of the articles exhibited against him, and prevent his giving surety.

In the above case, *Le Blanc* J. adverted to the case of *R. v. Bringlee*, *M. 7 G. 2. temp. Ld. Hardwicke*, in which it was refused the defendant to controvert the facts, but explanation was allowed of such parts of the articles as were ambiguous. *13 East, 74. notis.*

Formerly the articles must have been verified by the oath of the exhibitant, and an affirmation was not sufficient. *R. v. Green, Str. 527. Hilton v. Byron, 12 Mod. 243.*

But it is presumed that the rule is now different since *9 G. 4. 32.*, which allows Quakers and Moravians, when required to give evidence in any case whatsoever, criminal or civil, to make their solemn affirmation or declaration, which is to be of the same force and effect as an oath.

By *3 & 4 W. 4. c. 49.*, Quakers and Moravians are permitted to make an affirmation or declaration in all cases where an oath is required by law.

By *3 & 4 W. 4. c. 82.*, a similar provision is made with respect to Separatists. See tit. Perjury, p. 666, 667.

But may explain.

9 G. 4. c. 32.
Affirmation of
Quakers and
Moravians.

3 & 4 W. 4. c. 49.

3 & 4 W. 4. c. 82.

V. How the Peace-Warrant may be superseded.

It is said, that if one who fears that the surety of the peace will be demanded against him, find sureties before any justice of the peace county, either before or after a warrant is issued against him, he may have a *supersedeas* from such justice, which shall discharge him from arrest from any other justice at the suit of the peace party, for whose security he has given such surety. *1 Haw. 60. § 14.*

In which *supersedeas* it is not necessary to name either the sureties or the sums in which they are bound: but yet it is the better form to express them both. *Dalt. c. 118. p. 274.*

Also, it is said, that an appearance upon a recognizance for the peace may be superseded, by finding sureties in the chancery or B., and purchasing a writ testifying the same; but this practice having been often abused, it is enacted by stat. *21 J. 1. c. 8.* that writs of *supersedeas* shall be granted out of the chancery or B., but upon motion in open court, and on such sufficient sureties as shall appear on oath to the court, to be assessed in the assize book at *5*l.** lands, or *10*l.** in goods; and unless it shall also appear to the court, that the process of the peace or good behaviour is prosecuted against him, desiring such *supersedeas bond*, by some party grieved in that court out of which the *supersedeas* is desired to be awarded. *1 Haw. c. 60. § 14.*

Finding sureties before arrest.

Supersedeas.

Supersedeas in the chancery or K. B.
21 J. 1. c. 8.

VI. How the Peace-Warrant shall be executed.

It can be executed only by the persons to whom it is directed, some of them, unless it be directed to the sheriff, who may, either by parole or by precept in writing, authorise an officer sworn and known to serve it, but cannot empower any other person without a precept in writing. *1 Haw. c. 60. § 11.*

By whom to be executed.

Breaking open doors.

Where a person authorised to arrest another who is sheltered in a house is denied quietly to enter it in order to take him, it seems generally to be agreed that he may justify breaking open the doors (among other instances there stated) upon a *capias* from the K. B. or chancery, to compel a man to find sureties for the peace or good behaviour, or even upon a warrant from a justice of the peace for such purpose. 2 *Haw. c. 14. § 2*.

But no one can justify the breaking open another's doors to make an arrest, unless he first signify to those in the house the cause of his coming, and request them to give him admittance. 2 *Haw. c. 14. § 1*. See tit. *House*.

What justice to be carried before.

If the warrant specially direct that the party shall be brought before the justice who made it, the officer ought not to carry him before any other; but if the warrant be general, to bring him before any justice of such place, the officer has the election to bring him before what justice he pleaseth, and may carry him to prison for refusing to find surety before such justice. 1 *Haw. c. 60. § 13*.

Supersedes by a justice of peace, after surety taken.

And if the party be carried before another justice, and not before him who issued the warrant, such other justice must take the surety, and bind him by recognizance in all points as the form of the precept doth require; and thereupon such other justice having so taken surety of the peace may and ought, upon request to make his *supersedeas* to all officers, and to all other justices of the same county; and thereby the said party shall be discharged from finding other surety, and from any other arrest from the same cause: but by such *supersedeas*, the other justice cannot discharge the warrant of the first justice, until the party be brought indeed; nor give any other day to the party to appear. *De. c. 118. p. 274*.

Whether he may be carried to prison without any further warrant.

If the warrant be in the common form, directing the officer to cause the party complained of to come before some justice to find sufficient surety, and if he shall refuse so to do, to convey him immediately to prison, without expecting any further warrant, if he shall willingly do the same, the officer who serves it, before he makes any arrest, ought first to require the party to go with him, and find sureties according to the purport of the warrant; but upon refusal to do either, he may carry him to the gaol by force of the same warrant without more. 1 *Haw. c. 60. § 12. De. c. 118. p. 273*.

And yet the constable, or officer, may bring him, in that case before the justice; and if he refuse there to give sureties, he may commit him without further warrant or *mittimus*. 2 *Hale, 112*.

Not advisable to leave the proceeding to the judgment of the constable.

Nevertheless, notwithstanding these great authorities, it may not be convenient for the justices to leave so much to the constable's judgment, as to determine what shall or shall not be deemed a refusal to find such sureties; for that the constable is constituted a judge in such case by no law. And much less doth it seem advisable to require in the warrant, as is usual, that the constable shall carry the party to gaol, if he shall refuse to find sufficient sureties; it doth not appear how the constable can any way be deemed a competent judge of that; for it is certain that he cannot administer an oath to such sureties, or others, whereby to inform himself of such sufficiency.

And it is the best way, and now the usual practice, to direct the constable, in the first instance, to take the party before the

justice, who in case of refusal or neglect to find sureties commits to prison.

If the justice was deceived in the sufficiency of the sureties, he may afterwards compel the party to find and in other sufficient sureties, and may take a new recognizance the same. *Dalt. c. 119. p. 278.*

Insufficient sureties.

If the sureties die, the party principal shall not be compelled to find new sureties, *Dalt. c. 119.*, because their executors and administrators are liable.

Sureties dying.

But if a man that was bound to keep the peace hath broken bond, the justices ought of discretion to bind him anew, *mb. 78.*

Breaking of the bond.

But not until he be thereof convicted by due course of law; for before conviction he standeth indifferent whether he hath forfeited recognizance or not. *Cromp. 125.*

I. What ought to be the Form of a Recognizance for the Peace.

As to the point what ought to be the form of such a recognizance, if it be taken in pursuance of a writ of *supplicavit*, it may wholly governed by the direction of such writ: but if it be taken before a justice, upon a complaint below, it seems, that it may be regulated by the discretion of such justice, both as to the number and sufficiency of the sureties, and the largeness of the bond, and the continuance of the time for which the party shall be bound. And it hath been said that a recognizance to keep the peace as to any person, for a year, or for life, or without expressing any certain time (in which case it shall be intended for life), without fixing any time or place for the party's appearance, or without binding him to keep the peace against all the king's people in general, is good. *1 Haw. c. 60. § 15.* See the form, *post.*

On *supplicavit*.

On complaint to a justice.

However, it seems to be the safest way to bind the party to appear at the next sessions of the peace, and in the mean time to keep the peace as to the king and all his liege people, especially as to the party, according to the common form of precedents. *Haw. c. 60. § 16.*

Better way to bind to the next sessions.

However, where articles of the peace had been exhibited before a justice, and the defendant, being required to give security for two years, refused, and was in consequence committed by warrant for that period, unless he should in the mean time find sureties for two years, the defendant brought his action against the justice for false imprisonment; after verdict for plaintiff, the question of the legality of the warrant came before *B. R.* on a special case; and, after time taken to consider, the court held, on a review of all the authorities, that it was competent for the justice to require sureties for such specific time, and that, though even it might be the safer and better course to take the recognizance to the next sessions only, still that it was not imperative; and it was said that the stat. 3 H. 7., requiring the recognizance to be certified to the next sessions, was a cumulative provision only, and did not limit the time for which the recognizance was to be taken; and judgment was given for the defendant. *Willes v. Bridger, 2 B. & A. 278.*

It is not imperative on the justice to take recognizance to the next sessions only.

But if a recognizance to appear at the sessions be taken, and an

Where party is bound to ap-

pear at the sessions, fresh articles of the peace must then be exhibited.

order of court for finding sureties applied for, articles of the peace must be exhibited. The practice referred to in a former edition of this work, if any such still prevail, of calling on the party at the sessions at which he is bound to appear to find sureties to the following sessions, *and so on, from sessions to sessions, without any fresh complaint*, is conceived to be incorrect. In *R. v. Bowet, E. 27 G. 3., B. R., 1 T. R. 696.*, where *Lady Strathmore* had exhibited articles of the peace against the defendant (her husband), the court of K. B. ordered him to give security for 14 years, (it being a case of great outrage, and articles of the peace having been once before exhibited against him on a different complaint; himself in 10,000*l.* and two sureties in 5000*l.* each. The defendant afterwards applied to the court to reduce the time to one year instead of fourteen, and also to diminish the sum; and in the course of the argument in support of the rule, the defendant's counsel suggested that the court might take bail for one year at first, and afterwards renew that from year to year, if they should see occasion, without any fresh facts being exhibited against him. But though the court, on the particular circumstances of the case, ordered the time to be reduced to two years, because an information then depending for the outrage complained of would be disposed of within that time, when the court might deal with the defendant as they thought proper, in the event of his being convicted, Mr. J. *Ashurst*, in answer to the suggestion at the bar, that new bail might be required of the defendant at the end of the first year, on the original complaint, said, "I very much doubt whether we have such a power. It has been admitted that there never was any instance of the kind; and I confess I should be very loath to establish such a precedent."

VIII. How such Recognizance shall be certified.

How to be certified.

If it be taken by force of a writ of *supplicavit*, it needs not be certified till the justice receive a writ of *certiorari* to that purpose. But if it be taken upon a complaint below, it must be certified, sent, or brought to the next sessions, by force of stat. 3 H. 7. c. 1. that the party so bound may be called. 1 Haw. c. 60. § 18.

IX. How such Recognizance may be forfeited.

What is deemed no forfeiture.

There are divers things which may be done against the peace and divers offences for which an indictment against the peace may lie, and yet the committing or doing such offence or act shall be no forfeiture of the recognizance for the peace; for that act that shall cause a forfeiture of such recognizance must be done or intended unto the *person*, as is aforesaid, or in terror of the *person*. Therefore, to enter into lands, where he ought to bring his actions or to disseise another of his lands; or to enter into lands or tenements with force, being without offer of violence to any *man*; *person*, and without public terror; or to do a trespass in another *man's* corn or grass; or to take away another *man's* goods wrongfully, so it be not from his *person*; or to steal another *man's* horse, or other goods feloniously, being not from his *person*; but these, and the like, are breaches of the peace, and yet these are

make no breach of this recognizance, nor breach of the peace within the meaning of the commission of the peace. *Dalt. c. 121.*

But the recognizance is forfeited, if the party make default of appearance, and the same default shall be recorded. *3 H. 7. c. 1.* What shall be a forfeiture.

However, if the party have any excuse for his not appearing, it seems that the sessions are not bound peremptorily to record his default, but may equitably consider of the reasonableness of such excuse. *1 Haw. c. 60. § 18.*

And Mr. *Dalton* says, in case of the sickness of the party, so that he cannot appear, he has known that the justices, upon due proof thereof, have forborne to certify or record such forfeiture or default; and that they have taken sureties for the peace of some friends of his, present in court, until the next sessions; for that the principal intent of the recognizance was but the preservation of the peace. But he queries how this is warrantable by their oath. *Dalt. c. 120. p. 278.* Case of sickness.

Also, there is no doubt but that it may be forfeited by any actual violence to the person of another, whether it be done by the party himself, or by others through his procurement; as manslaughter, rape, robbery, unlawful imprisonment, and the like. *1 Haw. c. 60. § 20.* Actual violence.

Also, it hath been holden, that it may be forfeited by any reason against the king's person, and also by any unlawful assembly *in terrorem populi*, and even by words directly tending to a breach of the peace, as by challenging one to fight, or in his presence threatening to beat him. *1 Haw. c. 60. § 21.* Acts or words tending to breach of the peace.

Otherwise it is if the party be absent; and yet if the party so bound shall threaten to kill or beat a person who is absent, and after shall lie in wait for him to kill or beat him, this is a forfeiture of the recognizance. *Dalt. c. 121. p. 280.*

However, it seems that it shall not be forfeited by bare words of heat and choler, as calling a man a knave, teller of lies, rascal, or drunkard: for though such words may provoke a choleric man to break the peace, yet they do not directly challenge him to it, nor does it appear that the speaker designed to carry his resentment any farther: and it hath been said, that even a recognizance for the good behaviour shall not be forfeited for such words; from whence it follows, *a fortiori*, that a recognizance for the peace shall not. *Haw. c. 60. § 22.* Bare words of anger not sufficient.

Also, there are some actual assaults on the person of another, which do not amount to a forfeiture of such recognizance; as if an officer, having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him; or a parent in a reasonable manner chastise his child; or a master his servant, being actually in his service at the time; or a schoolmaster his scholar; or a gaoler his prisoner; or even a husband his wife, as some say; or if one confine a friend who is mad, and bind and beat him, in such a manner as is proper in such circumstances; or if a man force a sword from one who offers to kill another therewith; or if a man gently lay his hands upon another, and thereby stay him from inciting a dog against a third person; or if a man beat another (without wounding him, or throwing at him a dangerous weapon), who wrongfully endeavours with violence to dispossess him of his lands or goods, or the goods of another delivered to him to be kept, and will not desist upon his laying his

hands gently on him, and disturbing him ; or if a man beat, or (as some say) wound or maim one who makes an assault upon his person, or that of his wife, parent, child, or master, especially if it appear that he did all he could to avoid fighting before he gave the wound ; or if a man fight with or beat one who attempts to kill any stranger ; or if a man even threaten to kill one who puts him in fear of death, in such a place where he cannot safely fly from him ; or if one imprison those whom he sees fighting till the heat is over. 1 *Haw. c. 60. § 23, 24.*

X. How the Recognizance being forfeited shall be proceeded on.

On breach, recognizance to be removed into courts at Westminster.

It is said that the sessions cannot in any case proceed against a party for a forfeiture of his recognizance, either in respect of his not appearing, or breaking the peace ; but that the recognizance itself, with the record of default of appearance, ought to be removed into some of the courts at Westminster, who shall proceed by *scire facias* upon such recognizance. 1 *Haw. c. 60. § 18.*

XI. How such Recognizance may be discharged.

Discharged on appearance.

He who is bound to the peace, and to appear at a certain day, must appear at that day and record his appearance, although he who craved the peace cometh not to desire that it may be continued ; otherwise the recognizance cannot be discharged. *Dalt. c. 120. p. 278.*

If the recognizance be made to keep the peace generally, without any time or day limited, it shall be construed to be during the party's life ; and this the justice may do upon reasonable cause : but if such surety be so taken during the offender's life, neither the king, nor the justice, nor the party, can release or discharge it : and therefore the justice must be well advised, how he granteth such surety. *Dalt. c. 119. p. 276.*

By the death of the king or party bound.

But it seems to be agreed, that it may be discharged by the death or demise of the king in whose reign it was taken, or of the principal party who was bound thereby, if it were not forfeited before. 1 *Haw. c. 60. § 17.*

Or the release of the party complaining, &c.

Also it hath been holden, that it may be discharged by the release of the party at whose complaint it was taken, being certified together with it ; but this may justly be questioned, because the recognizance is not to the subject, but to the king, and consequently cannot be discharged by the subject, who is not a party to it ; however, such a release will be a good inducement to the court to which such a recognizance shall be certified, to discharge it. And so will the non-appearance of the party at whose complaint it was taken, in order to pray the continuance of it ; and yet it is said that the sessions in that case may in their discretion refuse to discharge it. However, it is certain that such a recognizance cannot be pardoned or released by the king before it is broken, because the subject has a kind of interest in it. And it is said that the sureties are not discharged by their death, but that

their executors continue to be bound as their testators were.
Haw. c. 60. § 17.

And if a man be bound to keep the peace towards the king and all his people, but not towards any person certain, and to appear at such a sessions, the court at that sessions may make proclamation, that if any man can shew cause why the peace granted against such a one shall be continued, he shall speak; and if no person cometh to demand the peace against him, or to shew cause why it should be continued, then the court may discharge him. But if a man be bound as aforesaid, and *especially to keep the peace towards a certain person*, there, though such person cometh not to desire the peace may be continued, yet the court by their discretion may bind him over till the next sessions, and that may be to keep the peace against that person only, if they shall think good; or it may be that the person who first craved the peace is sick, or otherwise letted, so as he cannot come to that sessions to demand the continuance of the peace further. *Dalt. c. 120. p. 278.*

May be discharged or continued by the sessions.

Likewise, if the party be imprisoned for default of sureties, and after he that demandeth the peace against him happen to die, it seemeth the justice may make his *liberate* or warrant for the delivery of such prisoner; for after such death, there seemeth no cause to continue the other in prison. Also, any justice may, upon the offer of such prisoner, take surety of him for the peace, and may thereupon deliver him. *Dalt. c. 118. p. 274.*

He that demandeth sureties dying.

Surety for the Good Behaviour.

A MAN may be compelled to find sureties both for the good behaviour and for the peace; and yet the good behaviour includeth the peace: and he that is bound to the good behaviour is herein also bound to the peace. *Dalt. c. 122. p. 286.*

Good behaviour includeth the peace.

This surety for the good behaviour being of near affinity to surety for the peace, both as to the manner in which it is to be taken, superseded, and discharged, it seemeth not to require a particular consideration, save only as to these two points:

I. For what Misbehaviour it is to be required.

[94 Edw. 3. c. 1.]

II. For what it shall be forfeited.

I. For what Misbehaviour it is to be required.

It doth not appear that the conservators of the peace at common law had any power as touching the *good behaviour*, further than as it had a relation to the *peace*; and not as it is distinguished from it. And it seemeth that the power which the justices of the peace do exercise at this day, in relation thereto, is wholly depeud upon the commission of the peace, and the statute of 34 Ed. 3. c. 1. (Except in some special instances, wherein the power of binding to the good behaviour is given to them by particular statutes, which pertain not to this general title.)

Power given to justices by the commission.

The words in the commission are these:—"We have assigned you jointly and severally, and every one of you, our justices, to keep our peace, and to cause to come before you, or any one of you, all those who to any one or more of our people concerning their bodies, or the firing their houses, have used threats; to find sufficient security for the peace or their good behaviour towards us and our people; and if they shall refuse to find such security, then them in our prisons, until they shall find such security, to cause to be safely kept."

34 Ed. 3. c. 1.
Power given by statute.

Stat. 34 Ed. 3. c. 1. as to this matter runs thus:—"In every county shall be assigned for the keeping of the peace one lord, and with him three or four of the most worthy in the county, with some learned in the law; and they shall have power to restrain the offenders, rioters, and all other barators, and to pursue, arrest, take, and chastise them, according to their trespass or offence; and to cause them to be imprisoned and duly punished according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretions and good advisement; and also to inform them, and to inquire of all those that have been pillors and robbers in the parts beyond the sea, and be now come again, and go wandering, and will not labour as they were wont in times past; and to take and arrest all those that they may find, by indictment, or by suspicion, and to put them in prison; and to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the king and his people, and the other duty to punish, to the intent that the people be not by such rioters or rebels troubled nor endangered, nor the peace blemished, nor merchants nor others passing by the highways of the realm disturbed, nor put in the peril which may happen of such offenders."

This statute seems to have had in view chiefly the disorders to which the country was then liable, from great numbers of disbanded soldiers, who having served abroad in the wars of that victorious king, were grown strangers to industry, and were rather inclined to live upon rapine and spoil. *Barl. 524.*

But whatever the natural and obvious sense of it may be when compared with the history and circumstances of those times, it is certain that it hath been carried much farther by construction, and the purport of it hath been extended by degrees, until at length there is scarcely any other statute which hath received such largeness of interpretation.

And that I may proceed with clearness in a matter so essential to the office of a justice of the peace, I will set down the seven expositions which have been given of this statute from time to time by learned men, and then raise such observations thereupon as the subject will naturally suggest.

Surety of good behaviour relates to matters concerning the peace.

The first unfolding of the sense of this statute which has occurred was in the case of *Sir Richard Croftes* and *Sir Richard Corles*, in the second year of the reign of king *Hen. 7.*, wherein it was resolved by all the judges for that purpose assembled, that he who is bound to the good behaviour ought not to do any thing which shall be cause of breach of the peace, or to put the people in fear, dread, or trouble; and so shall be intended of all things which concern the peace: but not in misdoing of other things which touch not the peace. Yet a diversity was observed between a

breach of the peace and a breach of the good behaviour ; for the peace is not broken without an affray or battery, but the good behaviour may be forfeited by the number of people a man has, and by their harness or weapons, and the like, although they break not the peace. 2 H. 7. 2. *Crompt.* 121.

The second instance, and upon which much stress hath been laid, was in the 13th year of the same king. In trespass of assault, battery, and imprisonment at *D.*, the defendant saith that one *Alice B.* had a house in the same town, and kept there suspicious people, to wit, of common bawdry, and that the plaintiff often-times resorted to the same house suspiciously with women of bad fame and name, whereby the constable of the same town required the defendant to aid him to arrest the plaintiff, to find surety of his good behaviour ; whereby the defendant came with the said constable at the hour of twelve in the night, and him found suspiciously in the same place ; whereupon he took him and put him in ward ; and it was holden by all the justices to be a good justification ; for they said, that it is lawful for every constable to take suspected persons, which wake in the night and sleep in the day, or that keep suspicious company. 13 H. 7. 10. *Crompt.* 126.

In the next place, Sir *Anthony Fitzherbert*, who lived in the reign of king *Hen. 8.*, saith, that it seemeth that one justice may, by the commission, issue a warrant against a person to find surety of the good behaviour, by his discretion, as well as two justices may ; and the words of the statute of the 34 *Ed. 3.* are to the same effect ; otherwise, he says, damage may happen to some of the king's subjects, if the party be not attached, before that two justices have made the precept ; yet (he says) the common usage is, to make such precept of the good behaviour in the name of two justices, and it is good to observe this direction. *Fitz. 7. Crom.* 22.

In the next place, it is proper to take notice of a case adjudged in the court of K. B. in the 30th of queen *Eliz.*, reported by *Ad. Coke*, 4 *Inst.* 181., which was thus : at the sessions at *Bridge-water*, in the county of *Somerset*, one *William King* with sureties was bound by recognizance to appear at the next general sessions of the peace in the same county, and in the mean time to be of the good behaviour towards the queen and all her people. And after, at the next sessions, *William King* appeared, and was indicted for slanderous words spoken since his binding, to wit, for saying at one time to *Edward Kyrton*, esquire, *Thou art a peller, thou art a liar, and hast told my lord lies.* And he was further indicted, that since the said recognizance, *the close of one John Nick with force and arms he broke and entered, and the cattle of the said John depasturing in the said close unlawfully vexed and chased.* And afterwards, at another time, he said to the said *Kyrton*, *Thou art a drunken knave.* Which indictment was removed into the K. B. And hereupon it was debated divers times, both at the bar and the bench, whether, admitting all that is contained in the indictment to be true, any thing therein was, in judgment of law, a breach of the said recognizance. And it was resolved, that neither any of the words, nor the trespass, were any breach of the good behaviour, for that none of them did extend immediately to the breach of the peace ; for though the said words, *Thou art a liar, Thou art a drunken knave*, are provocations,

May be required of persons haunting bad houses.

May be taken by one justice only.

Abusive words and common trespass held not to be a breach of recognizance of good behaviour.

yet they tend not immediately to the breach of the peace; as if *William King* had challenged *Kyrton* to fight with him, or had threatened to beat or wound him, or the like; these tend immediately to the breach of the peace, and are therefore breaches of the recognizance of the good behaviour. And this diversity (*Ld. Coke* says) was justly collected upon the coherence and context of the statute of the 34 *Ed. 3.*, whereby justices are assigned for keeping of the peace, and to restrain the offenders, rioters, and all other barrators, and to chastise them according to their trespass and offence; and to inquire of pillors and robbers in the parts beyond the seas, and be now come again, and go wandering, and will not labour. And thus much for the punishment of offences against the peace, after they be done. Then followeth an express authority given to justices, for prevention of such offences before they be done, namely, *and take of all them that be not of good fame, (that is, that be defamed and justly suspected that they intend to break the peace,) where they shall be found, sufficient surety and mainprise of their good behaviour towards the king and his people, (which must concern the king's peace, as is also proved by the words subsequent,) to the intent that the people be not by such rioters troubled or endamaged, nor the peace blemished, nor merchants nor others passing by the highways disturbed, nor put in the peril that may happen of such offenders.* And as for the trespass, although every wrongful trespass is by force and arms, and against the peace, yet these are not taken to be such as shall make a breach of the good behaviour.

Lambard.

After this, *Mr. Lambard*, who wrote towards the beginning of the reign of king *James* the first, saith thus:—Surety of the good abearing is of great affinity with that of the peace, as being provided for preservation of the peace, as that other is; for in the commission of the peace they are both conveyed under one tract of speech, against such as threaten to hurt men's bodies, or enter their houses; which things (he says) are now commonly prevented by surety of the peace only. *Lamb. 115.*

Of whom
surety may be
required.

And in the 2 *H. 7. 2.* (above recited) the surety of the good abearing is set forth to rest in this point chiefly, that a man do nothing that may be cause of a breach of the peace; and that doth not consist in the observation of things that concern not the peace; and that it should differ from surety of the peace in this, that where the peace is not broken without an affray, or battery, or such like, the surety may be broken by the number of a man's company, or by his or their weapons or harness.

And herewithal (he says) do also agree certain precedents: the *K. B.*

But all this notwithstanding, he thinks that a man may reasonably affirm, that the surety of good abearing should not be restrained to so narrow bounds.

In proof of which, he proceeds to comment on the above-mentioned statute of the 34 *Ed. 3.*, enabling the keepers of the peace to take of them all that be not of good fame, where they shall be found, sufficient surety and mainprise of their good abearing towards the king and his people; so that if a man be defamed, he may, by virtue hereof, be bound to his good behaviour, at the discretion of the justices. Now the doubt resteth in this; to understand concerning what matters this defamation must be: and this (he thinks)

may be partly gathered out of the said statute; for after it hath first given power to the wardens of the peace to arrest and chase offenders, (that is to say, against the peace, rioters and barabors,) then it willet them to *inquire of such as, having been robbers beyond the sea, were come over hither, and would not labour as they were wont*; and, lastly, it authoriseth them to *take surety of the good behaviour of such as be defamed*, namely, for any of those former offences; for so it standeth well together that they should not punish such as have already so offended, and shall also provide that others shall not likewise offend. *Lamb. 117.*

But, he says, the further this bond of the good abearing doth extend, the more regard there ought to be taken in the awarding of it; and therefore (says he), although the justices have power to grant it, either by their own discretion or upon the complaint of others, even as they may that of the peace, yet I wish rather that they do not command it but only upon sufficient cause seen to themselves, or upon the complaint of other very honest and credible persons.

On sufficient cause.

And then, being about to set forth the form of a warrant, and of recognizance for the good behaviour, he says,—And here, forasmuch as one justice alone, and out of sessions, may both by the first clause of the commission, and also by the opinion of *Fitzherbert*, grant this surety of the good abearing (although the common practice be, that two such justices do join in that doing, hereof also *Fitzherbert* hath very good liking), I will not stick to set forth the common forms, as well of the precept as of the recognizance for the same, wherein if I shall use the names of two justices, you must take that to be done according to the common fashion, and not of any necessity in law. For, as I would more gladly use the assistance of a fellow-justice in this behalf, if I may conveniently have it, so, if that may not be gotten, I would not greatly fear, when good cause shall require, to undertake the thing myself alone. *Lamb. 120.*

One justice may take the surety though usually taken by two.

And besides this, he says, you may see admitted by the opinion of the court, 13 *H. 7.*, that if a man in the night season haunt a house that is suspected for bawdry, or use suspicious company, then may the constable arrest him, to find surety for his good bearing; for bawdry is not merely a spiritual offence, but mixed, and sounding somewhat against the peace of the land.

For immoral practices.

And therefore, says he, it shall not be amiss at this day, in my slender opinion, to grant surety of the good abearing against him that is suspected to have begotten a bastard child, to the end that he may be forthcoming when it shall be born; for otherwise there will be no putative father found, when the justices shall, after the birth, come to take order for his punishment. *Lamb. 119.*

In the next place, Mr. *Pulton*, who lived about the same time with Mr. *Lambard*, writeth thus:—The surety of the good abearing is ordained for the preservation of the peace, and it doth differ in nothing from that of the peace, but that there is more difficulty in the performance of it, and the party bound may sooner slide into the peril and danger of it. The surety of good bearing is most commonly granted in open sessions, or by two or three justices; or, upon a *supplicavit*, and great cause shewn and proved, it is granted in the chancery or K. B. And though one justice alone may grant it if he will, yet it is seldom done so,

Pulton.

Nature of the
surety.

unless it be to prevent some great, sudden, and imminent enormity or danger. The surety of the peace is most times taken at the request of one, for the preservation of the peace, chiefly against one. But the surety for the good abearing is oftentimes granted at the suit of divers, and those must be men of credit, and to provide for the safety of many; for the effect and purport thereof is that the party bound shall demean himself well in his port, behaviour, and company, and do nothing that may be the cause of breach of the peace, or in putting the people in fear or trouble; and it is chiefly granted against common barrators, common rioters, common quarrellers, common peace-breakers, and persons greatly defamed for resorting to houses suspected to maintain incontinency or adultery, and against those that be generally feared to be robbers or spoilers of the king's people, or which do damage, disturb, trouble, or put in peril passengers by the way. *Pult.* 18.

Dalton.
S. P.

Afterwards, Mr. *Dalton*, who wrote towards the latter end of the reign of king *James* the first, says, The surety of good behaviour is of great affinity with that of the peace, and is provided chiefly for the preservation of the peace; and is most commonly granted either in the open sessions, or by two or three justices out of sessions. Yet by the words of the commission, as also by the common opinion of the learned, one justice alone out of sessions may grant this surety of the good behaviour. But this is not usual, unless it be to prevent some great and sudden danger, especially against a man that is of any good estate, carriage, or report. And it shall be good discretion in the justices that they do not grant it, but either upon sufficient cause seen to themselves, or upon the suit or complaint of others, and the same very honest and credible persons. *Dalt. c.* 123. p. 287.

Hawkins.

In the next place, Mr. *Hawkins*, who wrote in the reign of king *George* the first, saith thus:—There seem to have been some opinions that the statute, speaking of those that be not of good fame, means only such as are defamed and justly suspected, that they intend to break the peace, and that it does not any way extend to those who are guilty of other misbehaviours not relating to the peace. But this seems much too narrow a construction: since the above-mentioned expression of persons of evil fame, is common understanding, as properly includes persons of scandalous behaviour in other respects, as those who by their quarrelsome behaviour give just suspicion of their readiness to break the peace, and accordingly it seems always to have been the better opinion, that a man may be bound to his good behaviour for many causes of scandal, which give him a bad fame, as being contrary to good manners only; as for haunting bawdy houses with women of bad fame; or for keeping bad women in his own house; or for speaking words of contempt of an inferior magistrate, as a justice of the peace, or mayor, though he be not then in the actual execution of his office; or of an inferior officer of justice, as a constable, and such like, being in the actual execution of his office. *1 Haz. c.* 61. § 2.

May be re-
quired of those
who lead ill
lives.

Who revile
justices, &c.

Aliter, for mere
words of abuse.

However, it seems the better opinion, that no one ought to be bound to the good behaviour for any rash, quarrelsome, or unmannerly words, unless they either directly tend to a breach of the peace, or to scandalise the government, by abusing those who

are entrusted by it with the administration of justice, or to deter an officer from doing his duty; and therefore it seems, that he who rarely calls another rogue or rascal, or teller of lies, or drunkard, ought not for such cause to be bound to the good behaviour. *Haw. c. 61. § 3.*

However, says he, I cannot find any certain precise rules for the direction of the magistrate in this respect; and therefore am inclined to think, that he has a discretionary power to take such surety of all those whom he shall have just cause to suspect to be dangerous, quarrelsome, or scandalous; as of those who sleep in the day, and go abroad in the night; and of such as keep suspicious company; and of such as are generally suspected to be robbers, and the like; and of eves-droppers, and common drunkards; and all other persons, whose misbehaviour may reasonably be intended to bring them within the meaning of the statute, as persons of evil fame, who being described by an expression of so great latitude, seem in a great measure to be left to the judgment of the magistrate. But if he commit one or want of sureties, he must shew the cause with convenient certainty. 1 *Haw. c. 61. § 4.*

And thus the sense of the statute hath been extended, not only to offences immediately relating to the peace, but to divers misbehaviours not directly tending to a breach of the peace; inso-much as it is become difficult to define how far it shall extend, and where it shall stop.

Mr. Dalton, in order to determine the same with some kind of certainty, hath (notwithstanding his opinion, as above mentioned) asserted a number of instances, wherein sureties of the good behaviour may be granted; and they are these that follow:—

- (1) Against rioters.
- (2) Barators.
- (3) Common quarrellers and common breakers of the peace.
- (4) Such as lie in wait to rob, or shall be suspected to lie in wait to rob, or shall assault, or attempt to rob another, or shall put passengers in fear or peril, or shall be generally suspected to be robbers by the highway.
- (5) Such as are like to commit murder, homicide, or other grievances to any of the king's subjects in their bodies.
- (6) Such as shall practise to poison another; one instance of which may be, the poisoning of their food. Thus *Mr. Dalton* granted the good behaviour against one who had bought ratsbane, and mingled it with corn, and then cast it among his neighbour's owls, whereby most of them died.
- (7) Such as in the presence and hearing of the justice shall misbehave themselves in some outrageous manner of force or fraud.
- (8) Such as are greatly defamed for resorting to houses suspected to maintain adultery or incontinency.
- (9) Maintainers of houses commonly suspected to be houses of common bawdry.
- (10) Common whoremongers and common whores; for bawdry is an offence temporal as well as spiritual, and is against the peace of the land.
- (11) Night-walkers and eves-droppers.
- (12) Suspected persons, who live idly, and yet fare well, or are

Persons dangerous, quarrelsome, or scandalous.

Dalton.
Against whom sureties of the good behaviour may be granted.

well apparelled, having nothing whereon to live; unless upon examination they shall give a good account of such their living.

(13) Common gamesters, especially if they have not whereon to live.

(14) Such as raise hue and cry without cause.

(15) Libellers.

(16) Putative father of a bastard child.

(17) Such as persuade or procure the putative father to run away, or the mother to be conveyed away, whereby she leaveth her child to the charge of the town.

(18) Such as abuse a justice's warrant, or shall abuse him or the constable in executing their offices. Nay, it seemeth, he says, that he who shall use words of contempt, or contrary to good manners, against a justice of the peace, though it be not at such a time as he is executing his office, yet he shall be bound to his good behaviour.

(19) Such as charge another before a justice with felony, riot, or forcible entry, and yet will not prosecute or give evidence.

(20) In general, whatsoever act or thing is of itself a misbehaviour, is cause sufficient to bind such an offender to the good behaviour. *Dalt. c. 124.*

To which others have added other instances; as,

(21) Forcible entry. 1 *Haw. c. 64. § 8.*

(22) Mr. *Hawkins* says, that he hath heard it agreed in the court of K. B., that a writing full of obscene ribaldry, without any kind of reflection upon any one, is not punishable at all by any prosecution at common law; yet it seems, he says, that the author may be bound to his good behaviour, as a scandalous person of evil fame. 1 *Haw. c. 73. § 9.*

(23) A man did beat a woman in *Westminster-hall*, and he was bound to the good behaviour; and so, says Mr. *Crompton*, he may be bound to the peace and good behaviour, where he striketh a person in the presence of the justices in sessions. *Crompt. 124.*

(24) A man was bound to the good behaviour by the court of K. B., for assaulting and threatening a person so that he could not attend the court in suit there, without great cost. And so it seemeth that it may be done where one cometh to the session about a traverse to be tried there, or to prefer a bill of indictment if he be assaulted or threatened. *Crompt. 125.*

Observations
by Dr. Burn.

I have omitted to make any remarks in the progress of these authorities, being willing to exhibit them together in one view: I proceed now to take notice of such observations as do occur upon the whole.

Power of
one justice.

First, It appears from hence, that the universal practice of our justice binding to the good behaviour is but of a modern date; although the law for it is the same now that it was near 400 years ago; and that it was a long time doubted whether one justice alone could require sureties of the good behaviour. But here a distinction ought to be made between the power given by the commission of the peace and the power given by the above-mentioned statute: as to the commission, there seemeth to be no foundation for any doubt, but that thereby one justice alone may require such sureties; for the words are express, *We have assigned you, jointly and severally, and every one of you*: but then that extends only to two instances, namely, to the threatening of a person concerning

body, or the firing of his house. As to the statute, the doubt seems to have arisen upon this; in that, having appointed who shall be assigned for justices, it then directeth that *they shall have power to restrain offenders*; and it is holden, Mr. Lambard hath observed, that if no power be expressly given by any statute to any one justice alone, he cannot otherwise compel the observation thereof, than by the help of his fellow-justices. And Mr. Hawkins, speaking hereof in the case of riots, says, that if one justice alone, proceeding upon this statute, shall arrest *an innocent person* as a rioter, it seemeth that he is liable to an action of trespass, and that the party arrested may justify the rescuing of himself; because no one single justice is by this statute made a judge of the said offence: yet, nevertheless, he says, by a favourable construction which this statute hath received for the advancement of justice, it hath been resolved, that any one justice upon this statute, *if he find the persons riotously assembled*, may, without staying for his companions, arrest the offenders, and bind them to their good behaviour.

Secondly, It seemeth, from what hath been rehearsed, that the words, *not of good fame*, were generally understood for a long time to refer to such offences only as have a relation to the peace, and not to other things which concern not the peace.

Extension of cases in which surety may be required.

Thirdly, That one great inlet to the larger and at length almost unlimited interpretation of the words, was the case above mentioned, 13 H. 7., wherein it was adjudged to be lawful to arrest a man for the good behaviour, for frequenting a suspected bawdy house, with women of bad fame. And this is the reason which Mr. Dalton gives for many of his instances above specified; namely, that they are more properly against the peace, than this one case of avourtry. *Dalt. c. 124. p. 289.*

Fourthly, That when once the gap was opened for the admission of other offences not immediately relating to the peace, they were in and multiplied. Thus in the case of bastardy, having some affinity with the other, of frequenting bawdy houses, Mr. Lambard thought that with equal reason the reputed father of a bastard child might be bound to the good behaviour; and in a few years after Mr. Dalton delivers it absolutely, that he may be so bound.

Fifthly, That, therefore, the natural and received sense of any statute ought not to be departed from without extreme necessity; nor that one concession will make way for another, and the latter will plead for the same right of admission as the former.

Sixthly, That, notwithstanding the aforesaid instances given by Mr. Dalton and others, it may not be safe in all cases to rely upon every one of them without distinction; not only because it is almost impossible for any two cases to be exactly alike in all their circumstances, but also because in fact divers of them at different times have been adjudged otherwise, and others have not prevailed without much difficulty and contradiction in the courts above, and perhaps were at length admitted rather from the convenience and reasonableness of the thing itself, and from an indulgence usually allowed to those gentlemen who serve their country without gain, and oftentimes with much trouble, than from any clear, positive, and express power given to them by the commission, or by the said statute.

Seventhly, That, notwithstanding all which hath been said, perhaps the case before recited, concerning the frequenting of a suspected bawdy house, will not support the weight which so many authors have laid upon it. For the question, whether a justice of the peace had cognizance of the offence by virtue of the commission of the peace, or of the statute of the 34 *Ed. 3.*, was no part of the dispute; for it was an arrest by the constable *ex officio*, as a conservator of the peace at common law, and without any warrant from a magistrate: and the question was not, whether the constable might require sureties for the good behaviour, as a thing different from sureties for the peace, but whether in that case he could arrest at all or not.

And if the authority of this case shall be abated, several of the above-mentioned instances will abate in proportion.

Eighthly, It is to be observed, that others of the above-said instances were established upon matters originally determined in the court of K. B., and Mr. *Crompton* himself refers to the authority and practice of that court in several instances. *Crompt. 190.* But it doth by no means follow, from what the justices of the court of K. B. may do, that the justices of the peace may do the like; for their authority is circumscribed and limited by their commission and the statute law.

Binding to
good behaviour
after a common
law conviction;
distinction.

Ninthly, That it will perhaps abate some other of the foregoing instances, if we attend to this consideration; that there is a great difference between what the justices in sessions may do, after a conviction by a jury, for an offence committed, and what a single justice out of the sessions may do, before an offence is committed, and to prevent the same from being committed; or what a single justice may do, upon a summary conviction before him, for an offence, as directed by some special act of parliament. The truth is, binding to the good behaviour was a discretionary judgment at the common law, given by a court of record for an offence at the suit of the king, after a common-law conviction by verdict of twelve men. Trial by his peers is the *Englishman's* birthright by the great charter, and cannot be taken away but by an authority equal to that which established it, that is, by act of parliament; and therefore, where an act gives a summary conviction before a justice of the peace, and inflicts a punishment upon such conviction, such statute must be pursued, both as to the conviction and punishment. And it seemeth incongruous, that a justice of the peace shall have power to bind a man to the good behaviour, for an offence which he himself hath no power to hear and determine; for that is, in effect, giving judgment, and awarding execution, when it doth not and cannot legally appear to him that the person is guilty.

Great caution
recommended.

Tenthly, That therefore upon the whole it may be proper to conclude, that the magistrate in this article of the good behaviour cannot exercise too much caution and good advisement; that in matters which the law hath left indefinite, it is better to fall short of than to exceed his commission and authority; that to bind a man to the good behaviour upon the statute for *evil fame* in general may not always be with safety: not only because upon an action brought it may be hard to prove such evil fame, but also because in fact it is not always true, for many a good man hath been evil spoken of; that although in some cases a justice of the peace may

ave a *discretionary* power (as Mr. *Hawkins* expresseth it), yet he must remember withal that it is a *legal* discretion, as Mr. *Barlow* terms it, in which in favour of liberty great tenderness is to be used; or, as Lord *Coke* hath defined it, discretion is a knowledge of understanding to discern between truth and falsehood, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to our wills and private affections; and such discretion ought to be limited and bounded with the rules of reason, law, and justice. *Rep.* 100. 10 *Rep.* 140.

Discretion defined.

II. For what it shall be forfeited.

This hath been handled in part as it fell in with the former section; and agreeably to the doctrine there laid down, Mr. *Dalt.* says, that he who is bound to the good behaviour ought to demean himself well in his carriage, and in his company, not doing any thing which shall be a cause of breach of the peace, or to put people in fear, dread, or trouble; and so shall be intended of things which concern the peace, but not in misdoing of other things which touch not the peace. *Dalt. c.* 122. p. 287.

Any act tending to breach of peace.

And Mr. *Hawkins* saith, it hath been laid down as a general rule, that whatever will be a good cause to bind a man to his good behaviour will forfeit a recognizance for it; but that this hath since been denied, and indeed seems by no means to be maintainable, because the statute, in ordering persons of evil fame to be bound in this manner, seems, in many places, chiefly to regard the prevention of that mischief which they may justly be suspected to be likely to do; and in that respect requires them to secure the public from that danger which may probably be apprehended from their future behaviour, whether any actual crime can be proved upon them or not; and it would be extremely hard in such cases to make persons forfeit their recognizances, who yet may justly be compellable to give one, as those who keep suspicious company, or those who spend much money idly, without using any visible means of getting it honestly, or those who lie under a general suspicion of being rogues, and the like. 1 *Haw.* c. 1. § 5.

Any actual misbehaviour which it was the intention of the recognizance to prevent.

However, it seems that such a recognizance shall not only be forfeited for such actual breaches of the peace for which a recognizance for the peace may be forfeited, but also for some others, for which such a recognizance cannot be forfeited; as for going armed with great numbers to the terror of the people, or speaking words tending to sedition; and also for all such actual misbehaviours which are intended to be prevented by such a recognizance, as not for barely giving cause of suspicion of what perhaps may ever actually happen. 1 *Haw. c.* 61. § 6.

A. A. Form of Information and Complaint to require Surety of the Peace or Good Behaviour.

County of _____ { The information and complaint of A. B. of —, in the said county of —, yeoman, taken upon oath before me, one of his majesty's justices of the peace in and for the said county, the _____ day of —, one thousand eight hundred and twenty —;

WHO says, that C. D. of —, in the said county, yeoman, did on the _____ day of — now last past, c. —, in the said county, threaten to, &c. [here state the precise threats and words used] and that from the above and other threats used by the said C. D. towards this complainant, he the complainant is afraid that the said C. D. will do him some bodily injury, and therefore prays that the said C. D. may be required to find sufficient sureties to keep the peace [or, be of good behaviour, as may be required, see post, p. 897.] towards him this complainant. And the said A. B. also says, that he doth not make this complaint against nor require such sureties from the said C. D. from any malice or ill will, but merely for the preservation of his person from injury.

Sworn before me,
G. C.

} A. B.

B. B. Form of Warrant on the above Complaint.

County of _____ } To the constable of —, in the said county.

WHEREAS A. B. of —, in the said county, yeoman, this day made oath before me, one of his majesty's justices of the peace in and for the said county, that C. D. of —, in the said county, yeoman, did, on the _____ day of — last, c. —, in the said county, threaten to, &c. [here pursue the words of the complaint]; and that from the above and other threats used by the said C. D. towards the said A. B., he the said A. B. is afraid that the said C. D. will do him some bodily injury, and therefore the said A. B. hath prayed that the said C. D. may be required to find sufficient sureties to keep the peace [or, be of good behaviour, as may be required] towards him the said A. B.; I do therefore hereby require and command you to apprehend and bring the said C. D. before me, or some other of his majesty's justices of the peace for the said county, to answer the said complaint, and to find sufficient sureties to keep the peace or be of good behaviour towards his majesty and all his liege people, and especially towards the said A. B., for such term as shall be then enjoined him. Given under my hand and seal the _____ day of —, one thousand eight hundred and twenty —.

G. C. (L. S.)

[If the justice intend to bind the party to appear at the sessions the form of the warrant must be altered thus :—" To find sufficient sureties, as well for his appearance at the next general quarter sessions of the peace, to be held for the said county, to answer the said

complaint; as also, in the mean time, to keep the peace, [or, be of good behaviour, as may be required,] towards his majesty and all his liege people, and especially towards the said A. B.]

C. Warrant for the Good Behaviour; on Stat. 34 Ed. 3. c. 1. from *Lambard* and *Dalton*.

C.

County of } J. T. esquire, and T. L. esquire, justices of our
 _____ } lord the king assigned to keep the peace within
 the said county; to the sheriff of the said county, to the constable
 of the hundred of _____, in the said county, to the petty con-
 stables of the town of _____, in the said county, and to all and
 singular the bailiffs, constables, and other officers of our said lord
 the king, as well within liberties as without, in the same county,
 greeting:

Forasmuch as we are given to understand, by the information,
 testimony, and complaint of many credible persons, that A. O. of
 _____, in the county aforesaid, gentleman, and B. O. of the
 same, yeoman, are not of good name and fame, nor of honest con-
 versation, but evil doers, rioters, barators, and disturbers of the
 peace of our said lord the king, so that murder, homicide, strifes,
 discords, and other grievances and damages amongst the lieges of
 our said lord the king concerning their bodies are likely to arise
 hereby; therefore, on the behalf of our said lord the king, we
 command you, and every of you, that you omit not by reason of any
 liberty within the county aforesaid, but that you attach, or one of
 you do attach, the aforesaid A. O. and B. O., so that you have them
 before us or others our fellows, justices of our said lord the king
 assigned to keep the peace within the county aforesaid, as soon as
 they can be taken, [or, before the justices of our said lord the king
 assigned to keep the peace within the county aforesaid, and also to
 hear and determine divers felonies, trespasses, and other misde-
 meanors in the said county committed, at the next general quarter
 sessions of the peace to be holden in and for the said county.] to
 and then before us [or, the said justices] sufficient surety and main-
 prise for their good behaviour towards our said lord the king, and
 his people, according to the form of the statute in such case made
 and provided. And this you shall in nowise omit, on the peril
 at shall ensue thereon. And have you before us [or, before the
 said justices, at the sessions aforesaid] this precept. Given under
 our seals at _____, in the county aforesaid, the _____ day
 of _____, in the _____ year of the reign of our said lord _____.

. Form of Commitment for Want of Sureties for a limited
 Period fixed by the Justice.

D.

County of { To the constable of _____, in the said county, and
 _____ } also to the keeper of his majesty's gaol for the said
 _____ } county.

WHEREAS [recite the complaint, as in the warrant]: And
 whereas the said C. D. was this day brought before me to
 answer the said complaint, and I, the said justice, have ordered and
 judged, and do hereby order and adjudge, that the said C. D.
 shall enter into his own recognizance in the sum of 50*l.*, with two

Surety for the Good Behaviour. [Criminal

sufficient sureties in the sum of 25l. each, to keep the peace [or, be of good behaviour, as may be required] towards his majesty and all his liege people, and particularly towards the said A. B., for the space of twelve calendar months now next ensuing: And inasmuch as the said C. D. hath refused to enter into such recognizance, and to find such sureties as aforesaid, I do hereby require and command you the said constable forthwith to convey the said C. D. to the common gaol of the said county, and to deliver him to the keeper thereof, together with this warrant: And I do also require and command you the said keeper to receive the said C. D. into your custody in the said gaol, and him there safely to keep for the space of twelve calendar months, unless he in the mean time enter into such recognizance with such sureties as aforesaid to keep the peace in the manner and for the term above mentioned. Herein fail not. Given under my hand and seal the _____ day of _____, one thousand eight hundred and twenty _____.

G. C. (L. S.)

E.

E. Form of Commitment for Want of Sureties to appear at the Sessions.

County of _____ { To the constable of _____, in the said county, and also to the keeper of his majesty's gaol for the said county.

WHEREAS [recite the complaint, as in the preceding form of warrant to the constable]: *And whereas the said C. D. having been this day brought before me the said justice, to answer the said complaint, and having been required by me to find sufficient sureties, as well for his appearance at the next general quarter sessions of the peace to be held for the said county, to do what shall be then and there enjoined him by the court, as also in the mean time to keep the peace [or, be of good behaviour, as may have been required] towards his majesty and all his liege people, and especially towards the said A. B., hath refused [or, neglected, as the case may be] to find such sureties; I do therefore hereby require and command you the said constable forthwith to convey the said C. D. to the common gaol of the said county, and to deliver him to the keeper thereof, together with this warrant: And I do also require and command you, the said keeper, to receive the said C. D. into your custody, and him there safely to keep until the next general quarter sessions of the peace to be held for the said county, unless he in the mean time find sufficient sureties as well for his appearance at the said sessions as in the mean time to keep the peace as aforesaid. Given under my hand and seal the _____ day of _____, one thousand eight hundred and twenty _____.*

G. C. (L. S.)

F. Recognizance for the Peace or Good Behaviour.

F.

County of _____ } **BE** it remembered, that on the _____ day of _____, in the _____ year of the reign of our lord William the fourth, of the united kingdom of Great Britain and Ireland king, defender of the faith, A. O. of _____, in the county aforesaid, yeoman, A. S. of the same place, yeoman, and B. S. of the same place, yeoman, came before me Henry Chaytor,

Doctor of laws, one of the justices of our said lord the king, assigned to keep the peace within the said county, and acknowledged themselves to owe to our said lord the king, to wit, the said A. O. the sum of twenty pounds, and the said A. S. the sum of ten pounds, and the said A. S. the sum of ten pounds, of good and lawful money of Great Britain, to be respectively made and levied of their several goods and chattels, lands and tenements, to the use of our said lord the king, his heirs and successors, if he, the said A. O., shall fail in performing the condition underwritten.

Acknowledged before me,
Henry Chaytor.

The condition of this recognizance is such, that if the above named A. O. shall keep the peace [or, be of good behaviour, as may be required (a)] towards the king, and all his liege people, and especially towards A. I. of ———, in the said county, yeoman, or the term of twelve calendar months now next ensuing, then the said recognizance shall be void, or else remain in its force.

[If the justice bind the party to appear at the sessions, the condition of the recognizance must be, "that if the said C. D. shall personally appear at the next general quarter sessions of the peace to be holden for the said county, to do and receive what shall be then and there enjoined him by the court, and, in the mean time, shall keep the peace [or, be of good behaviour] towards his majesty and all his liege people, and especially towards the said A. B. Then, &c."]

F. Liberate to discharge one committed for Want of Sureties to keep the Peace.

G.

County of } To the keeper of his majesty's gaol for the said
———. } county.

DISCHARGE out of your custody the body of A. O. of ———, in the said county, yeoman, he having this day entered into a recognizance before me, one of his majesty's justices of the peace for the said county, in the sum of fifty pounds, with two sureties in twenty-five pounds each, to keep the peace [or, be of good behaviour] towards his majesty and all his liege people, and especially towards A. B. of, &c. yeoman, for the space of twelve calendar months now next ensuing. Given under my hand and seal the ——— day of ———, one thousand eight hundred and ———.

H. The Form of a Supersedeas.

County of } JOHN Robinson, esquire, one of the justices of our
———. } lord the king assigned to keep the peace within the
county aforesaid, to the sheriff, bailiffs, constables, and others the
faithful ministers and subjects of our said lord the king within the
said county, and to every of them, greeting.

H.

(a) Mr. Christian, in his Charges to Grand Juries, p. 490, says, "Justices can never bind to keep the peace AND be of good behaviour, which is inserted in the printed form of recognizance;" and it seems that these latter words cannot be inserted as a matter of course in a recognizance.

Forasmuch as A. O. of ———, in the said county, yeoman, hath personally come before me at ———, in the said county, and hath found sufficient surety, that is to say, A. S. of ———, yeoman, and B. S. of ———, yeoman, either of the which hath undertaken for the said A. O. under the pain of 20*l.*, and he the said A. O. hath undertaken for himself under the pain of 40*l.*, that he the said A. O. shall personally appear at the next general quarter sessions of the peace to be holden in and for the said county, then and there to do and receive what shall be enjoined him by the said court, and in the mean time shall well and truly keep the peace [or, be of the good behaviour] towards our said lord the king and all his liege people, and especially towards A. I. of ———, yeoman: therefore, on the behalf of our said lord the king, I do command you and every of you, that you utterly forbear, and surcease to arrest, take, imprison, or otherwise by any means for the said cause to molest the said A. O., and if you have, for the said occasion, and for none other, taken and imprisoned him the said A. O., that then him you deliver, or cause to be delivered, and set at liberty, without further delay. Given at ——— aforesaid, in the county aforesaid, under my seal, this ——— day of ———, in the ——— year of the reign of ———.

1. I. Liberate to discharge one committed for Want of Sureties for personal Appearance at Quarter Sessions.

County of } JOSEPH Deane, esquire, one of the justices of the
———. } lord the king assigned to keep the peace in the
county aforesaid, to the keeper of his majesty's gaol at ———, in
the said county, greeting.

Forasmuch as A. O. in the prison of our said lord the king, in your custody now being, at the suit of A. I. of ———, in the said county, yeoman, for the want of his finding sufficient sureties for his personal appearance at the next general quarter sessions of the peace to be holden in and for the said county, and for his keeping the peace, [or, being of the good behaviour,] in the mean time, towards our said lord the king and all his liege people, and especially towards the said A. I., hath found before me sufficient sureties, to wit, A. S. of ———, yeoman, and B. S. of ———, yeoman, either of which hath undertaken for the said A. O. under the pain of 20*l.*, and he the said A. O. hath undertaken for himself under the pain of 40*l.*, that he the said A. O. shall and will personally appear at the next general quarter sessions of the peace to be holden in and for the said county, and shall well and truly keep the peace, [or, be of the good behaviour,] in the mean time, towards our said lord the king and his liege people, and especially towards the said A. I.: therefore, on the behalf of our said lord the king, I do command you, that if the said A. O. do remain in the said gaol, for the said cause, and for none other, then you forbear to grieve or detain him any longer, but that you deliver him thence, and suffer him to go at large, and that upon the pain that will fall thereon. Given under my seal, this ———, in the said county, the ———, day of ——— in the ——— year of the reign of our said lord William the fourth, of the united kingdom of Great Britain and Ireland king, &c.

Swans. See Game.

Transportation.

[18 C. 2. c. 3. — 30 G. 3. c. 47. — 56 G. 3. c. 63. — 5 G. 4. c. 84. — 1 W. 4. c. 39. — 2 & 3 W. 4. c. 62. — 4 W. 4. c. 4. c. 6. — 4 & 5 W. 4. c. 67.]

EXILE and *transportation* are punishments unknown to the common law of *England*; and whenever the latter is inflicted, it is either by the choice of the criminal himself, to escape a capital punishment, or it is imposed by the express direction of some modern act of parliament; for no power on earth, except the authority of parliament, can send a subject of *England*, no, not even a criminal, out of the land against his will. 1 *Blac. Com.* 137. 3 *P. Wms.* 37. & 460. 4 *Haw.* 7th edit. c. 33. p. 297.

Exile is said to have been first introduced as a punishment in the reign of *Elizabeth*, when a statute [39 *Eliz.* c. 4.] enacted "that such rogues as were dangerous to the inferior people should be banished the realm." And the first statute by which *transportation* is authorised is 18 C. 2. c. 3., which gives a power to the judges at their discretion either to execute or *transport to America* for life certain notorious thieves and spoil-takers in the counties of *Northumberland* and *Cumberland*. 1 *Blac. Com.* 137. n. (1.) See also stats. 22 C. 2. c. 5. and 6 *Ev. Col. Stat. Part V. Cl.* xxv. (G), p. 852, 853. 1st ed. & 2d ed. p. 287. (a)

39 *Eliz.* c. 4.
(now repealed.)
18 C. 2. c. 3.

Transportation is now, however, become the common sentence of criminals under several statutes.

The provisions established for regulating this species of punishment are collected by 5 G. 4. c. 84, Under which, intituled "*An Act for the transportation of offenders from Great Britain*," after reciting, that "the several laws in force for regulating the transportation of offenders from *Great Britain* will expire at the end of the present session of parliament; and it is expedient that the laws relative to that subject should be revised and consolidated into one act;" it is enacted, by § 1., "That this act shall take effect on the last day of this present session of parliament; and that on and from that day, all things remaining to be done, touching the punishment, imprisonment, correction, removal, transportation, discipline, employment, diet, and clothing of persons sentenced or ordered to transportation or banishment from any part of *G. B.*, under any acts heretofore, or now in force, or pardoned on condition of being transported under any such acts, shall be continued, done, and completed under the provisions of this act; and that all sentences and orders for transportation, all orders in council, and other orders, warrants, instructions, directions, appointments, authorities, contracts, and securities, made, issued, or given under any of the said acts, and in force at the time of the commencement of this act, shall continue in force under and by virtue of this act, unless and until they shall be revoked or superseded."

5 G. 4. c. 84.

Commencement of act, under the provisions of which all persons already sentenced or ordered for transportation shall be placed.

(a) But *justices in sessions* had long previously been authorised to transport rogues, vagabonds, and sturdy beggars, duly convicted and adjudged to be corrigible." See stat. 13 & 14 C. 2. c. 12. § 23. now repealed by stat. 5 G. 4. 83. § 1. See post, tit. *Flag ants*.

5 G. 4. c. 84.

Offenders adjudged for transportation to be transported under this act.

Power for subsequent court, &c. to allow conditional pardon in cases where H. M. extends mercy to the offender.

H. M. may appoint places of transportation.

Secretary of state to authorise persons to make contracts for the transportation of offenders, &c.

Sheriffs or

§ 2. enacts, "That from and after the commencement of this act, every person convicted before any court of competent jurisdiction in *G. B.* of an offence for which he or she shall be liable to be transported or banished, shall be adjudged and ordered to be transported or banished beyond the seas, for the term of life or years for which such offender shall be liable by any law to be transported or banished; and every sentence of transportation or banishment passed or to be passed on any offender in any court of competent jurisdiction in *G. B.*, and every order for transportation or banishment made or to be made in pursuance of the sentence of any such court or other competent authority, shall subject the offender to be conveyed beyond the seas under provisions of this act; and whenever H. M. shall be pleased to extend mercy to any offender convicted of any crime for which he or she is or shall be excluded from the benefit of clergy, upon condition of transportation beyond the seas, either for the term of life, or any number of years, and such intention of mercy shall be signified by one of H. M.'s principal secretaries of state to the court before which such offender hath been or shall be convicted, or any subsequent court with the like authority, such court shall allow to such offender the benefit of a conditional pardon, and make an order for the immediate transportation of such offender; and in case such intention of mercy shall be so signified to the judge or justice before whom such offender hath been or shall be convicted, or to any judge of H. M.'s court of K. B. or C. P., or to any baron of the exchequer of the degree of the coif in *England*, such judge, justice, or baron shall allow to such offender the benefit of a conditional pardon, and make an order for the immediate transportation of such offender, in the same manner as if such intention of mercy had been signified to the court during the term or session in or at which such offender was convicted; and such allowance and order shall be considered as an allowance and order made by the court before which such offender was convicted, and shall be entered on the records of the same court by the proper officer thereof, and shall be as effectual to all intents and purposes, and have the same consequences as if such allowance and order had been made by the same court during the continuance thereof; and every such order, and also every order made by the court of judicatory in *Scotland* for the transportation of any offender, whose sentence of death shall be remitted by H. M., shall subject the offender to be conveyed beyond the seas under the provisions of this act."

§ 3. enacts, "That it shall be lawful for H. M., by and with the advice of his privy council, from time to time to appoint any place or places beyond the seas, either within or without H. M.'s dominions, to which felons and other offenders under sentence of order of transportation or banishment shall be conveyed; and that when any offenders shall be about to be transported or banished from *G. B.*, one of H. M.'s principal secretaries of state shall give orders for their removal to the ship to be employed for their transportation, and shall authorise and empower some person to make a contract for their effectual transportation to some of the places so appointed, and shall direct security to be given for their effectual transportation, in the manner herein-after mentioned."

By § 4., "The sheriff or gaoler receiving such order of removal

hall by virtue thereof forthwith remove every offender to whom he same shall apply, and who, having been examined by an experienced surgeon or apothecary, shall appear to be free from any putrid or infectious distemper, and fit to be transported to the ship employed for his or her transportation, and there deliver every such offender to the contractor, together with a true copy, attested by such sheriff or gaoler, of the caption and order of the court by which each such offender was sentenced or ordered for transportation, containing the sentence or order of transportation of each such offender, by virtue whereof he or she shall be in the custody of such sheriff or gaoler; and also a certificate specifying concisely the description of his or her crime, his or her age, whether married or unmarried, his or her trade or profession, and an account of his or her behaviour in prison before and after trial, and the gaoler's observations on his or her temper and disposition, and such information concerning his or her connexions and former course of life as may have come to the gaoler's knowledge; and such contractor shall give a receipt in writing to the sheriff or gaoler, for the discharge of such sheriff or gaoler."

§ 5. enacts, "That every such contractor, with two sureties, shall, before any such offender shall be delivered to him to be transported, give security by bond to H. M., that he will effectually transport, or cause to be transported, every offender included in his contract, to such place beyond the seas as shall be specified in the contract, and procure from the governor of the colony, or other person or persons to whom he shall be directed by one of the principal secretaries of state to deliver such offender, a certificate of the landing of such offender in that place whereto he or she shall be ordered to be transported (death and casualties by sea excepted); and that such offender shall not be suffered to return to any part of the U. K., by the wilful default of such contractor, or of any person employed by him."

§ 6. enacts, "That if any such offender shall be guilty of misbehaviour or disorderly conduct on board of the ship in which he or she shall be transported, it shall be lawful for the surgeon or principal medical officer for the time being of such ship to inflict or cause to be inflicted on such misbehaving or disorderly offender such moderate punishment or correction as may be authorised by the instructions which he may receive from one of H. M.'s principal secretaries of state: Provided always, that no such punishment or correction shall be so inflicted, unless the master or principal officer for the time being of such ship shall first signify his approbation thereof in writing under his hand; and every such punishment or correction, together with the particulars of the offence for which the same is inflicted, and such written approbation as aforesaid, shall on the same day, in all cases, be entered by such master or principal officer as aforesaid, upon the log book of the ship, under a penalty of 20*l.* for every neglect to make such entry, to be recovered to the use of the informer, by bill, plaint, or information, in any court of record in *England*, or in any of the supreme courts of *New South Wales* or *Van Diemen's Land*."

§ 7. provides and enacts, "That whenever the transportation of any such offender shall take place in any ship belonging to H. M., it shall be lawful for one of the principal secretaries of

5 G. 4. c. 84.

gaolers, on receiving orders for removal of offenders for transportation, to deliver them over to the contractor, if free from distemper.

Persons undertaking to transport offenders to give proper security.

For punishment of transports misbehaving on the voyage.

Secretary of state may give the custody of

5 G. 4. c. 84.

offenders transported in king's ships, without security being given for their transportation.

Governor of the colony, &c. to have property in service of offender.

Not to interfere with king's prerogative.

H. M. to appoint places of confinement of offenders in England.

state, by warrant under his hand, to nominate some person or persons who shall have the custody of such offender during the voyage; and thereupon such offender may be delivered to such nominee or nominees, without any contract or security being required or given for the effectual transportation of such offender; and every such nominee shall have the like power of punishing misbehaviour and disorderly conduct in such offender during the voyage, as is hereby given to the surgeon of a ship specially employed for the transportation of offenders."

§ 8. enacts, "That so soon as any such offender shall be delivered to the governor of the colony, or other person or persons to whom the contractor, or such nominee or nominees as aforesaid, shall be so directed to deliver him or her, the property in the service of such offender shall be vested in the governor of the colony for the time being, or in such other person or persons; and it shall be lawful for the governor for the time being, and for such other person or persons, whenever he or they shall think fit, to assign any such offender to any other person for the then residue of his or her term of transportation, and for such assignee to assign over such offender, and so as often as may be thought fit; and the property in the service of such offender shall continue in the governor for the time being, or in such other person or persons as aforesaid, or his or their assigns, during the whole remaining term of life or years for which such offender was sentenced or ordered to be transported: Provided always, that for the purposes of this act, every person administering the government of a colony, by whatever name or title he may be denominated, shall be deemed to be the governor thereof."

§ 9. "Nothing in this act contained shall in any manner affect H. M.'s royal prerogative of mercy."

By § 10., "It shall be lawful for H. M. from time to time, by warrant under his royal sign manual, to appoint places of confinement within *England* or *Wales*, either at land, or on board vessels to be provided by H. M. in the river *Thames*, or some other river, or within the limits of some port or harbour of *England* or *Wales*, for the confinement of male offenders under sentence or order of transportation, which shall be under the management of a superintendant and overseer to be appointed by H. M.; and it shall be lawful for one of H. M.'s principal secretaries of state to direct the removal of any male offender who shall be under sentence of death, but who shall be reprieved, or whose sentence shall be respited during H. M.'s pleasure, or who shall be under sentence or order of transportation, and who, having been examined by an experienced surgeon or apothecary, shall appear to be free from any putrid or infectious distemper, and fit to be removed from the gaol or prison in which such offender shall be confined, to any of the places of confinement so appointed; and every offender who shall be so removed shall continue in the said place of confinement, or be removed to and confined in some other such place or places as aforesaid, as one of H. M.'s principal secretaries of state shall from time to time direct, until such offender shall be transported according to law, or shall become entitled to his liberty, or until one of H. M.'s principal secretaries of state shall direct the return of such offender to the gaol or prison from which he shall have been removed; and the sheriff or

gaoler having the custody of any offender whose removal shall be ordered in manner aforesaid, shall, with all convenient speed, after he receipt of any such order, convey or cause to be conveyed every such offender to the place appointed, and there deliver him to such superintendant or overseer, together with a true copy, attested by such sheriff or gaoler, of the caption and order of the court by which such offender was sentenced or ordered for transportation, containing the sentence or order of transportation of each such offender, by virtue whereof he shall be in the custody of such sheriff or gaoler; and also a certificate, specifying concisely the description of his crime, his age, whether married or unmarried, his trade or profession, and an account of his behaviour in prison before and after his trial, and the gaoler's observations on his temper and disposition, and such information concerning his connexions and former course of life as may have come to the gaoler's knowledge; and such superintendant or overseer shall give a receipt in writing to the sheriff or gaoler, for the discharge of such sheriff or gaoler."

5 G. 4. c. 84.

§ 11. enacts, "That it shall be lawful for H. M. to appoint one fit and able person to be superintendant of the said places of confinement; and in case it shall be deemed expedient, it shall be lawful for H. M. also to appoint one fit and able person to be assistant or deputy to such superintendant, at one or more of the said places of confinement, and to be constantly resident at or near the place or places to which he shall be appointed; and also one fit and able person to be overseer of each such place of confinement, who, with a sufficient number of officers and guards, shall constantly reside therein; and such superintendant shall personally visit and inspect such places of confinement four times in every year, or oftener if occasion shall require, and shall distinctly examine into the state of such places of confinement, the behaviour and conduct of the respective assistants or deputies, overseers, officers, and guards, the treatment and condition of the prisoners, and the amount of the several earnings, and the expenses attending every such place of confinement, and shall, at least twice in every year, make a faithful report of the same to one of H. M.'s principal secretaries of state, who shall cause such report to be laid before both houses of parliament at the beginning of every session; and such superintendant shall distinguish in each report the amount of the earnings and expenses at each of such places of confinement, and shall state the average number of prisoners confined therein, and the number of days' labour done by such prisoners, distinguishing the work of artificers, and of any other superior labourers, from that of common labourers; and such superintendant shall also, in matters of extreme necessity, make a special report thereof to one of H. M.'s principal secretaries of state, who may, and is hereby authorised, to afford such redress or provide such regulations as he shall deem proper; and such superintendant, assistants or deputies, and overseers, shall continue in office during H. M.'s pleasure, and shall receive such salaries as one of H. M.'s principal secretaries of state shall appoint; and such superintendant shall be paid such travelling and other reasonable expenses as shall be incurred by him in discharge of his duty."

Appointment
of superintendant
of such
places of confinement,
&c.

5 G. 4. c. 84.

For cleansing
and purifying
and clothing
offenders.

By § 12, "Whenever any offender shall be brought to any such place of confinement as aforesaid, in pursuance of the powers of this act, he shall be washed, cleansed, and purified, and the clothes in which he shall be then clothed shall be burnt, if necessary, or otherwise shall be preserved and taken care of for him by the overseer, and redelivered to him upon his quitting it, or sold for his benefit, and the produce thereof accounted for to him by the overseer; and when such offender shall be finally discharged, such other decent clothing, as shall be judged necessary and proper by the superintendent, shall be delivered to such offender by the overseer, and also such sum of money for his immediate subsistence as the superintendent shall think proper, so as such sum shall not in any case exceed 3*l*."

H. M. by order
in council, may
direct convicts
to be employed
in any part of
H. M.'s domi-
nions out of
England, under
the manage-
ment of the
superintendent
and overseer.

§ 13. enacts, "That it shall be lawful for H. M., by any order or orders in council, to declare his royal will and pleasure, that male offenders convicted in *G. B.*, and being under sentence or order of transportation, shall be kept to labour in any part of H. M.'s dominions out of *England*, to be named in such order or orders in council; and that, whenever H. M.'s will and pleasure shall be so declared in council, it shall be lawful for one of H. M.'s principal secretaries of state to direct the removal and confinement of any such male offender, either at land or on board any vessel to be provided by H. M., within the limits of any port or harbour in that part of H. M.'s dominions which shall be named in such order in council, under the management of the said superintendent, and of an overseer to be appointed by H. M. for each such vessel or other place of confinement; and every offender who shall be so removed, shall continue on board the vessel or other place of confinement to be so provided, or any similar vessel or other place of confinement to be from time to time provided by H. M., until H. M. shall otherwise direct, or until the offender shall be entitled to his liberty."

Superintendent
to make returns
of prisoners to
the secretary of
state, on the 1st
of January,
April, July,
and October,
yearly.

§ 14. enacts, "That the said superintendent shall from time to time make returns, specifying the name of every person in custody in each of such places of confinement, the offence of which he shall have been guilty, the court before which he shall have been convicted, and the sentence of such court, together with his age and bodily state, and his behaviour whilst in custody, and also the names of such offenders as shall have died whilst in such custody, or shall have escaped, or have been lawfully discharged from the same; which returns shall be made on the first day of *January, April, July, and October* in every year, to one of H. M.'s principal secretaries of state, on the oath of the overseer of each place of confinement, such oath to be made before a justice of the peace."

Power and du-
ties of super-
intendent and
overseers.

§ 15. enacts, "That after the removal of any offender under this act, the superintendent and overseer who shall have the custody of him shall, during the term of such custody, have the same powers over him as are incident to the office of a sheriff or gaoler, and shall in like manner be answerable for any escape of such offender; and if any offender shall, during such custody, be guilty of any misbehaviour or disorderly conduct, the superintendent or overseer shall be authorised to inflict, or cause to be inflicted on him, such moderate punishment or correction as shall be allowed by one of H. M.'s principal secretaries of state; and

ch superintendant or overseer shall also, during such custody, e every offender fed and clothed according to a scale of diet d clothing, to be fixed on and notified in writing by one of . M.'s principal secretaries of state to the superintendant; and all keep such offender to labour at such places, and under such gulations, directions, limitations, and restrictions, as by such retary of state shall from time to time be prescribed; and in se of the absence of any such superintendant or overseer, or of e vacancy of his office, his duties or powers shall be discharged d exercised in all respects by the officer or person on whom the mmand of the place of confinement shall devolve."

§ 16. enacts, "That it shall be lawful for such superintendant, d he is hereby authorised, in every such place of confinement aforesaid, either at land or on board any vessel to be provided aforesaid, and also in every place wherein any offenders under s superintendence shall be employed to labour, to act in every spect as a justice of the peace, as if he had been named in the mmission of the peace, and had been duly qualified to act as a stice of the peace for the county or place in which any such ace of confinement shall be, or any such offender shall be mployed to labour."

Superintendent to act as a justice of the peace.

§ 17., after reciting that "by the laws in force in some parts H. M.'s dominions not within the U. K., offenders convicted of rtain offences are liable to be punished by transportation beyond e seas, and other convicts adjudged to suffer death in such rts of H. M.'s dominions have received or may receive H. M.'s ost gracious pardon upon condition of transportation beyond the as, and there may be no means of transporting such convicts to y of the places appointed by H. M. in council in that behalf, thout first bringing them to *England*;" enacts, "That when- er any convict adjudged to transportation by any court or dge in any part of H. M.'s dominions not within the U. K., or y convict adjudged to suffer death by any such court or judge, d pardoned on condition of transportation, have been or shall be ought to *England* in order to be transported, it shall and may :lawful to imprison any such offender in any place of confine- ment provided under the authority of this act, until such convict all be transported, or shall become entitled to his liberty; and at so soon as every such convict shall be so imprisoned, all the ovisions, rules, regulations, clauses, authorities, powers, penalties, atters, and things aforesaid, concerning the safe custody, con- ement, treatment, and transportation of any offender convicted G. B., shall extend and be construed to extend to every convict o may have been, or may be hereafter adjudged to transport- ion by any court or judge in any part of H. M.'s dominions not thin the U. K., and to every convict adjudged by any such court judge to suffer death, and pardoned on condition of transport- ion, and brought to *England* in order to be transported, as fully d effectually, to all intents and purposes, as if such convict had en convicted and sentenced at any session of gaol delivery lden for any county within *England*."

Convicts ad- judged by courts out of the U. K. to transportation, and convicts pardoned on condition of transportation, may, when brought to Eng- land, be impris- oned and transported.

By § 18., "It shall be lawful to keep to hard labour every ender under sentence or order of transportation, while he or she all remain in the common gaol, if his or her health shall permit, d if one or more of the visiting justices of such gaol shall give

Convicts may be kept to hard labour in com- mon gaol, and may be removed

5 G. 4. c. 84.

to house of correction.

Time of imprisonment to be deemed part of term.

Offenders may be carried through any county to the sea-port.

Expenses of removal to be paid by the county where conviction took place.

Punishing person found at large before the expiration of his sentence.

Capital.

Persons rescuing prisoners to be punished.

a written order to that effect; and it shall be lawful for one of H. M.'s principal secretaries of state, if he shall think fit, to order that any such offender be removed from the common gaol to the house of correction, and there kept to hard labour."

By § 19., "The time during which any offender shall continue in any gaol or house of correction, or in any such place of confinement as aforesaid, under sentence or order of transportation or banishment, shall be taken and reckoned in discharge or part discharge of the term of his or her transportation or banishment."

By § 20., "The sheriff or gaoler, and every person employed in the conveyance of any offender in order to be transported or banished, or to be imprisoned in any such place of confinement as aforesaid, or in the reconveyance of any offender from any such place of confinement to the gaol or prison from which he was removed, may, in such manner as he shall think fit, carry and secure such offender in and through any county of G. B., towards the sea-port or place from whence he or she is to be transported or banished, or where he or she is to be confined, or to the gaol or prison to which he or she is to be reconveyed."

By § 21., "In *England and Wales* all such fees, on the delivering out of custody of any such offender so ordered to be transported or removed, as have usually been paid to the sheriff or gaoler, and all reasonable expences which the sheriff or gaoler shall incur every such removal, shall be paid by the county, riding, division, city, borough, liberty, or place for which the court in which the offender was convicted shall have been held; and the sheriff or gaoler shall receive the money due for such expenses from the treasurer of such county, riding, division, city, borough, liberty, or place; such fees and expenses being first allowed by the order of the justices of the peace at their quarter or other general sessions of the peace, who are hereby required to make such order as shall be just in that behalf; and the clerk of the court shall be paid by such treasurer the same fee as hath been usually paid, and he is lawfully entitled to receive, for every order of transportation; and in *Scotland* all such fees and expenses shall be paid in the same manner as has been heretofore practised."

By § 22., "If any offender who shall have been or shall be so sentenced or ordered to be transported or banished, or who shall have agreed or shall agree to transport or banish himself or herself on certain conditions, either for life or any number of years, under the provisions of this or any former act, shall be afterwards at large within any part of H. M.'s dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself, every such offender so being at large, being thereof lawfully convicted, shall suffer death as in cases of felony without the benefit of clergy; and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished; and if any person shall rescue, or attempt to rescue, or assist in rescuing or attempting to rescue, any such offender from the custody of such superintendant or overseer, or of any sheriff or gaoler or other person conveying, removing, transporting or reconveying him or her, or shall convey or cause to be conveyed any disguise,

instrument for effecting escape, or arms to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted; and whoever shall discover and prosecute to conviction any such offender so being at large within this kingdom, shall be entitled to a reward of 20*l.* for every such offender so convicted."

By § 23., "In any indictment against any offender for being found at large contrary to the provision of this or of any other act now made or hereafter to be made, and also in any indictment against any person who shall rescue or attempt to rescue, or assist in rescuing any such offender from such custody, or who shall convey or cause to be conveyed any disguise, instrument for effecting escape, or arms, to any such offender, contrary to the provisions of this or of any other act now made or hereafter to be made, whether such offender shall have been tried before any court or judge within or without the U. K., or before any naval or military court-martial, it shall be sufficient to charge and allege the order made for the transportation or banishment of such offender, without charging or alleging any indictment, trial, conviction, judgment, or sentence, or any pardon or intention of mercy, or signification thereof, of or against or in any manner relating to such offender."

By § 24., "The clerk of the court or other officer having the custody of the records of the court where such sentence or order of transportation or banishment shall have been passed or made, shall, at the request of any person on H. M.'s behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation or banishment (not taking for the same more than 6*s.* 8*d.*), which certificate shall be sufficient evidence of the conviction and sentence or order for the transportation or banishment of such offender; and every such certificate, made by the clerk or officer of any court in G. B., shall be received in evidence, upon proof of the signature and official character of the person signing the same; and every such certificate, made by the clerk or officer of any court out of G. B., shall be received in evidence, if verified by the seal of the court, or by the signature of the judge, or one of the judges of the court, without other proof."

By § 25., nothing in this act contained respecting offenders under sentence or order of banishment shall apply to persons adjudged to be banished under and by virtue of stat. 60 G. 3. c. 8., intitled *An act for the more effectual prevention and punishment of seditious and seditious libels.* (a)

§ 26., after reciting that "it hath sometimes happened, that persons under sentence or order of transportation in *New South Wales* and the islands adjacent, have received from the governor

5 G. 4. c. 84.

Reward for prosecuting to conviction persons at large, 20*l.*

Form of indictment against offenders found at large, or against persons rescuing, attempting to rescue, or assisting in rescuing prisoners.

Certificate of clerk of court of conviction and sentence, sufficient evidence.

Not to extend to persons banished under stat. 60 G. 3. c. 8.

For protecting transported felons in the enjoyment of property acquired after conviction.

(a) The punishment of banishment under this enactment is now repealed by V. 4. c. 73. See tit. *Libels*, § 3. p. 522.

5 G. 4. c. 84.

or lieutenant governor thereof remissions, either absolute or conditional, of the whole or of some part of the term of their transportation, and have by their industry acquired property, in the enjoyment whereof it is expedient to protect them; and the like may happen in future in the same colony, and in other colonies to which felons may be transported under and by virtue of this act; enacts, "That it shall and may be lawful for every felon under sentence or order of transportation, who hath received or shall receive any such remission as aforesaid from the governor or lieutenant governor of *New South Wales*, or from the governor or lieutenant governor of any other colony who may be authorised to grant the same, while such felon shall reside in a place where he lawfully may reside under such sentence, order, or remission, and under the provisions of this act, to maintain any action or suit for the recovery of any property, real, personal, or mixed, acquired by such felon since his or her conviction, and for any damage or injury sustained by such felon since his or her conviction, not only in the courts of the colony or place where such felon shall lawfully reside, but also in the courts of this kingdom and of all other H. M.'s dominions; and if the defendant in any such action or suit shall plead or allege in his defence the plaintiff's or complainant's conviction of felony, and the plaintiff or complainant shall allege and prove that he or she hath received such remission as aforesaid, and is residing in some place consistent therewith and with the provisions of this act, a verdict shall pass and judgment shall be given for the plaintiff or complainant."

General issue.

By § 27., "If any suit or action shall be prosecuted in *England, Wales, or Ireland*, against any person for any thing done in pursuance of this act, the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and that the same was done by the authority of this act; and if a verdict shall pass for the defendant, or judgment shall in any manner be given against the plaintiff, the defendant shall recover treble costs, and have the like remedy for the same as any defendants have by law in other cases; and notwithstanding a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be had shall certify his approbation of the verdict."

Limitation of actions.

By § 28., "All actions, suits, and prosecutions against any person for any thing done in pursuance of this act, shall be commenced within six calendar months after the fact committed, and not otherwise; and if the fact was done within the body of any county, it shall be laid and tried in that county, and no other; and if done out of the body of any county, it shall be laid and tried in the county of *Middlesex*, and not elsewhere."

The following acts and parts of acts repealed, viz. 4 G. 1. c. 11. in part.
6 G. 1. c. 23. in part.
16 G. 2. c. 15.
8 G. 3. c. 15.
28 G. 3. c. 24. in part.

By § 29., from and after the commencement of this act (see) so much of stat. 4 G. 1. c. 11. as relates to contracts and security for the transportation of offenders, and to the punishment of those who return from transportation; and so much of stat. 6 G. 1. c. 2. as relates to the same objects; and stats. 16 G. 2. c. 15. and 8 G. 3. c. 15.; and so much of stat. 28 G. 3. c. 24. as relates to the transportation of offenders, and their removal to and imprisonment in temporary places of confinement (viz. § 4, 5.); and so much of

stat. 31 G. 3. c. 46. as relates to the imprisonment and employment in hard labour of prisoners sentenced to transportation viz. § 7.); and stat. 43 G. 3. c. 15., shall be repealed.

By the 1 W. 4. c. 39., entitled "An act to amend an act passed in the fifth year of his late majesty, for the transportation of offenders from *Great Britain*, and for punishing offences committed by transports kept to labour in the colonies," passed 16th July 1790, reciting that, by 5 G. 4. c. 84., "it is amongst other things enacted, that it shall be lawful for H. M., by and with the advice of his privy council, from time to time to appoint any place or places beyond the seas, either within or without H. M.'s dominions, to which felons and other offenders under sentence or order of transportation or banishment shall be conveyed; and that, when any offenders shall be about to be transported or banished from *Great Britain*, one of H. M.'s principal secretaries of state shall give orders for their removal to the ship to be employed for their transportation, and shall authorise and empower some person to make a contract for their effectual transportation to some of the places so appointed, and shall direct security to be given for their effectual transportation, in the manner hereinafter mentioned; and it is thereby further enacted, that whenever the transportation of any such offender shall take place on any ship belonging to H. M., it shall be lawful for one of the principal secretaries of state, by warrant under his hand, to nominate some person or persons who shall have the custody of such offender during the voyage, and thereupon such offender may be delivered to such nominee or nominees, without any contract or security being required or given for the effectual transportation of such offender; and it is thereby further enacted, that so soon as any such offender shall be delivered to the governor of the colony, or other person or persons to whom the contractor or such nominee or nominees as aforesaid shall be so directed to deliver him or her, the property in the service of such offender shall be vested in the governor of the colony for the time being, or in such other person or persons as aforesaid; and whereas divers felons and other offenders have heretofore been transported from *Great Britain* to H. M.'s colonies of *New South Wales* and *Van Diemen's* and respectively, and in pursuance of the directions of one of the principal secretaries of state have been delivered to the governors of those respective colonies, or other persons in those colonies to whom such respective contractors or nominees as aforesaid have been so directed to deliver them; but, from divers unforeseen causes, it hath occurred that some of such offenders have been landed and put on shore, and delivered at one of the before-mentioned colonies, who ought, according to such directions as aforesaid, to have been landed and put on shore, and delivered at the other of the before-mentioned colonies; and whereas, under the licences of the governors of the said respective colonies, divers offenders who had been transported as aforesaid have from time to time been removed from the one to the other of the said colonies; and whereas doubts have arisen whether offenders who have been so landed, put on shore, and delivered or removed as aforesaid, can, within the respective colonies in which they are now respectively resident, be lawfully dealt with in such and the same manner as if they were respectively resident within the colony to

31 G. 3. c. 46.
in part
43 G. 3. c. 15.

1 W. 4. c. 39.
reciting
5 Geo. 4. c. 84.

1 W. 4. c. 39.

Felons ordered to be put on shore in the one colony, but put on shore in the other, and those removed from one colony to the other subject to the same rules as other convicts in the same colony.

Governor of the one colony may receive felons who are ordered to be delivered in the other colony.

Governor of one colony may remove felons to the other colony.

which they were originally sentenced or ordered to be transported;" it is enacted, "That all felons and other offenders who have heretofore been transported from *Great Britain* to *New South Wales*, or to *Van Diemen's Land*, or to their respective dependencies, and who, having been contracted or ordered to be landed, and put on shore, and delivered in one of those colonies, have in fact been landed, and put on shore, and delivered at the other of those colonies, and that all such felons and other offenders who, under the licence, or by the order or with the consent of the governor, or of the officer administering the government of either of the said colonies, have been removed from the one to the other of such colonies, shall, within the colony in which they are respectively now resident, be subject and liable to all such and the same laws, rules, and regulations as if they had been contracted or ordered on their original transportation to be delivered to the governor or the officer administering the government of such colony, and shall within the colony in which they are respectively now resident be dealt with, governed, and disposed of in all respects, in such and the same manner as other convicts within the same colony; and that the property in the service of all such offenders shall be vested in the governor or officer administering the government of the colony in which they are actually resident, in the same manner, and subject to all such and the same rules and conditions, as if they had been contracted or ordered as their original transportation to be delivered to him."

§ 2. "That in any case in which a ship conveying felons or other offenders from the U. K. of *Great Britain* and *Ireland*, the master of which has entered into a contract or been ordered to deliver such felons or other offenders at the colony or place specified in such contract or order, shall, by stress of weather or other circumstances, convey such felons or other offenders to any other colony or place to which such offenders may legally be transported or banished, the governor or officer administering the government of such other colony or place is hereby authorised, if he shall deem it expedient, to receive and retain such felons or other offenders in the said colony or place; and the said felons or other offenders shall be subject and liable to all such and the same laws, rules, and regulations, as if they had been contracted or ordered on their original transportation to be delivered to him."

§ 3. "That it shall be lawful for the governor or the officer administering the government of either of the said colonies, with the concurrence of the governor or officer administering the government of the other of the said colonies, by an order in writing under his hand, to authorise the removal of any such convicts as aforesaid from the colony under his government to the other of the said colonies, and, for that purpose, to deliver any such convicts into the charge of the master of any ship or any other proper person proceeding directly to the colony to which such removal is to be made, and to contract with such master or other person for the effectual removal of such convicts to such other colony, and to take security by bond to his H. M. that he will effectually remove or cause to be removed every convict included in such contract to the colony to which it is proposed so to remove him, and procure from the governor or officer administering the government of such colony a certificate of the landing of such

convict there (death and casualties by sea excepted), and that such convict shall not be suffered to escape from the vessel in which he or she shall be so removed, by the wilful default of such contractor, or of any person employed by him."

§ 4. "That all and every the laws in force for the punishment of misbehaviour or disorderly conduct by any offender on board of any ship in which he or she may be transported from *Great Britain*, shall apply and extend, and are hereby extended, to every convict who, by virtue of any such order as aforesaid, shall be removed from either of the said colonies to the other of them."

§ 5. "That so soon as any such convict shall be delivered to the governor or to the officer administering the government of the colony to which he or she shall be so removed, such convict shall within such colony be subject and liable to all such and the same laws, rules, and regulations, as if he or she had been contracted or ordered on his or her original transportation to be delivered to the governor or the officer administering the government of such colony, and shall be there dealt with, governed, and disposed of, in all respects, in such and the same manner as other convicts within the same colony; and that the property in the service of every such convict shall be vested in the governor or officer administering the government of the colony to which he or she may be so removed, in the same manner, and subject to all such and the same rules and conditions, as if he or she had been contracted or ordered on his or her original transportation to be delivered to such governor or officer as aforesaid."

§ 6. "That if any person, in contravention of the existing rules and regulations for the government of any place of confinement for male offenders under sentence or order of transportation within *England or Wales*, or in any part of H. M.'s dominions out of *England*, shall carry or bring, or attempt or endeavour to carry or bring, into any such place of confinement as aforesaid, or shall supply or cause to be supplied to any offender there confined an offender, any spirituous or fermented liquors, it shall be lawful for any overseer or other officer belonging to such place of confinement to apprehend or cause to be apprehended such person, and to carry such person before a justice of the peace (who is hereby empowered to hear and determine such offence in a summary way); and if he shall lawfully convict such person of such offence, he shall forthwith commit such person to the common gaol or house of correction of the place where the same shall be heard and determined, there to be kept in custody for any time not exceeding three months, without bail or mainprize, unless such person shall immediately pay down such sum of money, not exceeding 20*l.*, and not less than 10*l.*, as the said justice shall impose upon such person; one moiety thereof to be paid to the informer, and the other moiety to be paid and made applicable to the maintenance of the place employed for the confinement of offenders under sentence of transportation as aforesaid."

§ 7. "That, from and after the commencement of this act, when any person shall be convicted at any session of oyer and terminer or gaol delivery, or at any quarter or other general session of the peace, to be holden for any county, riding, division, city, borough, liberty, or place, within that part of *Great Britain* called *England*, at any great session to be holden for the county palatine of

1 W. 4. c. 38.

Convicts removed from one colony to another liable to punishment for disorderly conduct.

Convicts removed from one colony to another to be subject to the regulations of the colony to which removed.

For prohibiting the supply of spirituous liquors to offenders under sentence of transportation.

Manner of proceeding in cases of extension of mercy to offenders convicted of capital offences.

1 W. 4. c. 39.

Chester, or within the principality of *Wales*, of any crime punishable by death, if H. M. shall be pleased to extend mercy to any such offender upon condition of imprisonment, or upon condition of imprisonment with hard labour, and such intention of mercy shall be signified by one of H. M.'s principal secretaries of state to the court before whom such offender hath been or shall be convicted, or any subsequent court with the like authority, such court shall allow to such offender the benefit of a conditional pardon, and make an order for the imprisonment of such offender, with or without hard labour, as the case may be; and, in case such intention of mercy shall be so signified to the judge or justice before whom such offender hath been or shall be convicted, or to any judge of H. M.'s court of K. B. or C. P., or to any baron of the exchequer of the degree of the coif, in *England*, such judge, justice, or baron shall allow to such offender the benefit of a conditional pardon, and make an order for such imprisonment of such offender, in the same manner as if such intention of mercy had been signified to the court during the term or session in or at which such offender was convicted; and such allowance and order shall be considered as an allowance and order made by the court before which such offender was convicted, and shall be entered on the records of the same court by the proper officer thereof, and shall be as effectual, to all intents and purposes, and have the same consequences, as if such allowance and order had been made by the same court during the continuance thereof; and every such order shall subject the offender to be so imprisoned."

Power to appoint an assistant or deputy to the superintendant at places of confinement out of *England*.

§ 8. "And whereas by the aforesaid act of the fifth year of H. M.'s reign, power is given to H. M. to appoint a superintendant of places of confinement within *England* and *Wales*, and power also to appoint one fit and able person to be assistant or deputy of such superintendant, at one or more of the same places of confinement; and by the said act, power is also given to remove male offenders convicted in *Great Britain*, and being under sentence of order of transportation, and to confine such offenders at land or on board any vessel to be provided by H. M. within the limits of any port or harbour in any part of H. M.'s dominions out of *England* named in any order in council, under the management of the said superintendant, and of an overseer to be appointed by H. M. for each such vessel or other place of confinement; and whereas it is expedient that power should be given to H. M. to appoint an assistant or deputy to the said superintendant, in any such part of H. M.'s dominions out of *England*; be it therefore enacted, that it shall be lawful for H. M., in case it shall be deemed expedient to appoint a fit and able person to be assistant or deputy to such superintendant, at any such place of confinement out of *England* named in any order in council as aforesaid, to be constantly resident at or near the place to which he shall be appointed."

2 & 3 W. 4. c. 62. § 2.

No governor, &c. to remit sentence till after a certain period of service.

By 2 & 3 W. 4. c. 62. (for abolishing the punishment of death in certain cases, and substituting a lesser punishment) it is enacted, § 2, that neither the governor nor lieutenant-governor of any island, colony, or settlement, or any other person, shall give a pardon or ticket of leave to any person sentenced to transportation, or who shall receive a pardon on condition of transportation, or any order or permission to suspend or remit the labour of any such person, except in cases of illness, until such person

transported for seven years, shall have served four; if transported for fourteen years, shall have served six; or if transported for life, shall have served eight years of labour; and that no such person shall be capable of acquiring or holding any property, or of bringing any action for the recovery of any property until after such person shall have duly obtained a pardon from the governor or lieutenant-governor of the colony or settlement where he shall have been confined; provided that nothing herein contained shall affect H. M.'s royal prerogative of mercy.

By 4 & 5 W. 4. c. 67., reciting part of 5 G. 4. c. 84. § 22., it is enacted, That so much of the recited act as inflicts the punishment of death upon persons convicted of any offence therein and herein-before specified shall be and the same is hereby repealed; and that from and after the passing of this act every person convicted of any offence above specified in the said act of the fifth year of the reign of his late majesty king George the fourth, or aiding or abetting, counselling or procuring the commission thereof, shall be liable to be transported beyond the seas for his or her natural life, and previously to transportation shall be imprisoned, with or without hard labour, in any common gaol, house of correction, prison, or penitentiary, for any term not exceeding four years.

By stat. 56 G. 3. c. 63., which was passed for the purpose of regulating the *general penitentiary* for convicts, erected at *Milbank*, in the county of *Middlesex*, it is enacted (§ 13.) that, when the penitentiary shall be completed for the reception of convicts, the king, by an order in writing, to be notified by the principal secretary of state for the home department, may direct that any person under sentence or order of transportation for any offence committed in *England or Wales*, and who, having been examined by an experienced surgeon or apothecary, shall appear to be free from infectious distemper, and fit to be removed, shall be removed to the penitentiary, there to continue for five years, in case such convict shall be under sentence or order of transportation for ten years only; and for seven years, in case such convict shall be under such sentence or order for fourteen years; and for ten years, in case such convict shall be under such sentence or order for life. And certain regulations are made (§ 14.) as to the time of confinement in the penitentiary, where the convicts have, previously to their removal thither, been kept confined in some other prison, during a part of their term of transportation. The statute subsequently makes provision respecting such convicts breaking prison or escaping, and respecting persons rescuing, or attempting to rescue them, or supplying means of escape.

By § 43. it is enacted, "That if any convict who shall be ordered to be confined in the said *penitentiary*, shall, at any time during the term of such confinement, break prison, or escape from the place of his or her confinement, or in his or her conveyance from such place of confinement, or from the person or persons having the lawful custody of such convict, he or she so breaking prison or escaping, shall be punished by an addition of three years to the term for which he or she, at the time of his or her breach of prison or escape, was subject to be confined; and if such convict so punished by such addition to the term of confinement shall afterwards be convicted of a second escape or breach of

2 & 3 W. 4. c. 62.

No right of property, or of suing till after pardon obtained.

4 & 5 W. 4. c. 67.

So much of recited act as inflicts the punishment of death for returning from transportation, repealed.

Punishment substituted for such offence, or for aiding it.

56 G. 3. c. 63.

Convicts sentenced to transportation may, under an order from the Home Office, be confined in the *general penitentiary at Millbank*, erected under 52 G. 3. c. 44.

Convicts confined in the penitentiary breaking prison or escaping, are to be punished by an addition of three years to the term of their confinement; and upon a second breach of prison or escape to be

56 G. 3. c. 63.

guilty of felony
without clergy.Persons rescu-
ing or attempt-
ing to rescue
convicts.

Felony.

Officers per-
mitting escape.Supplying
means of escape.

Felony.

Misdemeanor.
Punishment.Trial for such
offences, either
where offender
is apprehended,
or where offence
is committed.Evidence of the
order of com-
mitment to such
penitentiary.Mutiny Act,
4 W. 4. c. 6.
Cases of trans-
portation.

prison, he or she shall be adjudged guilty of felony, without benefit of clergy."

By § 44. it is enacted, "That if any person shall rescue any convict who shall be ordered to be confined within the said penitentiary, either during the time of his or her conveyance to the said penitentiary, or whilst such convict shall be in the custody of the person or persons under whose care and charge he or she shall be so confined; or if any person shall be aiding or assisting in any such rescue, every such person so rescuing, aiding, or assisting, shall be guilty of felony, and may be ordered to be confined in the said penitentiary for any term not less than one year, nor exceeding five years; and if any person having the custody of any such convict as aforesaid, or being employed by the person having such custody as a keeper, under-keeper, turnkey, assistant, or guard, shall voluntarily permit such convict to escape; or if any person whatsoever shall, by supplying arms, tools, or instruments of disguise, or otherwise, be in any manner aiding and assisting to any such convict in any escape, or in any attempt to make an escape, though no escape be actually made, or shall attempt to rescue any such convict, or be aiding and assisting in any such attempt, though no rescue be actually made, every such person so permitting, attempting, aiding, or assisting, shall be guilty of felony; and if any person having such custody, or being so employed by the person having such custody as aforesaid, shall negligently permit any such convict to escape, such person so permitting shall be guilty of a misdemeanor, and, being lawfully convicted of the same, shall be liable to fine or imprisonment, or to both, at the discretion of the court."

§ 45. relates to the more ready and effectual trial and conviction of persons committing offences within the act; and provides, that any convict so escaping, breaking prison, or being rescued, may be tried either in the county where he shall be apprehended and retaken, or in the county in which the said offence shall have been committed; and enacts that, in case of any prosecution for such escape, attempt to escape, breach of prison, or rescue, either against the convict escaping, or attempting to escape, or having broken prison, or being rescued, or against any other person or persons concerned therein, or aiding, abetting, or assisting the same, a copy properly attested of the order of commitment to such penitentiary shall, (after proof made that the person then in question before the court is the same that was delivered with such order,) be sufficient evidence to the court and jury that the person then in question was so ordered to such confinement.

It is enacted, by the Mutiny Act (see 4 W. 4. c. 6. § 7.), that whenever a general court-martial, by which any soldier shall have been tried, shall not think the offence deserving of capital punishment, the court may, instead of awarding a corporal punishment or imprisonment, adjudge the offender, according to the degree of the offence, to be transported as a felon for life, or for a certain term of years. And it is also provided, that in all cases where a capital punishment shall have been awarded by a general court-martial, H. M., instead of causing such sentence to be carried into execution, may order the offender to be transported as a felon, either for life or for a certain term of years. And if any

person so transported as a felon, whether in pursuance of the original sentence or in pursuance of such order from H. M., shall afterwards return, or be found at large, without leave from H. M., or other lawful authority, within any part of H. M.'s dominions, abroad or at home (other than the place to which he shall have been transported), before the expiration of the term limited by such sentence or order, and shall be duly convicted thereof, he shall suffer death as a felon.

Returning or being at large without leave.

By § 18., such sentence of transportation is to be notified in writing to a judge, who shall thereupon make an order for transportation, &c.; and the person so sentenced shall be subject to every provision made by law concerning persons sentenced to transportation, and also as to their escape, and as to persons aiding and abetting their escape; and the notification and order for transportation are to be filed in the court of K. B., and on application a certificate is to be delivered of the name of the offender, his offence, the place where he was convicted, and the conditions on which the order of transportation was given, which certificate is to be evidence of the conviction and sentence, and also of the terms of his transportation, in any court, or in any proceedings where such inquiry may be necessary.

Mode of executing such sentence.

Proof of conviction and sentence by certificate.

Enactments of a similar nature are contained in the statutes relating to the regulation of the royal marine forces while on shore. See 4 W. 4. c. 4. § 10. 17.

So with the marines.

Upon the several statutes relating to the transportation of offenders, the following points have been resolved:—

1st. That if an act of parliament direct that an offender shall be transported, without saying to what place, it shall be understood to the place where convicts are, at the time, legally transported, as formerly to *America*, and now to *Botany Bay*. By all the judges on a case reserved by Mr. J. Bathurst. *Vide* 1 Haw. 7th edit. 407.

Where an act directs transportation generally.

2d. That the daily book kept by the clerk of the papers of a public prison, in which all commitments and discharges are registered, is good, and indeed the best evidence to prove the day from which the time of transportation takes place. The clerk of the papers is a public officer of the prison, and the law reposes such a confidence in public officers, that it *presumes* they will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence, and shall be taken to be *true*, under such a degree of caution as the nature and circumstances of each case may appear to require, except the *falsity* of them can be made to appear; for every presumption may be repelled by contrary evidence; but unless the truth of the entries in question be impeached they are admissible evidence. *R. v. Aickle, O. B. Sept. Sess. 1785, Leach, 390. 1 Russ. 403.*

Prison day-book kept by the clerk of the papers, evidence to prove the time at which the transportation begins.

3d. That if a convict, on his trial for returning from transportation before his time was expired, confess the fact, and acknowledge that *he is the man*, the court will record such confession, but that otherwise the record of the conviction must be produced, and evidence given of his identity. *O. B. 1785, 1 Haw. 7th edit. p. 408.* A certificate of conviction is now sufficient. See G. 4. c. 84. § 24. *ante*, p. 909.

Identity on return from transportation before term expired.

Sign-manual promising a pardon on condition of leaving the kingdom for seven years.

4th. That if a convict be sentenced to transportation for seven years, and receive a sign manual promising him a pardon upon condition of his giving security to leave the kingdom within fourteen days from the date thereof, and not to return again for the space of seven years, and on his giving such security is discharged from prison, but neglect to transport himself within the fourteen days, he cannot be indicted for being unlawfully found at large before the term for which he received sentence of transportation had expired; for the sign-manual and the recognizance entered into in consequence of it are good evidence that he was lawfully at large, although he had not substantially performed the condition on which the promise of pardon was granted. In this case the prisoner was referred to his original sentence of transportation. *Maximilian Miller's case*, O. B. Jan. Sess. 1771, 1 *Leach*, 74. See *Hawk. c. 58. § 5. n. (4)*; and see *Aickles's Case*, S. P. 1 *Russ.* 404., and *n. (d) ib.*

Being at large in G. B. after sentence of death, commuted for transportation for life.

5th. That a prisoner convicted of a capital crime, whose sentence is respited during the king's pleasure, and who, on having received a pardon on condition of transportation for life, is afterwards found at large in G. B. without lawful cause, shall, on his being indicted for returning from transportation and acquitted, be referred back to his original sentence. *R. v. Patrick Martin*, O. B. Dec. Sess. 1780, 1 *Leach*, 223. See S. C. 1 *Russ.* § n. (4).

Passing second sentence of transportation.

It is also decided that sentence of transportation may be a second time passed upon a prisoner, although the time for which he before received sentence of transportation be unexpired. *R. v. Bath and others*, O. B. Feb. Sess. 1787, 1 *Leach*, 441.

Indictment for being at large, and certificate of former conviction qu. ? of sufficiency.

Where the prisoner was indicted for being at large after sentence of transportation for seven years, under 56 G. 3. c. 2. (now expired), which provided that a certificate in writing, signed by the officer of the court, containing the effect and substance only (omitting the formal part) of the indictment and conviction and order for transportation, shall be sufficient evidence of his conviction and sentence (which terms are similar to those used in the same purpose in 5 G. 4. c. 84. § 24.); and the indictment stated that the prisoner had been convicted of felony without stating the nature of the felony, and the certificate given as evidence of his conviction stated only that the prisoner had been convicted of felony, it was held on case reserved that the indictment and certificate were insufficient, for that they ought to have stated the nature of the felony; and the prisoner was remitted to his former sentence. *M. T. 1821, R. v. Watson*, C. C. R. 468. See *L. Sutcliffe, Acc. ib.* 469. n.

Indictment for being at large must state correctly the sentence of transportation.

The prisoner was tried and convicted for being at large after order for his transportation; the indictment stated his having been capitally convicted, and that he was pardoned on condition of being transported for life to some parts beyond the seas. It appeared, however, in evidence, that the condition of the pardon was that he should be transported to *New South Wales*, or some of the islands adjacent. On case reserved, this was held to be a fatal variance, and that the conviction was wrong. *R. v. Frisby*, C. C. R. 512.

Lawful excuse as to convict not transporting

Where a prisoner had been pardoned on condition of transporting himself beyond the seas within fourteen days from the day of

his discharge, but not having complied, was indicted for being found at large without lawful cause, it was held (*inter al.*) that if the prisoner had at the time of his discharge a real intention to quit the kingdom within the time, but was prevented by poverty and ill-health, that these impediments amounted to a lawful excuse. *Aickle's case*, 1 *Leach*, 396.; cit. 1 *Russ.* 405.

Rex v. Kenworthy, 1 *B. & C.* 711. Where a prisoner was convicted of perjury at the assizes at *Chester*, and the sentence of transportation was entered on record as follows:—“It is therefore ordered that he the said *L. K.* be transported to the coast of *New South Wales* for and during the term of seven years:” Held, an error brought, that this was no judgment, but merely an order; and a *procedendo* was awarded, commanding the court below to proceed to give judgment.

Rex v. Ellis, 8 *D. & R.* 173. A judgment of transportation for fourteen years, if bad for excess, is bad *in toto*, and cannot operate as a good judgment of transportation for seven years.

Where a court of quarter sessions have passed an erroneous judgment of transportation, the court of *K. B.* will not send it back to be amended, but will reverse it on writ of error. *Ibid.*

By stat. 30 *G. 3. c. 47.*, intituled *An act for enabling H. M. to authorise his governor or lieutenant-governor of such places beyond the seas to which felons or other offenders may be transported, to remit the sentence of such offenders*, it is enacted, § 1. That *H. M.* by commission under the great seal may authorise the governor or lieutenant-governor of any places to which any offenders may be transported, by an instrument in writing under the seal of the government in which such places are situated, to remit, either absolutely or conditionally, the whole or part of the term for which any such offenders shall be transported; and such instrument shall have the like force as if *H. M.* had signified his intention of mercy under his sign manual.

And by § 2., such governor, &c. shall transmit to one of the secretaries of state a duplicate under the government seal of each such instrument of remission; and the names of such offenders contained in such duplicate shall be inserted in the next general pardon that shall pass the great seal after the receipt of such duplicates. But see 2 & 3 *W. 4. c. 62.*, *supra*, p. 914.

Where an offender returns by permission of the governor of *New South Wales*, according to the provisions of stat. 30 *G. 3. c. 47.*, he is only to have the same advantage as if *H. M.* had signified his intention of mercy under his sign manual, and is to have his name inserted in the next general pardon under the great seal; a return, therefore, under such circumstances, is not sufficient to restore him to all his rights and capacities, until such pardon is signified under the great seal. *Bullock v. Dodds*, 2 *B. & A.* 58.

See, however, 7 & 8 *G. 4. c. 28.* § 13., tit. *Pardon*, *ante*, p. 655.

himself, ill health, &c.

Order for transportation not being a judgment, bad.

Judgment of transportation bad for excess, bad *in toto*, and will be reversed.

30 *G. 3. c. 47.* *H. M.* may authorise governor or lieutenant-governor of *New South Wales*, &c. to remit sentences.

Duplicates of instruments remitting sentences, shall be transmitted to secretary of state, &c.

Permission from governor to return not equivalent to a pardon.

Traverse.

[60 G. 3. c. 4.]

Traverse,
whence.

TRAVERSE took its name from the French *de traverse*, which is no other than *de transverso*, in Latin, signifying *on the other side*; because as the indictment on the one side chargeth the party, so he on the other side cometh in to discharge himself. *Lamb. 540.*

Its practical
meaning.

The word *traverse* is only applied to an issue taken upon an indictment for a misdemeanor; and it should rather seem applicable to the fact of putting off the trial till a following sessions or assizes, than to the joining of issue; and therefore perhaps the derivation is from the meaning of the word *transverso*, which in barbarous Latin is to go over, *i. e.* to go from one sessions, &c. to another; and thus it is that the officer of the court asks the party whether he be ready to try then, or will traverse over to the next sessions, &c.; but the issue is joined immediately, by pleading not guilty.

Traverse, what.

To traverse an indictment, then, is to take issue upon the chief matter thereof; which is the same as if one shall say, *to make contradiction, or to deny the point of the indictment.*

As in a presentment against a person for a highway overflowed with water, for default of scouring a ditch which he and they whose estate he hath in certain lands there have used to scour and cleanse, such person may traverse either the matter, to wit, that there is no highway there, or that the ditch is sufficiently scoured; or otherwise he may traverse the cause, to wit, that he hath not that land, or that he and they whose estate he hath, have not used to scour the ditch. *Lamb. 541.*

Form of
traverse.

And forasmuch as, in the record of one traverse, there is at once discovered the style of the sessions, the indictment, the process, answer, the traverse itself, the verdict and judgment thereupon, the process of execution, the yielding of the parties, and the assessment of their fines, so that it alone may serve instead of all, it is judged requisite to insert the same as follows:

(Style of the
sessions.)

Somerset. **HERETOFORE**, to wit, at the sessions of the peace at Bridgewater in the county aforesaid, on the Tuesday next before the feast of St. Matthew the apostle, in the _____ year of the reign of _____ by the grace of God of the united kingdom of Great Britain and Ireland king, defender of the faith, before J. P. and K. P. esquires, and other their associates, justices of our said lord the king, assigned to keep the peace in the county aforesaid, as also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed, in the oath of twelve jurors it is presented that John Long, _____ R. M. of _____ and T. L. of _____, with divers others unknown, evil doers and disturbers of the peace of our said lord the king, in a warlike manner arrayed, joined, and assembled on the _____ day of _____, in the night of the same day, in the year aforesaid, with force and arms, to wit, with swords, &c.

(The indictment.)

clubs, guns, and other arms, as well offensive as defensive, at ——— he close of one W. Willet, (called B.) unlawfully, riotously, routously broke and entered, and eight waggon loads of hay, to the value of ——— then and there being of the goods and chattels of the said W. W. then and there unjustly and unlawfully took and carried away, against the peace of our said lord the king, and against the form of the statute in that case made and provided: whereupon it was commanded to the sheriff that he should not omit for any liberty within his bailiwick, but cause them to come to answer. And afterwards, to wit, on the Tuesday aforesaid, next before the feast of St. Matthew the apostle, in the year aforesaid, before the aforesaid justices, came the aforesaid J. L., R. M., and T. L. in their proper persons, and having had the hearing of the indictment aforesaid, severally say that they are thereof not guilty, and of this they put themselves upon the country; and Adam Martin, who for our lord the king in this behalf prosecutes, in like manner doth the same. Therefore let there come thereupon a jury before the justices of our said lord the king, assigned to keep the peace in the county aforesaid, and also to hear and determine, &c. at the sessions of the peace at Nells, &c. on the Tuesday next after the Epiphany of our Lord, then next to be holden, and who are not of kin to the said J. L., R. M., and T. L., nor to any of them, to recognise upon their oath, whether the said J. L., R. M., and T. L. are guilty of the crime charged in the said indictment; because as well the said Adam Martin, who prosecutes for the said lord the king in this behalf, as he said J. L., R. M., and T. L. have put themselves upon the said jury. The same day is given as well to the aforesaid A. M. who prosecutes, &c. as to the aforesaid J. L., R. M., and T. L., &c. To which sessions of the peace holden at W. aforesaid, in the county aforesaid, on the aforesaid day, &c. before ——— and their associates, justices of our said lord the king, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county committed, came as well the aforesaid A. M. who prosecutes, &c. as the aforesaid J. L., R. M., and T. L., in their proper persons. And the jurors aforesaid, by the sheriff of the county aforesaid for this impanelled, and demanded, to wit, A. B., C. D., &c. likewise did come, who to say the truth concerning the premises being tried and sworn, say upon their oath that the aforesaid J. L., R. M., and T. L. are guilty; and every of them is guilty of trespass, contempt, and riot aforesaid, in the indictment aforesaid above specified, in manner and form as against them is above supposed. Therefore it is considered by the court that the aforesaid J. L., R. M., and T. L. be taken to satisfy our lord the king of their fines, by occasion of the trespass, contempt, and riot aforesaid. Which J. L., R. M., and T. L., then and there present in court prayed that they to a fine with our said lord the king, by the occasion aforesaid, may be admitted; and therefore they put themselves severally upon the mercy of our lord the king. And the fine of the same J. L. by the justices aforesaid is assessed at 3l. 6s. 8d., and the fine of the same R. M. is assessed at 10s., and the fine of the same T. L. is assessed at 5l., of good and lawful money of Great Britain, to the use and behoof of our said lord the king. Lamb. 543.

By stat. 60 G. 3. c. 4. "to prevent delay in the administration 60 G. 3. c. 4.

(Process to answer.

(Traverse.)

(Jury.)

(Verdict.)

(Judgment.)

(Process of execution.)

(Fine assessed.)

60 G. 3. c. 4.

Persons prosecuted in K. B. for misdemeanors, appearing in court, not permitted to imparle.

Judgment may be entered for want of plea.

Court may allow further time to plead.

Persons in custody for misdemeanors, or held to bail, twenty days before the session, shall plead to indictment and be tried, unless a writ of certiorari be delivered.

Certiorari may be issued before

of justice in cases of misdemeanor," after reciting that, "whereas great delays have occurred in the administration of justice, in cases of persons prosecuted for misdemeanors by indictment or information in H. M.'s courts of K. B. at *Westminster* and *Dublin*, and by indictment at the sessions of the peace, sessions of oyer and terminer, great sessions, and sessions of gaol delivery, in that part of *G. B.* called *England*, and in *Ireland* respectively, by reason that the defendants in some of the said cases have, according to the present practice of such respective courts, an opportunity of postponing their trials to a distant period, by means of imparlances in the said several courts of K. B., and by time being given to try in such respective courts of session;" for remedy thereof, it is enacted, "that where any person shall be prosecuted in H. M.'s court of K. B. at *Westminster*, or in H. M.'s court of K. B. in *Dublin* respectively, for any misdemeanor, either by information or by indictment there found, or removed into the same respective courts, and shall appear in term time in either of the said courts respectively in person, to answer to such indictment or information, such defendant, upon being charged therewith, shall not be permitted to imparle to a following term, but shall be required to plead or demur thereto within four days from the time of his or her appearance; and in default of his or her pleading or demurring within four days as aforesaid, judgment may be entered against the defendant for want of a plea; and in case such defendant shall appear to such indictment or information by his or her clerk or attorney in court, it shall not be lawful for such defendant to imparle to a following term, but a rule requiring such defendant to plead may forthwith be given, and a plea or demurrer to such indictment or information enforced, or judgment by default entered thereupon, in the same manner as might have been done, before the passing of this act, in cases where the defendant had appeared to such indictment or information by his or her clerk in court or attorney in a previous term."

§ 2. provides and enacts, that it shall be lawful for the said respective courts, or for any judge of the same respectively, upon sufficient cause shewn for that purpose, to allow further time for such defendant to plead or demur to such indictment or information.

§ 3. enacts, that "where any person shall be prosecuted for any misdemeanor by indictment at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery within that part of *G. B.* called *England*, or in *Ireland* having been committed to custody, or held to bail to appear to answer for such offence twenty days at the least before the session at which such indictment shall be found, he or she shall plead to such indictment, and trial shall proceed thereupon at such session of the peace, session of oyer and terminer, great session, or session of gaol delivery respectively, unless a writ of certiorari for removing such indictment into H. M.'s courts of K. B. at *Westminster* or in *Dublin* respectively, shall be delivered at such session before the jury shall be sworn for such trial."

§ 4. enacts, that such writ of certiorari may be applied for and issued before such indictment has been found, in the like cases."

the same manner, and upon the same terms and conditions, as if such writ of *certiorari* had been applied for after such indictment had been found.

§ 5. enacts, that "where any person shall be prosecuted for any misdemeanor by indictment at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery, within that part of *G. B.* called *England*, or in *Ireland*, not having been committed to custody, or held to bail to appear to answer for such offence twenty days before the session at which such indictment shall be found, but who shall have been committed to custody, or held to bail to appear to answer for such offence at some subsequent session, or shall have received notice of such indictment having been found twenty days before such subsequent session, he or she shall plead to such indictment at such subsequent session, and trial shall proceed thereupon at such same session of the peace, session of oyer and terminer, great session, or session of gaol delivery respectively, unless a writ of *certiorari* for removing such indictment into *H. M.'s* courts of *K. B.* at *Westminster* or in *Dublin* respectively, shall be delivered at such last-mentioned session before the jury shall be sworn for such trial, any law or usage to the contrary notwithstanding."

§ 6. provides and enacts, that nothing in this act contained shall extend to prevent any indictment, found by a grand jury of any city or town corporate, from being removed, at the prayer of any defendant, for trial by a jury of the county next adjoining to the county of such city or town corporate, pursuant to the provisions of stat. 38 *G. 3. c. 52.*, and upon such removal, the defendant shall plead, and the trial shall be had according to the provisions of this act, in like manner as if such indictment had been originally found by a grand jury of such next adjoining county.

§ 7. provides and enacts, that it shall be lawful for the court, at any session of the peace, session of oyer and terminer, great session, or session of gaol delivery respectively, upon sufficient cause shewn for that purpose, to allow further time for pleading to any such indictment, or for trial of the same.

§ 8. enacts, that in all cases of prosecutions for misdemeanors, instituted by *H. M.'s* attorney or solicitor general, in any of the courts aforesaid, the court shall, if required, make order that a copy of the information or indictment shall be delivered, after appearance, to the party prosecuted, or his clerk in court or attorney, upon application made for the same, free from all expense to the party so applying; provided that such party, or his clerk in court or attorney, shall not have previously received a copy thereof.

§ 9. provides and enacts, that in case any prosecution for a misdemeanor instituted by *H. M.'s* attorney or solicitor general in any of the courts aforesaid, shall not be brought to trial within twelve calendar months next after the plea of not guilty shall have been pleaded therein, it shall be lawful for the court in which such prosecution shall be depending, upon application to be made on the behalf of any defendant in such prosecution, of which application twenty days' previous notice shall have been given to *H. M.'s* attorney or solicitor general, to make an order, if the said court shall see just cause so to do, authorising such defendant

60 *G. 3. c. 4.*

or after indictment is found. So where indictment has been found at a prior sessions, and party has been committed, held to bail, or received notice twenty days before subsequent sessions.

Not to prevent indictments found by a grand jury of any city or town from being removed to an adjoining county to be tried. 38 *G. 3. c. 52.*

Court may, on sufficient cause shewn, allow further time for pleading, &c.

In prosecutions by the attorney or solicitor general, copy of the information or indictment to be delivered to the party.

In case such prosecution is not brought to trial within twelve calendar months, court may make an order thereon.

60 G. 3. c. 4.

to bring on the trial in such prosecution; and it shall thereupon be lawful for such defendant to bring on such trial accordingly, unless a *nolle prosequi* shall have been entered in such prosecution.

Not to extend to *quo warranto* or highway or bridge prosecutions.

Party committed for felony but indicted for misdemeanor.

§ 10. enacts, that nothing in this act contained shall extend to any prosecution by information in nature of a *quo warranto*, or for the non-repair of any bridge or highway.

In a case where the defendant had been committed more than twenty days before the assizes, for a felony, but at the assizes it was thought advisable to indict him jointly with others for a misdemeanor, it was held not to be within the stat., and that the prisoner was entitled to traverse. *Per Park J., R. v. Edm. G. Wakefield, Lanc. Spr. Ass., Talf. Dick. sess. 334.; cit. 5 Ch. Burn, 958.*

Bill for felony thrown out, and bill found for misdemeanour.

So, where the prisoner had been held to bail more than twenty days for rape, but the jury at the assizes threw out the bill for the capital offence, and found a bill for an assault, with intent, &c., *Vaughan B.* allowed the defendant to traverse, on the ground that he had not been on bail for twenty days, on the charge of misdemeanor upon which he was to be tried. *Hereford Summer Assizes, 1827, R. v. James, 3 C. & P. 222.*

Treason.

[3 Ed. 1. c. 15.—25 Ed. 3. st. 5. c. 2.—1 Mar. sess. 1. c. 1.—31 C. 2. c. 2.—7 W. 3. c. 3.—7 Ann. c. 21.—20 G. 2. c. 30.—6 G. 3. c. 53.—30 G. 3. c. 48.—36 G. 3. c. 7.—37 G. 3. c. 70.—39 & 40 G. 3. c. 93.—54 G. 3. c. 146.—57 G. 3. c. 6. c. 7.]

Meaning of the word treason.

TREASON, according to Lord Coke, is derived from *trahir*, to betray; and *trahison*, by contraction, *treason*, is the betraying itself. 3 *Inst.* 4.

Treason, generally speaking, is intended, not of petit treason but of high treason only. 1 *Hale*, 316.

Power of justices of the peace therein.

Notwithstanding that treason and misprision of treason are not within the letter of the commission of the peace, yet, inasmuch as they are against the peace of the king and of the realm, any justice of the peace may, either upon his own knowledge, or the complaint of others, cause any person to be apprehended for any such offence. And such justice may take the examination of the person so apprehended, and the information of all those who can give any material evidence against him, and put the same in writing, and also bind over such who are able to give any evidence to the K. B. or gaol delivery, and certify his proceedings to such court. 2 *Haw. c. 8. § 34. Hale's Sem. 168. 1 Hale*, 372.

Bail.
3 Ed. 1. c. 15.

And having committed the offender (for he is by no means bailable by justices of the peace, 3 *Ed. 1. c. 15. 2 Haw. c. 15. § 44.* it may be advisable for him to send an account immediately of all the particulars to a secretary of state.

By stat. 25 Ed. 3. st. 5. c. 2., which *Ld. Hale* calls a *sacred* act, and *Ld. Coke* an excellent act, and the king who made a *blessed* king, and the parliament a *blessed* parliament, all reasons which had been uncertain before were settled. Which act, by the 1 Mar. sess. 1. c. 1. is reinforced, and again made the only standard of treason; and all statutes, between the said statutes of the 25 Ed. 3. and 1 Mar., which made any offences high or petit treason, or misprision of treason, are abrogated; so that no offence is at this day to be esteemed high treason, unless it be either declared to be such by the said statute of the 25 Ed. 3., or made such by some statute since the 1 Mar.

And therefore I shall first consider such offences as are high treason within the said statute of the 25 Ed. 3., and then such as are made treason by statutes subsequent to the said statute of the 1 Mar.

The words of the statute of the 25 Ed. 3. as to this matter, are as follow:—

“Whereas divers opinions have been before this time in what case treason shall be said, and in what not [that is, what shall or shall not be said to be treason]; the king, at the request of the lords and commons, hath made a declaration in the manner as hereafter followeth; that is to say, when a man doth compass or imagine the death of our lord the king, or of our lady his queen, or of their eldest son and heir; or if a man do violate the king’s companion (that is, his wife, 3 Inst. 9.), or the king’s eldest daughter unmarried, or the wife of the king’s eldest son and heir; or if a man do levy war against our lord the king in his realm, or be adherent to the king’s enemies in his realm, giving to them aid and comfort in the realm, or elsewhere; and thereof be probably (proveably, proveably) attainted of open deed, by the people of their condition. And if a man counterfeit the king’s great or privy seal, or his money; and if a man bring false money into the realm, counterfeit to the money of *England*, knowing the money to be false; and if a man slay the chancellor, treasurer, or the king’s justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places, doing their offices. And it is to be understood, that in the cases above rehearsed, that ought to be judged treason which extends to our lord the king, and his royal majesty.

And by the statute of the 1 Mar. sess. 1. c. 1., which *Lord Hale* (*Hale*, 308.) calls another excellent law, no act, deed, or offence being by act of parliament made treason, by words, writing, phering, deeds, or otherwise whatsoever, shall be adjudged to be treason, but only such as be declared by the said statute of the 25 Ed. 3. And this (he says) at one blow laid flat all the numerous treasons at any time enacted since the 25 Ed. 3.

Ld. Coke (3 Inst. 14. 140.) seems to be of opinion, upon the said act of the 25 Ed. 3., that bare words are not a sufficient overt act, or open deed, whereby to convict a person of treason; but that they are misprision of treason only. So also *Ld. Hale* (1 Hale, 11. 118., and elsewhere throughout) seemeth to think that words, unless put into writing, are not regularly an overt act. But *Mr. Hawkins* (1 Haw. c. 17. § 39.) argues the contrary, and amongst other reasons for his opinion, he observes, that to charge a man with

Treason by stat. 25 Ed. 3.

25 Ed. 3. st. 5. c. 2.

Compassing the death of the king, &c. Violating the king’s wife, &c.

Levying war, or adhering to king’s enemies.

Counterfeiting king’s seal or money. Slaying king’s judges, being in their places.

1 Mar. sess. 1. c. 1.

Words alone are not an overt act.

speaking treason is unquestionably actionable, which could not be, if no words could amount to treason : also, that as in case of felony he who by command or persuasion induceth another to commit felony is an accessory in felony, so he who does the same in treason is a principal traitor (there being no accessaries in treason, but all being principals) ; and yet such person doth not act but by words. Nevertheless, at this day, it seems clearly to be agreed that by the common law and the statute of *Ed. 3.*, words spoken amount only to a high misdemeanor, and no treason. 4 *Blec. Com.* 80.

Bare words not treason.

With reference to the foregoing observations, it is to be understood that bare words not relative to any act or design, however wicked or reprehensible they may be, are not in themselves overt acts of high treason, but only a misprision punishable at common law by fine and imprisonment, or other corporal punishment, being frequently spoken in heat, without any intention to act accordingly. 1 *East, P. C.* 118.

Aliter, if advice, consultation, &c.

But words of advice or encouragement to destroy the king, and, above all, consultations for that purpose, fall under a very different consideration : they expressly relate to such an act or design in contemplation, and come directly and properly under the notion of means made use of for that end. But the consultation or incitement is the overt act, and the words are proper evidence of it. 1 *East, P. C.* 118.

Writings, when they amount to overt acts of treason.

In regard to writings, if they are plainly applicable to some treasonable design in contemplation, they are clear and satisfactory evidence of such design, although not published. But writings which have no connection with any actual purpose of a treasonable nature, while they remain unpublished, will not amount to an overt act of treason : but the fact of publishing them is an overt act, and may be evidence of the treasonable purpose which they import. but it ought to appear to the satisfaction of the jury that they were published with the intention of inciting to the commission of treason. 1 *East, P. C.* 119.

Other offences formerly made treason.

Several offences have by different statutes been made treason since the 1 *Mar.* ; many of which are now no longer in force.

Those regarding the Pretender, viz. 13 *W. 3. c. 3.*, 6 *Ann. c. 2.* and 17 *G. 2. c. 39.*, are no longer of any interest.

Coin.

Offences in relation to the coin are no longer punished as treason, but are treated as a different description of crime, under the enactments of particular statutes. See *ante*, tit. *Coin*.

Roman Catholics.

The statutes which created treasons in regard to Roman Catholics and the papal jurisdiction are now become obsolete, the Roman catholic religion and its professors being now placed on a very different footing by 31 *G. 3. c. 32.*, and 10 *G. 4. c. 7.* See *tit. Papery*.

No accessaries in high treason.

In high treason, as hath been said before, there are no accessaries, but all are principals ; and therefore, whatsoever act or consent will make a man accessory to a felony before the act done, the same will make him a principal in case of high treason. 3 *Inst.* 9. 21.

7 *W. 3. c. 3.*
Prosecution to be in three years.

By stat. 7 *W. 3. c. 3.*, no person shall be prosecuted for high treason but within three years after the offence committed ; except in the case of designing to assassinate the king's person.

And by stat. 31 *C. 2. c. 2.*, persons committed for high treason

all be indicted the next term, or next assize; otherwise they all be let to bail, unless it appear to the court, upon oath, that a witness for the king could not be produced in that time; and in such case they shall be indicted the second term or assize, or else discharged.

By stat. 7 W. 3. c. 3. § 1., persons indicted for high treason, whereby corruption of blood shall be made, or for misprision of high treason (except for counterfeiting the coin, the great seal, privy seal, privy signet or sign manual), shall have a copy of the indictment (but not the names of the witnesses) delivered to them seven days before the trial.

§ 7. And they shall have copies of the panel of the jurors delivered to them two days before trial.

And shall have process of court to compel their witnesses to appear.

And moreover, by stat. 7 Ann. c. 21. § 11., after the death of a person pretending to be king of *England* by the name of *James* the third, when a person is indicted for high treason, or misprision of treason, both a copy of the indictment, and lists of the jurors, and also of the witnesses, shall be delivered to the party indicted ten days before the trial.

But by stat. 6 G. 3. c. 53. § 3., this shall not extend to any indictment of high treason for counterfeiting the coin, the great seal, privy signet, or the sign manual.

And by stat. 7 W. 3. c. 3., such person shall have two such counsel as they shall desire assigned them by the court, who shall have access to them at reasonable times.

Likewise, by stat. 20 G. 2. c. 30., persons impeached by the house of commons of high treason, whereby corruption of blood shall be made, or for misprision thereof, shall be admitted to make their full defence by two counsel, who shall be assigned or that purpose, in like manner as upon indictments and other prosecution.

By stat. 7 W. 3. c. 3. § 1., they shall be allowed to make their defence by witnesses on oath.

§ 2. And they shall not be attainted but on the oath of two witnesses, either both of them to the same overt act, or one of them to one and the other of them to another overt act of the same reason: unless they shall confess or stand mute, or refuse to plead, or challenge peremptorily above thirty-five of the jury.

Stat. 39 & 40 G. 3. c. 93., reciting "that it is expedient that in cases of high treason in compassing or imagining the death of the king, and of misprision of such treason, where the overt act or acts of such treason alleged in the indictment shall be the assassination or killing of the king, or any direct attempt against his life, or any direct attempt against his person, whereby his life may be endangered, or his person may suffer bodily harm, the trial for such offence should not be different from trials for murder or wilful and malicious shooting;" enacts, that in all cases of high treason in compassing or imagining the death of the king, and of misprision of such treason, where the overt act or acts of such treason which shall be alleged in the indictment shall be assassination or killing of the king, or any direct attempt against his life, or any direct attempt against his person, whereby his life may be endangered or his person may suffer bodily harm, the person or persons charged with such offence shall and may be indicted, arraigned,

21 C. 2. c. 2.
Trial to be the
next term or
next assizes.

7 & 8 W. 3. c. 3.
Copy of the in-
dictment.

Copy of the
panel.

Process for
witnesses.

List of the
witnesses.

6 G. 3. c. 53.
Aliter as to coin,
&c.

Two counsel
to be assigned.

20 G. 2 c. 30.
Impeachments
for high treason
by house of
commons.
Full defence.

Witnesses.

Two witnesses
to the overt
act.

39 & 40 G. 3. c. 93. Exception
in cases of at-
tempts on the
king's person.
See 1 East's
P. C. 107. &
108.

39 & 40 G. 3.
c. 93.

tried, and attainted in the same manner, and according to the same course and order of trial, in every respect, and upon the like evidence, as if such person or persons stood charged with murder; and none of the provisions contained in the several acts of the 7 W. 3. and 7 Ann. respectively, touching trials in cases of treason and misprision of treason respectively, shall extend to any indictment for high treason in compassing and imagining the death of the king, or for misprision of such treason, where the overt act or acts of such treason alleged in the indictment shall be such as aforesaid; but upon conviction on such indictment, judgment shall be nevertheless given, and execution done, as in other cases of high treason.

54 G. 3. c. 146.

Form of sen-
tence in case of
high treason.

By stat. 54 G. 3. c. 146. *to alter the punishment in certain cases of high treason,*" after reciting that whereas in certain cases of high treason, as the law now stands, the sentence or judgment required by law to be pronounced or awarded against persons convicted or adjudged guilty of the said crime in such cases is, that they should be drawn on a hurdle to the place of execution, and there be hanged by the neck, but not until they are dead, but that they should be taken down again, and when they are yet alive the bowels should be taken out and burnt before their faces, and that afterwards their heads should be severed from their bodies and their bodies be divided into four quarters, and their heads and quarters to be at the king's disposal; and whereas it is expedient, in the said cases of high treason, to alter the sentence or judgment now required by law, it is enacted that in all cases of high treason, in which, as the law now stands, the sentence or judgment ordered by law is as aforesaid, the sentence or judgment to be pronounced or awarded from and after the passing of this act against any person convicted or adjudged guilty shall be, that such person shall be drawn on a hurdle to the place of execution, and be there hanged by the neck until such person be dead; and that afterwards the head shall be severed from the body of such person, and the body, divided into four quarters, shall be disposed of as H. M. and his successors shall think fit.

H. M. may
alter sentence.

§ 2. In case H. M. or his successors shall so think fit, H. M. or his successors, after such sentence or judgment shall be pronounced or awarded, may by warrant under his or their sign manual, countersigned by one of H. M.'s principal secretaries of state, declare it to be his or their will and pleasure, and may direct and order that such person as aforesaid shall not be drawn, but shall be taken in such manner as in the said warrant shall be expressed, to the place of execution, and that such person shall not be there hanged by the neck, but that instead thereof the head shall be there severed from the body of such person while alive, and in such warrant may direct and order how and in what manner the body, head, and quarters of such person shall be disposed of; and it shall be lawful for the sheriff or other person or persons to whom such warrant shall be addressed, and whom it shall concern, to carry the same into execution accordingly.

The ancient judgment of a woman for high treason was to be drawn and burnt. 3 Inst. 211.

30 G. 3. c. 48.

But by stat. 30 G. 3. c. 48. § 1., women are not to be burned, but hanged.

Forfeiture.

In the said judgment is implied forfeiture of lands and goods

the king, loss of dower, and corruption of blood. (a) 3 Inst.

1.

By stat. 36 G. 3. c. 7. § 1., if any person after the 18th December '95, during the natural life of H. M., and until the end of the next session of parliament after a demise of the crown, shall, without the realm or without, compass, imagine, invent, devise, or intend death or destruction, or any bodily harm, tending to death or destruction, maim or wounding, imprisonment or restraint of any person of the king, his heirs and successors, or to deprive or dispossess him or them from the style, honour, or kingly name of the imperial crown of this realm, or of any other of H. M.'s dominions; or to levy war against H. M., his heirs and successors, within this realm, in order by force or constraint to compel him or them to change his or their measures or counsels; or in order to put any force or constraint upon or to intimidate or overawe both houses of parliament; or to move or stir any foreigner or stranger with force to invade this realm, or any other H. M.'s dominions under his obedience, and such compassings, imaginations, inventions, devices, or intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, being convicted thereof upon the oaths of two witnesses, upon trial, or otherwise convicted or attainted due course of law, such person shall be deemed a traitor, and shall suffer and forfeit as in cases of high treason.

By stat. 57 G. 3. c. 6. § 1., after reciting stat. 36 G. 3. c. 7. § 1., and that it is necessary and expedient that such of the provisions of the said act as would expire at the end of the next session of parliament after the demise of the crown should be further continued and made perpetual; it is enacted, that all and every the provisions before recited provisions which relate to the heirs and successors of H. M., the sovereigns of these realms, shall be and the same are hereby made perpetual.

The offence which is the subject of the following statute being directly allied to the crime of treason, and being in some measure connected with it, may be fitly placed under the present title.

By stat. 37 G. 3. c. 70., for the better prevention and punishment of attempts to seduce persons serving in H. M.'s forces by sea or land, from their duty and allegiance to H. M., or to incite them to mutiny or disobedience, (made perpetual by 57 G. 3. c. 7.) § 1., it is enacted, that any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in H. M.'s forces, by sea or land, from his or their duty and allegiance to H. M., or to incite or stir up any such person or persons to commit any act of mutiny, or to make, or endeavour to make, any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy.

And, by § 2., any such offence, whether committed in England or on the high seas, may be tried before any court of oyer and terminer or gaol delivery for any county in England, as if the offence had been therein committed: Provided (§ 3.) that no person tried and acquitted, or convicted under this act, shall be liable

Treason by 36 G. 3. c. 7. Compassing, &c. death, bodily harm, &c., imprisonment or restraint or deposition king; levying war to compel him to change his counsels, &c. or to overawe parliament; stirring foreigners to invasion, and uttering such intent by writing or overt act.

57 G. 3. c. 6.

Provisions of recited act made perpetual.

37 G. 3. c. 70. Endeavouring to seduce soldiers or sailors. Any person who shall attempt to seduce any sailor or soldier from his duty, or incite him to mutiny, &c., to suffer death.

Trial in any county.

(a) See title Attainder.

to be tried again for the same offence or fact, as high treason or misprision of treason; nor shall this act prevent the trial of any person as for high treason or misprision of treason, who has not been tried for the same fact under this act.

The means of seducing, or of inciting, &c. to mutiny, need not be stated in the indictment.

Richard Fuller was indicted on the above act; and the indictment stated that the defendant, after the passing of the act, and whilst it was in force, to wit, on, &c. with force and arms, at, &c. "feloniously did maliciously and advisedly endeavour to seduce one *Matthew Lowe*, he the said *M. L.* then and there being a person serving in H. M.'s forces by land, from his duty and allegiance to his said majesty; against the form of the statute," &c. The second count was, for that the defendant "feloniously did maliciously and advisedly endeavour to incite and stir up the said *M. L.*, he the said *M. L.* then and there being a person serving, &c. to commit an act of mutiny, and to commit traitorous and mutinous practices, against the form of the statute," &c. After conviction, a question was reserved for the opinion of the judges, whether the indictment were good in this general form; or, whether it ought not to have stated how and by what acts the prisoner endeavoured to seduce the soldier. The case involving some difficulty, it was afterwards argued in the exchequer chamber before all the judges (except *Buller J.* who was indisposed, and all those who were assembled held the indictment to be sufficient. This opinion was grounded upon consideration of many precedents in *Tremaine* of the like general import, and on the nature of the offence itself, created by the act of parliament in the terms laid in the indictment. *Fuller's case*, O. B. July, 1797, cor. *Buller J.*, 1 *East's P. C.* 92.

Petit Treason.

25 Ed. 3. st. 5.
c. 2.
Petit treason,
what.

Moreover, there is another manner of treason, when a server sleyeth his master, or wife her husband; or when a man secular or religious sleyeth his prelate, to whom he oweth faith and obedience.

High treason is against the king, petit treason against the subjects. 3 *Inst.* 20.

Petit treason
to be treated as
murder.

But all distinction in regard to petit treason is now at an end. for by the 9 G. 4. c. 31. § 2. it is enacted, "that every offence which before the commencement of this act would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether principals or as accessaries, shall be dealt with, indicted, tried and punished as principals and accessaries in murder."

Misprision of Treason.

Misprision,
what.

Misprision cometh of the French word *mépris*, which properly signifieth neglect or contempt: and misprision of treason, in legal understanding, signifieth, when one knowing of any treason, though no party or consentor to it, yet conceals it, and doth not reveal it in convenient time. 3 *Inst.* 36. 1 *Hale*, 371.

The judgment of misprision of treason is, to be imprisoned during life, to forfeit all his goods for ever, and the profits of his lands during life. 3 *Inst.* 36. Judgment.

Every man, therefore, that knoweth a treason ought with all speed reveal it to the king, his privy council, or other magistrate. *Cautious.*

ale's Sum. 127.

But it seemeth that misprision of petit treason is not subject to judgment of misprision of high treason, but only is punishable by fine and imprisonment, as in the case of misprision of felony. *Misprision of petit treason.*

Hale, 375.

For a very satisfactory treatise on the heinous crime of treasons, see *East's P. C.*, Vol. I. p. 97—140.

Trees. See **Wood.**

Trespasses,

(*Wilful or Malicious.*)

[7 & 8 G. 4. c. 30.]

1 **ERE** acts of trespass, such as entering a yard, and digging the ground, &c., or pulling off the thatch from a person's house, if accompanied with circumstances constituting a breach of the peace, are not indictable, and the court will quash such indictment on motion. 1 *Russ.* 51. Mere trespasses not indictable.

So, where an indictment stated that defendant with force and arms unlawfully, forcibly, and injuriously seized, took, and carried away from *J. G.*, and against his will, a paper writing purporting to be a warrant to apprehend defendant for forgery, after conviction and argument judgment was arrested on the ground that nothing more than a mere private trespass was charged, and in which the king and the public had no interest. *R. v. Gardiner*, cit. *ibid.* Carrying away *vi et armis* a warrant to apprehend defendant not indictable.

Where twelve persons were indicted for that they unlawfully and with a strong hand entered a mill, land, and house, being in the possession of *A.*, and unlawfully and with strong hand expelled him out, on demurrer the indictment was held good; *per Curiam*, though an indictment will not lie for an illegal entry and trespass on lands *vi et armis*, yet that an unlawful forcible entry is indictable at common law, if it appear that actual force is used, so that the peace of the country is endangered. *v. Wilson and others*, 8 *T. R.* 357. *Aliter*, as to an entry with a strong hand.

By 7 & 8 G. 4. c. 30., the laws relative to malicious injuries to property are consolidated and amended, and the punishments inflicted against trespasses of that description are therein defined. tit. **Malicious Injuries**, § 2.

Trial. See tit. **Sessions.**

Turnips.

See 7 & 8 G. 4. c. 29. §§ 42, 43., tit. **Larceny**, and 7 & 8 G. 4. c. 30. §§ 21, 22., tit. **Malicious Injuries.**

Vagrants.

[43 G. 3. c. 61. — 52 G. 3. c. 31. — 58 G. 3. c. 92. — 5 G. 4. c. 13. c. 83.]

5 G. 4. c. 83.

3 G. 4. c. 40.
repealed.

Provisions
heretofore made
relative to
vagrants shall
be repealed,
except as to
offences com-
mitted before
the passing of
this act.
Such provisions
of 32 G. 3.
c. 45. as give
power of pass-
ing convicts on
discharge from
prison, re-
pealed.

Not to extend
to repeal any
act in force in
Scotland or
Ireland relative
to the removal
of poor, &c.

BY stat. 5 G. 4. c. 83., intituled *An act for the punishment of idle and disorderly persons, and rogues and vagabonds*, in that part of G. B. called England; after reciting that an act was passed in the 3d year of the reign of his present majesty, intituled *An act for consolidating into one act and amending the laws relating to idle and disorderly persons, rogues and vagabonds, incorrigible rogues and other vagrants*, in England; and that the said act was to continue in force until 1 Sept. 1824, and no longer; "and it is expedient to make further provision for the suppression of vagrancy, and for the punishment of idle and disorderly persons, rogues, and vagabonds, and incorrigible rogues, in England;" it is enacted "that all provisions heretofore made relative to idle and disorderly persons, rogues, and vagabonds, incorrigible rogues or other vagrants, in England, shall be and the same are hereby repealed, except only as to any offence committed before the passing of this act (viz. 21 June, 1824), which shall be punished under the provisions of the said recited act, and save and except as herein-after excepted."

By § 2., reciting that by stat. 32 G. 3. c. 45. H. M.'s judges at assizes and the justices at the general or quarter sessions, or any justice of the peace, are empowered to order any convict upon his discharge from prison to be conveyed by pass in manner therein directed; and the judge, justices or justice aforesaid, are also empowered to convey by pass any person who shall be acquitted at the assizes or general or quarter sessions, or discharged by proclamation or otherwise, who shall apply to be conveyed as aforesaid; and whereas doubts have arisen whether such parts of such act as give such power to order such person to be conveyed by pass were by the provisions of the said stat. 3 G. 4. c. 40. repealed; and that it is expedient to remove such doubts; it is enacted, that all such provisions of the said recited stat. 32 G. 3. c. 45. (viz. § 4.) as give such power of conveying by pass any convict upon his discharge from prison, and any person who shall be acquitted at the assizes or general or quarter sessions, or discharged by proclamation or otherwise, shall be hereby repealed.

By § 22., nothing herein contained shall be construed to extend or apply to Scotland or Ireland, nor to alter any law now in force for the removal of poor persons born in Scotland, Ireland, or the isles of Man, Jersey, and Guernsey, and becoming chargeable to parishes in England, such persons not having committed acts of vagrancy as herein-before described, nor to alter any law now in force relating to lunatic vagrants.

N. B. By 11 G. 4. c. 5., the provisions for removing poor persons born in Jersey and Guernsey are repealed.

- I. *Idle and disorderly Persons.*
[Stat. 5 G. 4. c. 83. § 3.]
- II. *Rogues and Vagabonds.*
[§ 4.]
- III. *Incorrigible Rogues.*
[§ 5.]
- IV. *Apprehending.*
[§ 6.]
- V. *Power of Justices out of Sessions.*
[§§ 7, 8, 9.]
- VI. *Proceedings at Sessions.*
[§ 10.]
- VII. *Duties of Constables and Peace Officers; — Penalties for Neglect.*
[§§ 11, 12.]
- VIII. *Power to search Lodging Houses.*
[§ 13.]
- IX. *Certificates to ask Alms.*
[§§ 15, 16.]
- X. *Form of Conviction.*
[§ 17.]
- XI. *Appeal.*
[§ 14.]
- XII. *Actions. Limitations. Treble Costs, &c. General Issue, &c.*
[§§ 18, 19.]
- XIII. *Removal of Convicts to their Settlements.*
[§ 20.]
- XIV. *General Saving.*
[§ 21.]
- XV. *Exemptions from the Vagrant Law.*
[43 G. 3. c. 61. — 58 G. 3. c. 92. — 5 G. 4. c. 13.]

I. *Idle and disorderly Persons.*

By stat. 5 G. 4. c. 83. § 3. — 1. Every person being able wholly in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall become chargeable to any parish, township, or place.

2. Every person returning to and becoming chargeable in any parish, township, or place from whence he or she shall have been ally removed by order of two justices of the peace, unless he she shall produce a certificate of the churchwardens and overseers of the poor of some other parish, township, or place, thereby

Persons committing certain offences to be deemed *idle and disorderly persons*, and how to be punished.

acknowledging him or her to be settled in such other parish, township, or place.

The commitment must state to what place the pauper returned.

Rex v. Elere Cole, Mich. 12 G. 3., 2 Nol. P. L. 255. 258. A motion was made to discharge a man out of custody upon the following objections:—1st, The commitment does not state to what place the man returned; 2dly, Nor that he returned without a certificate; 3dly, That it did not appear that he had been before convicted as a vagrant, which prior conviction alone, under stat. 17 G. 2. c. 5. (repealed, *supra*), gave a power of commitment for a month. The commitment was “for returning from the parish of St. Sepulchre’s, after a legal warrant of removal from the parish of the Holy Trinity.” And the court agreed that the commitment could not be supported, as it did not say to what place he returned.

Returning to reside in a tenement of 10l. a year.

R. v. Fillongly, 29 G. 3., 2 T. R. 709. Where a person who rented and resided on a tenement of 10l. a year value, having been removed to another parish, returned to the same tenement, the court said that the order of removal, though unappealed from, did not dissolve the contract, and that he could not be considered as returning in a state of vagrancy.

Person finding work on his return, semh. that he was not in a state of vagrancy.

Mann v. Davers, clerk, M. 60 G. 3., 3 B. & A. 103. A conviction stated, that the plaintiff, having been brought before a magistrate on an information charging him with having unlawfully returned, without a certificate, to a parish from which he had been removed, and that upon that occasion he confessed himself guilty; the court of K. B. held, that this conviction was good upon the face of it, and that it was not necessary to state in it expressly any act of vagrancy, it being for the party convicted to shew in his defence that he did not return in a state of pauperism.—*Abbott C. J.* said, The returning to the parish without a certificate, was at least *prima facie* evidence of his being an idle and disorderly person, and then it was for the defendant to shew that he had a lawful excuse for returning.—*Best J.* said, This conviction appears to be in the ordinary form; nevertheless, I must say that the parish officer acted most improperly in taking up a man as a vagrant who was at work in the harvest-field. But when he was before the magistrate, and alleged no fact to shew that he was not, as he appeared to be, in a state of vagrancy, the magistrate could do nothing but convict him. Had he stated to the magistrate that he returned for the purpose of working, it would have been a question for the court, whether the magistrate should not have used the language of this court in the case of *Rex v. Fillongly*. Judgment for the defendant.

5 G. 4. c. 83. Pauper must not only return but become chargeable.

It is to be remarked, that, under 5 G. 4. c. 83. § 3., a person does not become *idle and disorderly* unless he returns and becomes chargeable to the parish from which he has been removed.

3. Every petty chapman or pedler wandering abroad and trading, without being duly licensed, or otherwise authorised by act.

4. Every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner.

5. And every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, or causing or procuring or encouraging any child or children so to do. See § § 15, 16., *post*.

Shall be deemed an idle and disorderly person within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by his own view, or by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding one calendar month. (A.)

B.) (C.)

And such warrant ought to shew that the person convicting had authority to convict; for the omission thereof is a gross defect, and the defendants were therefore discharged. *Rex v. York and another*, 5 Burr. 2684.

A. B. C.

Warrant must shew the justice's authority.

The commitment (see the parallel words of stat. 17 G. 2. c. 5.) must be for a precise definite time, to be specified in the warrant of commitment. *Baldwin and others v. Blackmore, esq.*, 1 Burr. 96. S. P., *Rex v. J. Hall*, 3 Burr. 1636. If for deserting a family, the warrant must state that they were chargeable. 3 Burr. 636. It must also state that the defendant had been convicted of the offence, and not merely that he had been charged. *Rex v. Rhodes*, 4 T. R. 220. *Rex v. Hooper*, 6 T. R. 225.

Commitment must be for a limited time.

And by stat. 4 G. 4. c. 64. § 7., all idle and disorderly persons, rogues and vagabonds, incorrigible rogues, and other vagrants, are to be committed to houses of correction, and not to the common jails. See tit. Goals, &c. in another vol.

II. Rogues and Vagabonds.

By stat. 5 G. 4. c. 83. § 4. — 1. Every person committing any of the offences herein-before mentioned, after having been convicted as an idle and disorderly person.

Persons committing certain offences to be deemed rogues and vagabonds, and how to be punished.

2. Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device, by palmistry or otherwise, to deceive and impose on any of H. M.'s subjects.

3. Every person wandering abroad, and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself.

4. Every person wilfully exposing to view, in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition.

5. Every person wilfully, openly, lewdly, and obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female.

6. Every person wandering abroad and endeavouring by the exposure of wounds or deformities to obtain or gather alms.

7. Every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence.

8. Every person running away and leaving his wife, or his or her child or children, chargeable, or whereby she or they or any of them shall become chargeable to any parish, township, or place.

9. Every person playing or betting in any street, road, highway,

5 G. 4. c. 83.

or other open and public place, at or with any table or instrument of gaming, at any game or pretended game of chance. (a) See *R. v. Gardener*, tit. *Malicious Injuries*, § 1. *ant*, p. 544.

10. Every person having in his or her custody or possession any picklock key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coach-house, stable, or outbuilding, or being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or having upon him or her any instrument with intent to commit any felonious act.

It must be averred that prisoner had the implements on him when apprehended.

Rex v. Brown, 8 T. R. 26. *Brown* was committed upon stat. 23 G. 3. c. 88. (now repealed by stat. 5 G. 4. c. 83. § 1.), for having upon him many picklock keys, two crows, and other implements, with an intent feloniously to break and enter into a dwelling-house at *Wentley*. Objection was taken to the commitment, that it did not state that he had those implements upon him when he was apprehended. *Ld. Kenyon* C. J. said, I yield with great reluctance to the objection, but I am afraid it is well founded; and the prisoner was discharged.

11. Every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose. See *R. v. G. Howarth*, *post*, p. 938.

12. Every suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony.

13. And every person apprehended as an idle and disorderly person, and violently resisting any constable or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended. And see § 15., *post*.

C. E.

Shall be deemed a rogue and vagabond, within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit (C.) (E.) such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months; and every such picklock key, crow, jack, bit, and other implement, and every such gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, and every such instrument as aforesaid, shall, by the conviction of the offender, become forfeited to H. M.

III. Incurrible Rogues.

Who shall be deemed incurrible rogues.

By stat. 5 G. 4. c. 83. § 5.—1. Every person breaking or escaping out of any place of legal confinement before the expiration of the

(a) Playing bowls was held not to be within stat. 17 G. 2. c. 5. § 2. *Ld. Clarke*, 1 Cowp. R. 35. *Paley*, 85. 110.

term for which he or she shall have been committed or ordered 5 G. 4. c. 83. to be confined by virtue of this act.

2. Every person committing any offence against this act which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be (a), and duly convicted thereof.

3. And every person apprehended as a rogue and vagabond, and violently resisting any constable or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended.

Shall be deemed an incorrigible rogue within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to remain until the next general or quarter sessions of the peace; and every such offender who shall be so committed to the house of correction shall be there kept to hard labour during the period of his or her imprisonment.

IV. Apprehending.

By stat. 5 G. 4. c. 83. § 6., it shall be lawful for any person whatsoever to apprehend any person who shall be found offending against this act, and forthwith to take and convey him or her before some justice of the peace, to be dealt with in such manner as is herein-before directed, or to deliver him or her to any constable or other peace officer of the place where he or she shall have been apprehended, to be so taken and conveyed as afore-said; and in case any constable or other peace officer shall refuse or wilfully neglect to take such offender into his custody, and to take and convey him or her before some justice of the peace, or shall not use his best endeavours to apprehend and to convey before some justice of the peace any person that he shall find offending against this act, it shall be deemed a neglect of duty in such constable or other peace officer, and he shall on conviction be punished in such manner as is herein-after directed.

Any person may apprehend offenders.

Penalty on constables, &c. neglecting their duty.

On indictment against prisoner for maliciously cutting, &c. in order to prevent his lawful apprehension, the question was, whether the case fell within 5 G. 4. c. 83. §§ 4. 6. It appeared, that the prisoner having been seen in prosecutor's board-house designing to steal boards there, prosecutor was informed of it, and coming not long after, found prisoner secreting himself in an adjoining

Apprehension on fresh pursuit.

(a) On the question, "Whether persons once convicted under the vagrant act, which subsisted previous to stat. 5 G. 4. c. 40., as rogues and vagabonds, are under these words to be deemed incorrigible rogues for a second offence of like nature," the attorney general (Sir John Copley) has given the following opinion, which he kindly furnished for the use of this work, on 13th January, 1825:—

"I am of opinion, that a person convicted of any offence under the New Vagrant Act, which would subject him to be dealt with as a *rogue and vagabond*, and who has also been convicted as a *rogue and vagabond* under any former act of parliament, is by the statute 5 G. 4. c. 83. to be deemed an *incorrigible rogue*, and subject to be punished as such.

(Signed)

"JOHN COPLEY, Serjeant's Inn."

5 G. 4. c. 83.

No notice of cause of apprehension necessary, where circumstances make it sufficiently clear.

garden; and on endeavouring to apprehend prisoner was wounded by him. It was objected, that prisoner's intention of stealing in the outhouse was at an end when his apprehension was attempted, and further, that he ought to have had some notice why he was to be apprehended. The judges, however, held the conviction right; for that, being taken on fresh pursuit, it was the same as if he had been in the outhouse or running from it, being all one transaction; and that there could be no occasion for notice, as the cause of his apprehension must have been sufficiently clear from the circumstances. *R. v. G. Howarth*, 1 R. & M. 307. See *R. v. Gardener*, tit. *Malignant Injuries*, § 1. ante, p. 544.

V. Power of Justices out of Sessions.

Justices may issue warrant to apprehend suspected persons.

By stat. 5 G. 4. c. 83. § 7., it shall be lawful for any justice of the peace, upon oath being made before him that any person hath committed or is suspected to have committed any offence against this act, to issue his warrant to apprehend and bring before him or some other justice of the peace the person so charged, to be dealt with as is directed by this act.

All vagrants to be searched, and trunks, bundles, &c. to be inspected.

By § 8., it shall be lawful for any constable, peace officer, or other person apprehending any person charged with being an idle and disorderly person, or a rogue and vagabond, or an incorrigible rogue, to take any horse, mule, ass, cart, car, caravan, or other vehicle, or goods in the possession or use of such person, and to take and convey the same as well as such person before some justice of the peace, and for every justice of the peace by whom any person shall be adjudged to be an idle and disorderly person, or a rogue and vagabond, or an incorrigible rogue, to order that such offender shall be searched, and that his or her trunks, boxes, bundles, parcels, or packages shall be inspected in the presence of the said justice, and of him or her, and also that any cart, car, caravan, or other vehicle which may have been found in his or her possession or use, shall be searched in his or her presence; and it shall be lawful for the said justice to order that any money which may be then found with or upon such offender shall be paid and applied for and towards the expense of apprehending, conveying to the house of correction, and maintaining such offender during the time for which he or she shall have been committed; and if upon such search money sufficient for the purposes aforesaid be not found, it shall be lawful for such justice to order that a part, or if necessary, the whole of such other effects then found, shall be sold, and that the produce of such sale shall be paid and applied as aforesaid, and also that the overplus of such money or effects, after deducting the charges of such sale, shall be returned to the said offender. (a)

Effects found upon vagrants to be sold, and applied towards the expenses of maintaining such offenders.

Justices may bind persons by recognizance to prosecute vagrants at sessions.

By § 9., when any justice as aforesaid shall commit any such incorrigible rogue to the house of correction, there to remain till the next general or quarter sessions, or when any such idle and disorderly person, rogue and vagabond, or incorrigible rogue, shall

(a) As to the expenses of carrying vagrants to gaol, where they have no other see stat. 4 G. 4. c. 64. § 39., and 5 G. 4. c. 85. § 22., tit. *Gaols*, in another vol.

give notice of his or her intention to appeal against the conviction of him or her, and shall enter into recognizance as herein-after directed to prosecute such appeal, such justice shall require the person by whom such offender shall be apprehended, and the person or persons whose evidence shall appear to him to be material to prove the offence and to support such conviction, to become bound in recognizance (F.) to H. M., his heirs and successors, to appear at the said general or quarter sessions, to give evidence against such offender touching such offence; and the justices of the peace at their said general or quarter sessions are hereby authorised and empowered, at the request of any person who shall have become bound in any such recognizance, to order the treasurer of the county, riding, division, or place in which the offence shall have been committed, to pay unto such prosecutor, and unto the witness or witnesses on his or her behalf, such sum or sums of money as to the court shall seem reasonable and sufficient to reimburse such prosecutor and such witness or witnesses respectively for the expenses he, she, or they shall have been severally put to, and for his, her, or their trouble and loss of time in and about such prosecution; which order the clerk of the peace is hereby directed and required forthwith to make out and deliver unto such prosecutor, or unto such witness or witnesses, upon being paid for the same the sum of 2s. and no more; and the said treasurer is hereby authorised and required, upon sight of such order, forthwith to pay unto such prosecutor, or other person or persons authorised to receive the same, such money as aforesaid; and the said treasurer shall be allowed the same in his account; and in case any such person or persons as aforesaid shall refuse to enter into such recognizance, it shall be lawful for such justice to commit such person or persons so refusing to the common gaol, there to remain until he, she, or they shall enter into such recognizance, or shall be otherwise discharged by due course of law.

5 G. 4. c. 83.

Power of sessions to order payment of expenses to prosecutors and witnesses.

F.

VI. Proceedings at Sessions.

By stat. 5 G. 4. c. 83. § 10., when any incorrigible rogue shall have been committed to the house of correction, there to remain until the next general or quarter sessions, it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned in the house of correction, and be there kept to hard labour for any time not exceeding one year from the time of making such order, and to order further, if they think fit, that such offender (not being a female) be punished by whipping, at such time during his imprisonment, and at such place within their jurisdiction, as according to the nature of the offence they in their discretion shall deem to be expedient. (a)

Power of sessions to detain and keep to hard labour, and punish by whipping, rogues and vagabonds and incorrigible rogues.

(a) Before this act one justice might, under stat. 17 G. 2. c. 5. § 7., order a rogue and vagabond to be publicly whipped. The form and manner of such public whipping may perhaps be best collected from the provisions of former vagrant acts. By stat. 22 H. 8. c. 12. the vagrant was to be carried to some market town or other place, and there tied to the end of a cart naked, and beaten with whips throughout such market town or other place, till his body should be bloody, by reason of such whipping. By stat. 39 El. c. 4. § 3. he was to be stripped naked from the middle upwards, and only whipped, till his body should be bloody.

VII. Duties of Constables and Peace Officers; Penalties for Neglect.

5 G. 4. c. 83.
Penalty on
officers neglect-
ing their duties,
&c.

By stat. 5 G. 4. c. 83. § 11., in case any constable or other peace officer shall neglect his duty in any thing required of him by this act, or in case any person shall disturb or hinder any constable or other peace officer in the execution of this act, or shall be aiding, abetting, or assisting therein, and shall be thereof convicted upon the oath of one or more credible witness or witnesses before one or more justice or justices of the peace where such offence shall be committed, every such offender shall for every such offence forfeit any sum not exceeding 5*l.*; and in case such offender shall not forthwith pay such sum so forfeited, the same shall be levied by distress and sale of the offender's goods, by warrant from such justice or justices; and if sufficient distress cannot be found, it shall be lawful to and for one or more such justice or justices to commit the person so offending to the house of correction, there to be kept for any time not exceeding three calendar months, or until such fine be paid; and the said justice or justices shall cause the said fine, when paid, to be forthwith delivered to the treasurer of the county, riding, division, or place where such offence shall have been committed, to be by him added to and used as part of the stock of the said county, riding, division, or place.

On conviction
of officers, &c.
justices to
make order for
payment of
expenses of
prosecution.

By § 12., in case any constable or other peace officer shall be convicted before any one or more justice or justices of the peace, for any neglect of any duty required of him by this act, or of any disobedience of any lawful warrant or order of any justice or justices of the peace issued under the provisions of this act, and in case any two or more justices of the peace shall impose any fine, or direct any penalty to be paid by such officer, under and by virtue of the powers given to justices of the peace by stat. 33 G. 3. c. 55., intituled *An act to authorise justices of the peace to impose fines upon constables, overseers, and other peace or parish officers, for neglect of duty, and on masters of apprentices for ill-usage of such their apprentices, and also to make provision for the execution of warrants of distress granted by magistrates, or under any other powers enabling such justices in that behalf, then and in every such case it shall be lawful for such justice or justices, upon conviction of any such offender, to reimburse and allow to the person or persons on whose complaint or information such offender shall have been convicted all necessary costs and expenses which such person or persons may thereby have incurred, or by any appeal made in consequence thereof, by making an order under his or their hands and seals upon the treasurer of the county, riding, division, or place, to pay to such person or persons the amount of such costs and expenses, on producing the said order and giving a receipt for the same; and the same shall be allowed the said treasurer in his account.*

33 G. 4. c. 55.

VIII. Power to search Lodging Houses.

By stat. 5 G. 4. c. 83. § 13., it shall be lawful for any justice of the peace, upon information on oath before him made, that any person herein-before described to be an idle and disorderly person, or a rogue and vagabond, or an incorrigible rogue, is, or is reasonably suspected to be, harboured or concealed in any house kept or purporting to be kept for the reception, lodging, or entertainment of travellers, by warrant under his hand and seal to authorise any constable or other person or persons to enter at any time into such house, and to apprehend and bring before him or any other justice of the peace every such idle and disorderly person, rogue and vagabond, and incorrigible rogue as shall be found therein, to be dealt with in the manner herein-before directed.

5 G. 4. c. 83.
Lodging
houses, &c.
suspected to
conceal va-
grants may be
searched, and
suspected per-
sons brought
before a justice.

IX. Certificates to ask Alms.

By stat. 5 G. 4. c. 83. § 15., nothing herein contained shall extend or be construed to extend so as to restrain, hinder, or prevent any visiting justice of any county gaol, house of correction, or other prison, from granting a certificate or other instrument for enabling any person discharged from a county gaol, house of correction, or other prison, to have or receive alms or relief in or upon his or her route to his or her place of settlement; provided that such certificate be made and drawn up in compliance with the directions and provisions of any act or acts of parliament for the better regulation and management of gaols, houses of correction, or prisons. And if any person, to whom any such certificate or instrument shall be delivered, shall act in any manner contrary to the directions or provisions of such certificate or instrument, or shall loiter upon his or her route, or shall deviate therefrom, every such person shall be and be deemed to be a rogue and vagabond within the provisions and directions of this act, and shall be punished accordingly. See 5 G. 4. c. 85. § 22. *et seq.*, tit. *Gaols*.

Visiting jus-
tices of gaols,
&c. empowered
to grant certi-
ficates for en-
abling persons
discharged from
prison to receive
alms in their
route.

By § 16., from and after the passing of this act, no justice of the peace, mayor, or other magistrate shall grant to any person, other than a person entitled thereto under and by virtue of an act passed in the forty-third year of the reign of his late majesty king George the third, intituled *An act for the relief of soldiers, sailors, and marines, and of the wives of soldiers in the cases therein mentioned, so far as relates to England*, any certificate or other instrument enabling such person to ask alms or relief in their route to any place, or for any other purpose whatever; and every person asking alms or relief under and by virtue of any certificate or other instrument hereby prohibited, is liable to be declared to be an idle and disorderly person in like manner as if he or she had possessed no such certificate or other instrument as aforesaid.

Justices not to
grant certi-
ficates enabling
persons to ask
relief on route,
except to sol-
diers and sail-
ors. 43 G. 3.
c. 61. Other
persons asking
alms to be
deemed rogues
and vagabonds.

X. Form of Conviction.

5 G. 4. c. 83.
Form of conviction under this act.

By stat. 5 G. 4. c. 83. § 17., no proceeding to be had before any justice or justices of the peace under the provisions of this act shall be quashed for want of form; and every conviction of any offender as an idle and disorderly person, or as a rogue and vagabond, or as an incorrigible rogue under this act, shall be in the form or to the effect following, or as near thereto as circumstances will permit; (that is to say,)

_____ } *BE it remembered, that on the _____ day of _____, to wit. _____ in the year of our Lord _____, at _____ in the county of _____, A. B. is convicted before me C. D., one of his majesty's justices of the peace in and for the said county, of being an idle and disorderly person [or, a rogue and vagabond, or, an incorrigible rogue] within the intent and meaning of the statute made in the fifth year of the reign of his majesty king George the fourth, intituled An act [here insert the title of this act;] that is to say, for that the said A. B. on the _____ day of _____, at _____ in the said county, [here state the offence proved before the magistrate,] and for which said offence the said A. B. is ordered to be committed to the house of correction at _____, there to be kept to hard labour for the space of _____, [or, until the next general or quarter sessions.] Given under my hand and seal, the day, year, and at the place first above written.*

Conviction to be transmitted to the sessions, and a copy thereof to be evidence.

And the justice or justices of the peace before whom any such conviction shall take place shall, and he and they is and are hereby required to transmit the said conviction to the next general or quarter sessions of the peace, to be holden in and for the county, riding, division, or place wherein such conviction shall have taken place, there to be filed and kept on record; and a copy of the conviction so filed, duly certified by the clerk of the peace, shall and may be read as evidence in any court of record, or before any justice or justices of the peace acting under the powers and provisions of this act.

XI. Appeal.

Persons aggrieved may appeal to the next sessions.

By stat. 5 G. 4. c. 83. § 14., any person aggrieved by any act or determination of any justice or justices of the peace out of sessions, in or concerning the execution of this act, may appeal to the next general or quarter sessions for the county, riding, division, or place in and for which such justice or justices shall have so acted, giving to the justice or justices of the peace, whose act or determination shall be appealed against, notice in writing of such appeal, and of the ground thereof, within seven days after such act or determination, and before the next general or quarter sessions, and entering within such seven days into a recognizance, with sufficient surety, before a justice of the peace for the county or place in which such person shall have been convicted, personally to appear and prosecute such appeal; and upon such notice being given, and such recognizance being entered into, such

justice is hereby empowered to discharge such person out of custody; and the court at such general or quarter sessions shall hear and determine the matter of such appeal, and shall make such order therein as shall to the said court seem meet, and in case of the dismissal of the appeal, or the affirmance of the conviction, shall issue the necessary process for the apprehension and punishment of the offender, according to the conviction. 5 G. 4. c. 83.

XII. Actions. — Limitations. — Treble Costs. — General Issue, etc.

By stat. 5 G. 4. c. 83. § 18., in all cases where an action shall be brought against any justice of the peace, constable, or other person, for or on account of any matter or thing whatsoever done or commanded by him in the execution of his duty or office under this act, such justice, constable, or other person, if he shall have judgment in his favour, shall have treble costs awarded to him by the court, unless the judge shall certify that there was a reasonable cause for such action. Justices, &c. to have treble costs if judgment be in their favour. :

By § 19., every such action shall be commenced within three calendar months after the cause of action or complaint shall have arisen, and not afterwards; and if any person or persons shall be sued for any matter or thing which he, she, or they shall have done in the execution of this act, he, she, or they may plead the general issue, and give the special matter in evidence. Limitation of actions. General issue.

XIII. Removal of Convicts to their Settlements.

By stat. 5 G. 4. c. 83. § 20., every person who under the provisions of this act shall have been convicted as an idle and disorderly person, or as a rogue and vagabond, shall be deemed to be actually chargeable to the parish, township, or place in which such person shall reside; and such person shall be liable to be removed to the parish of his or her last legal settlement, by the order of two justices of the peace of the division or place in which such person shall reside. Persons convicted under this act to be chargeable to the parish in which they shall reside.

XIV. General Bailing.

By § 21., wherever by any act or acts of parliament now in force is directed that any person shall be punished as an idle and disorderly person, or as a rogue and vagabond, or as an incorrigible rogue, for any offence specified in such act or acts, and not herein-before provided for by this act, in every such case, whether such person shall or shall not have committed any offence against this act, every such person shall be punished under the provisions, powers, and directions of this act. Persons committing offences under former acts to be punished under this act.

XV. Exemptions from the Vagrant Law.

By stat. 43 G. 3. c. 61., soldiers, sailors, mariners, and the wives of soldiers therein mentioned are relieved against the penalties of 43 G. 3. c. 61. 58 G. 3. c. 92.

the vagrants acts. (a) Its provisions, and those of stat. 58 G. 3. c. 92, are stated, tit. *Military Law*, in another vol.

- A. (A.) Information against an Idle and Disorderly Person on stat. 5 G. 4. c. 83. § 3.

County of } *THE* complaint and information of A. I., one of the
to wit. } *overseers of the poor of the parish of* _____ *in the*
_____ *county of* _____, *taken upon oath this* _____ *day of* _____
before me, J. P. esquire, one of his majesty's justices of the peace in
and for the said county, Who saith that A. O. of the same parish,
labourer, being a person able to work, and thereby [or, by other
means, as the case may be], to maintain himself and family, hath
wilfully refused [or, neglected] so to do, by which wilful default
[or, neglect] they are become chargeable to the said parish, and
are now actually chargeable thereto, and have been for the space of
_____ *and upwards, [as the case may be,] whereupon he the said*
A. I. prays that he the said A. O. may be punished as an idle and
disorderly person [or, as the case may be].

A. I.

Sworn, &c. before me,
J. P.

- B. (B.) Warrant to apprehend thereupon.

County of } To the constable of the parish of _____, and to all
to wit. } constables and others his majesty's officers of the
_____ peace for the said county of _____.

FORASMUCH as A. I., one of the overseers of the poor of the
parish of _____, in the said county, hath this day made com-
plaint and information upon oath before me, J. P. esquire, one of
his majesty's justices of the peace in and for the said county, that
A. O. of the same parish, labourer, being a person able to work,
and thereby [or, by other means, as the case may be], to maintain
himself and family, hath wilfully refused [or, neglected] so to do,
by which wilful default [or, neglect] they are become chargeable to
the said parish of _____, and are now actually chargeable thereto,
and have been for the space of _____, and upwards [as the case
may be]: *These are therefore to command you in his said majesty's*
name forthwith to apprehend and bring before me the body of the
said A. O. to answer unto the said complaint, and to be further
dealt withal according to law. Herein fail you not. Given under
my hand and seal this _____ *day of* _____, *in the year of our*
Lord one thousand eight hundred and _____.

- C. (C.) Examination of a Vagrant on stat. 5 G. 4. c. 83. § 4

County of } *THE* examination of A. O., a rogue and vagabond
to wit. } *taken on oath before me* _____, *one of H. M.'s*
_____ *justices of the peace, in and for the said county, the*
_____ *day of* _____, *in the year of our Lord* 18—.

(a) By stat. 52 G. 3. c. 31., stat. 39 EL. c. 17. "against wandering persons pretending to be soldiers or mariners," is repealed.

*Who on his oath saith, that he was born at ——— [and so
ace out the history of his life so far forth as to ascertain his last
gal place of settlement.]*

D.) Commitment of an Idle and Disorderly Person under
stat. 5 G. 4. c. 83. § 3.

D.

ounty of { To the constable of ——— in the said county, and
to wit. { to the keeper of the house of correction at ———,
in the said county ———.

*WHEREAS A. V. was this day duly convicted before me ———,
one of the justices of our lord the king, assigned to keep the
ace of our said lord the king in and for the said county of ———,
d also to hear and determine divers felonies, trespasses, and other
isdemeanors in the said county committed, of being an idle and
sorderly person, for that he, on the ——— day of ———, in
e year of our Lord ———, at ———, in the parish of ———,
the said county, did [state act of vagrancy, as the case may be],
ntrary to the form of the statute in such case made and provided,
d was by me adjudged to be committed for the said offence to the
use of correction, there to be kept to hard labour for [any time
t exceeding one calendar month], according to the form of the
d statute: These are therefore to command you the said constable
convey the same A. V. to the said house of correction, and him to
liver to the keeper thereof, together with this warrant. And I do
reby command you the said keeper to receive the said A. V. into
ur custody, in the said house of correction, and him there safely
p to hard labour for ——— [as above]. And for so doing this shall
your sufficient warrant. Given under my hand and seal at
——, this ——— day of ———, in the ——— year of the reign
his present majesty king William the fourth, and in the year of
Lord one thousand eight hundred and ———.*

E.) Commitment of a Rogue and Vagabond under stat.
5 G. 4. c. 83. § 4.

E.

nty of { To the constable of ——— in the said county, and
to wit. { to the keeper of the house of correction at ———,
in the said county.

*WHEREAS A. V. was this day duly convicted before me J. P.
esquire, one of the justices of our lord the king assigned to
the peace of our said lord the king in and for the said county
——, as a rogue and vagabond, [or, of being an idle and dis-
erly person, as the case may be,] for that he the said A. V. on
—— day of ———, in the year of our Lord one thou-
t eight hundred and ———, at ———, in the parish of ———,
he said county, did [here state the act of vagrancy of which the
nder is convicted,] contrary to the form of the statute in such
made and provided; and was by me adjudged to be committed
the said offence to the house of correction, there to be kept to
l labour for the space of ——— (a): These are therefore to*

) If the offender be an "idle and disorderly person," he may be committed
e kept to hard labour, for any time not exceeding one calendar month; if a

command you the said constable to convey the said A. V. to the said house of correction, and him to deliver to the keeper thereof, together with this warrant. And I do hereby command you the said keeper to receive the said A. V. into your custody in the said house of correction, and him there safely keep to hard labour for the space of ———; [if the commitment be to the next sessions say, until the next general or quarter sessions of the peace to be holden at ——— in and for the said county of ———, then and there to be further dealt with according to law, and have you him then there, together with this precept (a), or, until he the said A. V. shall be discharged by due course of law;] and for so doing this shall be your sufficient warrant. Given under my hand and seal at ——— in the said county of ———, this ——— day of ———, in the ——— year of the reign of his present majesty king William the fourth, and in the year of our Lord one thousand eight hundred and ———.

Incorrigible
rogue.

In case of the commitment of an incorrigible rogue, it must be. "until the next general (or, quarter) sessions to be holden at or in and for the county, &c., to be then and there further dealt with according to law. And have you him then there, together with this precept." See form of conviction *ante*, § 10. of this tit.

F.

(F.) Recognizance to prosecute a Vagrant at the Sessions.
on stat. 5 G. 4. c. 83. § 9.

County of { *BE it remembered, that on the* ——— day of ———
to wit. { *in the* ——— year of the reign of our lord
William the fourth, of the united kingdom of Great
Britain and Ireland king, defender of the faith, A. B. of ———
in the said county of ———, personally came before me, J. P. a-
quire, one of the justices of our said lord the king, assigned to keep
the peace in and for the said county, and acknowledged himself to owe
to our said lord the king the sum of ——— pounds of good and law-
ful money of Great Britain, to be made and levied of his goods and
chattels, lands and tenements, to the use of our said lord the king, his
heirs and successors, if he the said A. B. shall fail in the condition
underwritten: —

The condition of this recognizance is such, that if the above
bound A. B. shall personally appear at the next general (or, quarter)
sessions of the peace to be holden at ——— in and for the said
county, and then and there prosecute and give evidence against
A. V. for [here state the act of vagrancy for which the offender
is committed], and shall not depart the court without leave thereof;
then the above-written recognizance to be void, or else to remain in
its full force. Taken and acknowledged the day and year as
above written before me,

J. P.

"rogue and vagabond," to be kept to hard labour for any time not exceeding
three calendar months. *Vide* § 3, 4.

(a) According to the observations of *Le Blanc J.*, in *R. v. the Justices of Staf-
fordshire*, 12 East, 576., under stat. 17 G. 2. c. 5., the conviction and commitment
were always in the same instrument.

Warrant.

[If a justice see a felony or other breach of the peace committed in his presence, he may in his own person apprehend the felon, and so he may by word command any person to apprehend him, and such command is a good warrant without writing: but if the same be done in his absence, then he must issue his warrant in writing. 2 Hale, 86. Dalt. c. 169. p. 401.

Concerning which we will shew,

Warrant to apprehend, in what case without writing.

- I. *For what Causes it may be granted.*
- II. *What is to be done previously to granting it.*
- III. *How far it is grantable on Suspicion.*
- IV. *The Form of it.*
- V. *Indorsement of a Warrant in another County.*

I. For what Causes it may be granted.

There seems to be no doubt but that a warrant may be lawfully granted by any justice for treason, felony, or *præmunire*, or any other offence against the peace; also it seems clear that wherever a statute gives to any one justice a jurisdiction over any offence, or a power to require any person to do a certain thing ordained by such statute, it impliedly gives a power to every such justice to make out a warrant to bring before him any person accused of such offence, or compellable to do any thing ordained by such statute; for it cannot but be intended that a statute, giving a person jurisdiction over an offence, doth mean also to give him the power incident to all courts of compelling the party to come before him. 2 Haw. c. 13. § 15. 12 Rep. 131. b. R. v. Simpson, 10 Mod. 248. Bane v. Methuen, 2 Bing. 63. ante, tit. *Trespass*.

For what cause a warrant may be granted.

In all cases where the justice has jurisdiction.

But in cases where the king is no party, or where no corporal punishment is appointed, as in cases for servants' wages, and the like, or in cases of misdemeanor, where there is no probability that the party will abscond, it seemeth that a *summons* is the more proper process, and for default of appearance the justice may proceed; and so indeed oftentimes it is directed by special statutes.

Where a summons is more proper.

Indeed, as a warrant deprives a man of his liberty, a summons only ought to issue, and not a warrant, without information upon oath. 2 Barnard, 34. 77. 101.

II. What is to be done previously to granting it.

It is convenient, though not always necessary, that the party who demands the warrant be first examined on oath touching the whole matter whereupon the warrant is demanded, and that such examination be put into writing. 1 Hale, 582. 2 Hale, 111.

Complaint to be on oath.

III. How far it is grantable on Suspicion.

Warrant upon suspicion, and before indictment.

Lord *Hale* proves at large, contrary to the opinion of Lord *Coke*, (4 *Inst.* 177.) that a justice hath power to issue a warrant to apprehend a person suspected of felony, before he is indicted; and that, though the original suspicion be not in himself, but in the party that prays his warrant. 2 *Hale*, 107—110.

For the justices are judges of the reasonableness of the suspicion, and when they have examined the party accusing touching the reasons of his suspicion, if they find the causes of suspicion to be reasonable, it is now become the justices' suspicion as well as theirs. 2 *Hale*, 79, 80.

S. P.

And in another place, speaking of this opinion of Lord *Coke*, he delivers himself seemingly with a kind of warmth not usual to him: "I think," says he, "the law is not so, and the constant practice in all cases hath obtained against it, and it would be pernicious to the kingdom if it should be as Lord *Coke* delivers it: for malefactors would escape unexamined and undiscovered, for a man may have a probable and strong presumption of the guilt of a person, whom yet he cannot positively swear to be guilty." 1 *Hale*, 579.

S. P.

Mr. *Hawkins* likewise seems to be of the same opinion against Lord *Coke*, but delivereth himself with his wonted caution and candour. "It seems probable," he says, "that the practice of justices of the peace in relation to this matter is now become a law, and that a justice may justify the granting of a warrant for the arrest of any person, upon strong grounds of suspicion, for a felony, or other misdemeanor, before any indictment hath been found against him; yet insomuch as justices claim this power rather by connivance than any express warrant of law, and since the undue execution of it may prove so highly prejudicial to the reputation, as well as the liberty of the party, a justice cannot well be too tender in his proceedings of this kind, and seems to be punishable, not only at the suit of the king, but also of the party grieved, if he grant any such warrant groundlessly and maliciously, without such a probable cause as might induce a candid and impartial man to suspect the party to be guilty." 2 *Haw. c.* 13. § 18.

General warrant void.

But a general warrant, upon a complaint of robbery, to apprehend *all persons suspected*, and to bring them before a justice, hath been ruled void; and false imprisonment lies against him that issues such a warrant. 1 *Hale*, 580. 2 *Hale*, 112.

The illegality of general warrants is now fully established. 2 *Hawk. c.* 13. § 10. & n. (2.) *ib.*

In libel.

So a general warrant to apprehend the authors, printers, and publishers of a libel, without naming them, is illegal. *Money v. Leach*, 1 *Blac. Rep.* 555. 19 *Howell's St. Tr.* 1002. 3 *Barr.* 1742.

Justice may grant his warrant.

But it appears to be now clearly established, that a justice of peace has authority to issue his warrant for the arrest of a party charged with having published a libel, and upon the neglect of the party so arrested to find sureties, may commit him to prison, there to remain till he be delivered by due course of law. *Butt v. Conant*, 1 *Brod. & Bing.* 548. See tit. *Libel*, § IV. p. 524.

IV. The form of it.

Mr. *Dalton* says, the warrant is the better if it bear date of the Place.
place where it is made. *Dalt. c. 169. p. 402.*

And Lord *Hale* says, the place, though it must be alleged in pleading, need not be expressed in the warrant. *2 Hale, 111.*

And Mr. *Hawkins* says, it is safe, but perhaps not necessary, in the body of the warrant to shew the place where it was made: yet it seems necessary to set forth the county, in the margin at least, if it be not set forth in the body. *2 Haw. c. 13. § 23.*

It may be directed to the sheriff, bailiff, constable (a), or to any different person by name who is no officer; for the justice may authorise any one to be his officer, whom he pleases to make such; yet it is most advisable to direct it to the constable of the precinct wherein it is to be executed, for no other constable, and, *a fortiori*, no private person is compellable to serve it. *2 Haw. c. 13. § 27. Dalt. c. 169. p. 404. 2 Hale, 110.*

But in the case of an act of parliament, it is said that if the act direct that a justice shall grant a warrant, and do not say to whom it shall be directed, by consequence of law it must be directed to the constable, and it cannot be directed to the sheriff, unless such power be given in the act. *2 Ld. Raym. 1192. 2 Salk. 381.*

Under the general provisions of a stat.

The warrant may be styled in divers manners; as, 1. In the name of the king; and yet the *teste* must be under the name of the justice that grants it out. Or, 2. It may be styled or made only in the name of the justice. Or, 3. It may be made without any style, and only under the *teste* of the justice, or only subscribed by him. As followeth:

Style of.

In the King's Majesty's Name.

County of _____ } WILLIAM the fourth, by the grace of God of the
to wit. } united kingdom of Great Britain and Ireland king,
of _____, } defender of the faith: To our sheriff of the county
of _____, } to the high constable of the hundred of _____, in the
same county, and constables of the town of _____, in the same
county, and to all and singular our bailiffs and ministers in the same
county, as well within liberties as without, greeting:

In the name of the king.

Forasmuch as A. I. of _____ hath come before J. P. esquire, one of our justices assigned to keep our peace within the said county, and hath, &c.

(Concluding it in the justice's name, as thus: *Witness the said J. P. at _____, the _____ day of _____.*)

Note. That wheresoever the warrant is made in the king's name, there it ought to be directed to all ministers, as well within liberties as without, for the king is made a party. And so it

(a) In *R. v. Weir and others*, *H. 1823, 1 B. & C. 288.*, a warrant of distress for a poor's rate, directed to the constables of *Woolwich*, without naming them as individuals, was held not legally executed by them out of their jurisdiction, viz. in *St. Paul's, Deptford*. But now by stat. 5 G. 4. c. 18. § 6., constables may execute warrants out of their precincts, provided the place in which such warrants are executed be within the jurisdiction of the justice granting or making the same. See tit. *Arrest*, § III. *ante*, p. 39.

may be done in all other warrants, especially for felony, or for the peace and good behaviour, because it is the service of the king. *Dalt. c. 174. p. 415.*

Or thus, in the Name of the Justice himself.

In the name of
the justice.

County of } *J. P. esquire, one of the justices of our lord the king assigned to keep the peace within the said county: To the sheriff of the said county, to the bailiff or constable of the hundred of —, within the said county, to the petty constables of the town of —, within the said hundred and county, and to all other the ministers and officers of our said lord the king within the said county, and to every of them, greeting:*
to wit. } *Forasmuch as, &c. Given under my hand and seal the — day of, &c. (Dalt. c. 174. p. 416.)*

The following is the common Form of a Warrant generally used.

County of } To the constable of S —, and all other peace
to wit. } officers in the said county of —.

Common form,
subscribed by
the justice.

FORASMUCH as A. I. of B — in the said county, yeoman, hath this day made information and complaint upon oath before me G. C. esq., one of his majesty's justices of the peace in and for the said county, that A. O. of C. in the said county, labourer, on the — day of — instant, at —, in the said county, [here state the crime and offence charged in the information.]

These are therefore to command you, in his majesty's name, forthwith to apprehend and bring before me, or some other of his majesty's justices of the peace in and for the said county, the body of the said A. O. to answer unto the said complaint, and to be further dealt withal according to law. Herein fail you not. Given under my hand and seal, the — day of —, in the year of our lord one thousand eight hundred and —.

To contain the
cause where-
upon granted.

Regularly, the warrant, especially if it be for the peace or good behaviour, or the like, where sureties are to be found or required, ought to contain the special cause and matter whereupon it is granted, to the intent that the party upon whom it is to be served may provide his sureties ready, and take them with him to the justice to be bound for him; but if the warrant be for treason, murder, or felony, or other capital offence, or for great conspiracies, rebellious assemblies, or the like, it hath been said that it needeth not to contain any special cause, but the warrant of the justice may be to bring the party before him, to make answer to such things or matters generally as shall be objected against him as the king's behalf. *Dalt. c. 169. 2 Haw. c. 13. § 25. 2 Hale, 111.*

But Mr. Lambard says, every warrant made by a justice of the peace ought to comprehend the special matter upon which it proceedeth; even as all the king's writs do bear their proper cause in their mouth with them: and as for the form that is commonly used, to answer to such things as shall be objected, and such like, they were not fetched out of the old learned precedents, but lately brought in by such as either knew not, or cared not, what they writ. *Lamb. 87.*

The warrant ought regularly to mention the name of the party to be attached, and must not be left in general, or with blanks to be filled up by the party afterwards. 2 *Hale*, 114. *Dalt. c.* 169. n. 402.

A warrant for the apprehension of "—— *Hood* (omitting the Christian name), of *B.* in the parish of *F.*, by whatever name he may be called or known, the son of *Samuel Hood*, to answer," &c. was held defective, as omitting the Christian name, assigning no reason for the omission, nor giving any distinguishing particulars of the individual; and the conviction of the prisoner because he had resisted was held wrong. *M. T.* 1830, *R. v. Hood*, 1 *M.* 281. See *antè* *S. C. tit. Homicide*, § IV. p. 341.

The same rule obtains in warrants on civil actions. *Burslem v. Fern*, 2 *Wils.* 47.

Therefore, where the sheriff having directed a warrant to *A.* by name, and all his other officers, *B.*'s name (another of the sheriff's officers) was inserted after the warrant was signed and sealed by the sheriff; and therefore an arrest by *B.* was holden illegal, *Housin v. Barrow*, 6 *T. R.* 122. In this case *Ld. Kenyon C. J.* said, "I remember a case of a very serious nature happening some years ago from the circumstance of altering a warrant; a gentleman who had obtained a warrant directed to a sheriff's officer to arrest his debtor, struck out the officer's name and inserted his own in its stead; and he was shot by the defendant in arresting him; the defendant was tried for the murder, and on the trial a special verdict was found; but it was held not to be murder, because the arrest was illegal, and that at the most it was only manslaughter."

The warrant may issue to bring the party before the justice who granted the warrant specially, and then the officer is bound to bring him before the same justice; but if the warrant be to bring him before any justice, then it is in the election of the officer to bring him before what justice of the county he thinks fit, and not in the election of the prisoner. 1 *Hale*, 582. 2 *Hale*, 112.

It ought to set forth the year and day wherein it is made, that on an action brought upon an arrest by virtue of it, it may appear to have been prior to such arrest; and also, in case where the statute directeth the prosecution to be within such a time, that it may appear that the prosecution is commenced within such time limited: likewise, where a penalty is given to the poor of the parish where the offence shall be committed, or the like, it ought to specify the place where the offence was committed. 2 *Haw.* 13. § 22.

Finally, it ought to be under the hand and seal of the justice who makes it out. *Ib.* § 21.

By the terms, however, of a particular statute, a warrant may be valid, though not under seal. Thus in *trover*, where defendant justified under a warrant of distress for a penalty under 9 *G. 2.* c. 23., for selling spirituous liquors without a licence, it appeared in case reserved that the warrant was signed by two justices, but not sealed: the court held the warrant sufficient, as the 2 *Car. 2. c. 24.* § 25., to which the statute in question referred, authorised the issuing of warrants under their hands. *Padfield v. Cabell, Willes*, 411.

The warrant of a magistrate is not returnable at any particular

To mention the name of the party to be attached.

Warrant omitting Christian name, and assigning no adequate cause, held bad.

Altering a warrant.

May issue to bring the party before any justice of the county.

Ought to state day and year where made, and place where offence committed.

Hand and seal of justice.

By particular statutes a warrant may be good though signed only.

How long continues in force.

time, but continues in force until it is fully executed and obeyed, though it were seven years, provided the magistrate so long live. *Per* *Ld. Kenyon C. J. Dickinson v. Brown, Peake's N. P. 234. 1 Esp. 218. S. C.*

Warrant to arrest that party may be bound to appear at next sessions.

A warrant to arrest the party, "to the end that he may become bound, &c. to appear at the next session," &c. means the next sessions after the arrest, and not after the date of the warrant. Therefore the officer executing it may justify an arrest after the sessions next ensuing the date of the warrant. *Mayhew v. Parier and others, 8 T. R. 110.*

Warrant must be drawn up at the time it is granted.

Though it is not necessary to draw up a conviction in regular form at the time it is pronounced, yet with respect to a warrant it is different, as a warrant cannot be acted upon till it is made out in proper form, and duly executed by the magistrate.

A warrant has no legal effect till duly executed. *§*

By 5 G. 4. c. 18. § 2., where penalties or sums of money are recovered before a magistrate, and it shall appear, either on return of the distress warrant, or by confession of the party, or otherwise, that there are no sufficient goods within the jurisdiction where the distress can be levied, the magistrate may issue his warrant for committing offender to gaol for three months, unless the sum, &c. be sooner paid; and the amount of the costs and expenses are to be specified in the warrant of commitment. It was held, that in such case the warrant of commitment must be made out at the time of the commitment, without unnecessary delay: and where it appeared that the warrant had not been made out till several days after the commitment, the party was held entitled to his action for false imprisonment, the court saying, that a commitment was in no respect like a conviction. *Hutchinson v. Lowndes, 4 B. & Ad. 118.*

Warrant signed in blank, but filled up before being issued.
(a) *Sic.*

Where a magistrate signs a blank warrant, but fills it up before he issues it, the warrant is good, and the proceeding regular: thus where a magistrate kept by him a number of blank warrants ready signed, one of which, on being applied to, he filled up and (a) signed and delivered to the officer, who was killed in endeavouring to execute it, it was held murder. *Per* *Ld. Kenyon C. J., 8 T. R. 455.*

Warrant addressed to several.

Where a warrant is directed to several persons, it may legally be executed by any one of them. *1 East, P. C. 320.*

V. Indorsement of a Warrant in another County.

[24 G. 2. c. 55.—13 G. 3. c. 31.—44 G. 3. c. 92.—45 G. 3. c. 92.—48 G. 3. c. 58.—54 G. 3. c. 186.]

24 G. 2. c. 55.
Oath to be made of the justice's hand-writing.

Indorsement by justice of county, &c. where offender shall escape. Proceedings thereon.

By stat. 24. G. 2 c. 55. § 1., if any person, against whom a warrant shall be issued, shall escape, go into, reside, or be in any place out of the jurisdiction of the justice granting the warrant, either before or after the issuing thereof, any justice for the county or place where such person shall so escape or be, upon proof on oath of the hand-writing of the justice granting such warrant, shall indorse his name thereon; which shall be a sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, to execute the same in such other county or place, and to carry the offender before the justice who indorsed the warrant, or some other justice or justices of that county, if the offence be bailable, and

the offender be ready to give bail for his appearance at the next assizes or sessions for the county or place where the offence was committed; and such justice or justices shall take bail accordingly, and shall deliver the recognizance, together with the examination or confession of the offender, and all other proceedings relating thereto, to the constable, or other person, who shall (on pain of 10*l.* to him who shall sue) deliver over the same to the clerk of assize, or clerk of the peace, where the offender is required to appear. And if the offence be not bailable, or he shall not give bail to the satisfaction of the justice before whom he is brought, the constable or other person shall carry the offender before a justice of the proper county or place where the offence was committed, there to be dealt with according to law.

The Form of which Indorsement may be thus :

County of { *FORASMUCH as proof upon oath hath been made before me J. P. esquire, one of his majesty's justices of the peace for the said county of ———, that the name A. B. is of the hand-writing of the justice of the peace within mentioned; I do hereby authorise A. C., who bringeth to me this warrant, and all other persons to whom the said warrant is directed, to execute the same within the said county of ———. Given under my hand, the ——— day of ———, in the year ———.*

See other forms,
4 Chitt. Crim.
L. 20.

And the justice may further order (if he think fit) the party, according as he shall appear bailable or not bailable upon the face of the warrant, to be brought before himself, or some other justice or justices of that county, or to be carried back into the county from whence the warrant did issue.

In *Rex v. Kynaston*, 1 East, 117., the court of K. B. held, that proof on oath of the hand-writing of the justice who granted the warrant, made before the justice of any other county to whom the same was tendered for indorsement, was sufficient to oblige him to indorse the same for execution within his jurisdiction, being of opinion that he had no discretion over the subject matter, and on affidavit of his refusal to indorse, granted a *mandamus* to compel him. *Ld. Kenyon* C. J. said, the justices by whom the original warrant was issued had a discretion to exercise upon the matter submitted to them; but the magistrate who merely indorses the warrant of another under this act is not answerable for the legality of it, which remains at the hazard of him who first granted it.

It is imperative
on the justice
to indorse.

By stat. 13 G. 3. c. 31. § 1., if any person against whom a warrant shall be issued by any justice in *England*, for any offence against the laws of *England*, shall escape or go into *Scotland*, the sheriff, or steward depute or substitute, or any justice of the county or place where such person shall be, may indorse his name on the said warrant; which warrant, so indorsed, shall be a sufficient authority to the person bringing such warrant, and to all persons to whom it was originally directed, and also to all sheriffs' officers, stewards' officers, constables, and other peace officers where such warrant shall be so indorsed, to execute the same in the county or place where it is so indorsed, by apprehending the person against whom such warrant is granted, and to convey him to the county or place in *England* (being ad-

13 G. 3. c. 31.
Offenders es-
caping out of
England into
Scotland.

13 G. 3. c. 31. jacent to *Scotland*) in which the offence was committed, before a justice of such county or place, to be there dealt with according to law; or, in case the offence was committed in the county not next adjacent to *Scotland*, then to convey him into any county of *England* adjacent to *Scotland*, before a justice there; who shall proceed with regard to such person, by indorsing the warrant, as by stat. 24 G. 2. c. 55., in like manner as if the person had been apprehended in the said county.

And *vice versa*. § 2. If any person against whom a warrant shall be issued by the lord justice general, lord justice clerk, or any of the lords commissioners of justiciary, or by any sheriff, or steward depute or substitute, or justice of the peace of *Scotland*, for any offence against the laws of *Scotland*, shall escape or go into *England*, any justice of the county or place where such person shall be, may indorse his name on the said warrant; which warrant, so indorsed, shall be a sufficient authority to the person bringing such warrant, and to all persons to whom it was originally directed, and also to all constables or other peace officers where such warrant shall be so indorsed, to execute the same in the county or place where it is so indorsed, by apprehending the person against whom such warrant is granted, and to convey him into the county or place in *Scotland* (being adjacent to *England*) where the offence was committed, before the sheriff or steward depute or substitute, or a justice of such county or place, to be there dealt with according to law; or in case the offence was committed in a county not next adjacent to *England*, then to convey him into any county of *Scotland* adjacent to *England*, before the sheriff or steward depute, or substitute, or a justice there; who shall proceed, with regard to such person, according to the rules and practice of the law of *Scotland*, in like manner as if he had been apprehended in the said county.

Expenses of removing prisoners.

§ 3. And the expense of removing such prisoners shall be repaid to the person defraying the same by the treasurer of the county in *England* or by the sheriff, or steward depute or substitute of the county in *Scotland*, in which the offence was committed; the amount of such expense being previously ascertained upon oath before two justices of such county, and allowed and signed by them.

44 G. 3. c. 92. Offenders escaping from Ireland into G. B., may be apprehended and conveyed to Ireland.

Stat. 44 G. 3. c. 92. § 3. enacts, that if any person against whom a warrant shall be issued by any of the judges of the court of K. B., or any justice of oyer and terminer, or gaol delivery, or any justice of the peace, or other person having authority to issue the same, for any crime or offence against the laws in force in *Ireland*, shall escape, go into, reside, or be in any place in *England* or *Scotland* respectively, any justice of the peace of the county, stewartry, riding, division, city, liberty, town, or place in *England* or *Scotland* respectively, whither or where such person shall escape go into, reside, or be, may indorse his name on such warrant; which warrant, so indorsed, shall be a sufficient authority to the person bringing such warrant, and to all persons to whom it was originally directed, and also to all constables or other peace officers of the place where such warrant shall be so indorsed, to execute the said warrant, in the place where it is so indorsed, by apprehending the person against whom such warrant is granted, and to convey him by the most direct way into *Ireland*, and before one of the justices of the peace of the county in *Ireland* living

near the place and in the county where he shall arrive; which justice is to proceed with regard to such person as if he had been legally apprehended in the said county in *Ireland*. 44 G. 3. c. 92.

By § 4., the same provision is made as to offenders escaping from *England* or *Scotland* into *Ireland*, being apprehended and conveyed back again to *England* or *Scotland*.

Stat. 45 G. 3. c. 92. § 1., after reciting stats. 13 G. 3. c. 31. and 44 G. 3. c. 92., and that there is no provision in the said acts for admitting to bail persons so apprehended for bailable offences, enacts, that in case any person shall be apprehended in one of the parts of the U. K. [of *England*, *Scotland*, and *Ireland*], for offences committed in either of the other parts of the same, under any warrant indorsed as provided by either of the said acts, such person may be taken before the justice who indorsed the warrant, or before some other justice of the county or place where the same was indorsed; and in case the offence be bailable in law, and such offender shall be willing and ready to give bail for his appearance, according to the exigence of the warrant, such justice may proceed with such offender, and take bail for him, according to the exigence of the said warrant, in the same manner as the justice who originally issued the same might have done. And such justice or justices so taking bail as aforesaid, shall take the recognizance or bail-bond of the said offender, and of his bail, in duplicate, and shall deliver one to the constable or officer who is to receive the same, and to deliver such recognizance or bail-bond to the clerk of the crown, or clerk of the peace, or other proper officer for receiving the same, belonging to the court in which such offender shall be bound to appear; and the same shall be of the like force as if entered into before a justice of the county or place where the offence was committed; and the justices so taking bail as aforesaid shall transmit the other of such duplicates to the court of exchequer of such part of the U. K. in which such bail shall be taken. And the court, in which any person so bound to appear shall forfeit his recognizance or bail-bond, may transmit a certificate testifying the forfeiture thereof under the seal of the court, or under the hand and seal of one of the justices of the same, to the proper court of exchequer; and such court of exchequer may, upon such certificate, levy the sum so forfeited. But if such offence be not bailable in law, or such offender shall not give bail for his appearance, according to the exigence of such warrant, the justices shall remand him to the custody of the constable or officer, who shall proceed to convey such offender into that part of the U. K. wherein the offence was committed.

§ 2. And whereas it may happen by reason of the difference in the law prevailing in the U. K., that the justices before whom offenders may be brought, may not know whether the offence be, or be not bailable; enacts, that in case any person suing out such warrant shall sue by affidavit, or otherwise, to the satisfaction of the justice granting such warrant, that it may be necessary to execute such warrant in a part of the U. K. different from that in which such warrant is issued, and it shall appear also to the justice that it is granted for an offence for which it would not be lawful for any justice to admit such offender to bail, such justice granting such warrant shall, upon the face of such warrant, write the words 'not bailable;' and in all cases in which such words shall not have been so written the justice before whom any

45 G. 3. c. 92. Offenders bailable to be admitted to bail.

How the recognizance or bail is to be taken.

How recognizance or bail-bonds are to be transmitted.

Offenders not bailable to be remanded.

Warrants not bailable must be so marked.

45 G. 3. c. 92.

Provision to
inforce the ap-
pearance on
subpoenas or
other process
in different
parts of the
U. K.

offender may be brought, under such warrant so indorsed, may admit such offender to bail.

§ 3. In order to provide for the appearance of persons to answer in cases where warrants are not usually issued, and to give evidence in criminal prosecutions in every part of the U. K., enacts, that the service of every writ of subpoena, or other process upon any person in any one of the parts of the U. K., requiring the appearance of such person to answer or give evidence, in any criminal prosecution, in any other parts of the same, shall be as effectual as if served in that part of the U. K. where the person served is required to appear; and in case the person so served shall not appear, the court out of which the same issued, upon proof of service, may transmit a certificate of such default under the seal of the court, or under the hand of one of the judges or justices of the same, to the court of K. B. in *England*, *judiciary in Scotland*, or K. B. in *Ireland*, according to the service, which court may respectively proceed against and punish the person having made default, as if such person had refused to appear to a subpoena or other process issued out of such courts.

Reasonable
expenses must
be tendered.

§ 4. But none of such courts shall so proceed, for default by not appearing to give evidence, unless it be made appear that a *reasonable and sufficient* sum to defray the expenses of coming and attending to give evidence, and of returning from giving such evidence, had been tendered to such person at the time when such writ of subpoena or other process was served.

54 G. 3. c. 186.

Warrants
issued in
England,
Scotland, or
Ireland, may
be indorsed and
acted upon in
either country,
as by 13 G. 3.
c. 31. § 1, 2.

Stat. 54 G. 3. c. 186., after reciting stats. 13 G. 3. c. 31., 44 G. 3. c. 92., and 45 G. 3. c. 92., repeals the 5th and 6th sections of the last-mentioned act, and enacts, § 2., that all warrants issued in *England*, *Scotland*, or *Ireland* respectively, may and shall be indorsed and executed, and enforced and acted upon, in any part of the U. K., in like manner as is directed by stat. 13 G. 3. c. 31., in relation to warrants issued or granted in *England* and *Scotland* respectively, as fully and effectually as if all the provisions of the said acts were in this act severally and separately repeated and re-enacted and made part of this act, as to every part of the U. K. and as to all justices of the peace, sheriffs' officers, constables, or other officer or officers of the peace in *Ireland*, as well as in *England* and *Scotland* respectively.

§ 3. Judges in either country are empowered to indorse letters of second diligence.

48 G. 3. c. 58.

Execution in
Scotland of
warrants is-
sued by others
than justices of
peace in
England.

By stat. 48 G. 3. c. 58. § 2., reciting the provisions of stat. 13 G. 3. c. 31. and 45 G. 3. c. 92., and that it is expedient that like provisions should be made for the execution in *Scotland* of warrants issued by others than justices of peace in *England*; it is enacted, that all matters in the said acts, whereby the execution in *Scotland* of any warrant of any justice of peace, for any offence, is authorised and regulated, shall extend to all warrants issued by any of the justices of the K. B. in *England*, or of the courts of great sessions in *Wales*, or by any justice of oyer and terminer or gaol delivery, or other persons having authority to issue the same in *England*, for any crime or offence.

Warrant, Execution of. See tit. Arrest.

Warrant to search for Stolen Goods. See tit.

Search-Warrant, ante.

Wife.

[19 Ed. 1. st. 1. c. 34.]

IN the case of *King and ux. v. Jones*, 2 *Ld. Raym.* 1525. 2 *Str.* 811., it was decided that, if an action be brought against a *feme sole*, though she marries before she appears or pleads, she may appear and plead by attorney without her husband.

Woman marry-
ing pending an
action.

A wife or *feme covert* is so much favoured in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft, or even burglary, in company with or by coercion of her husband.

Committing
offences with
her husband.

1 *Haw. c. 1. § 2.* 1 *Russ.* 15.

But if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder, or robbery, in company with or by coercion of her husband, she is punishable as much as if she were sole, because of the odiousness and dangerous consequences of these crimes.

Voluntary act
of wife, &c.;
so treason,
murder, rob-
bery.

1 *Haw. c. 1. § 2.* 1 *Russ.* 15.

It is stated to have been held by all the judges, upon an indictment against a married woman for falsely swearing herself to be next of kin, and procuring administration, that she was guilty of the offence, though her husband was with her when she took the oath.

Personating of
next of kin.

R. v. Dicks, 1781, *MS. Bayley J.*; cit. 1 *Russ.* 16.

And the coercion of the husband is only a presumption till the contrary appear; for if upon the evidence it can clearly appear that the wife was not drawn to it by the husband, but that she was the principal actor and inciter of it, she seems to be guilty as well as the husband.

Coercion of
husband pre-
sumption only.

1 *Hale*, 516. 1 *Russ.* 15.

Where the wife is to be considered merely as the servant of the husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct. *Charles Squire and Hannah his wife* were indicted for the murder of a boy, who was bound as a parish apprentice to the prisoner *Charles*; and it appeared in evidence that both the prisoners had used the apprentice in a most cruel and barbarous manner, and that the wife had occasionally committed the cruelties in the absence of the husband. But the surgeon who opened the body deposed, that in his judgment the boy died from debility and want of proper food and nourishment, and not from the wounds, &c. which he had received. Upon which *Lawrence J.* directed the jury, that, as the wife was the servant of the husband, it was not her duty to provide the apprentice with sufficient food and nourishment, and that she was not guilty of any breach of duty in neglecting to do so; though, if the husband had allowed her sufficient food for the apprentice, and she had wilfully withholden it from him, then she would have been guilty. But that here the fact was otherwise; and therefore, though *in foro conscientiae* the wife was equally guilty with her husband, yet in point of law she could not be said to be guilty of not providing the apprentice with sufficient food and nourishment.

Wife not an-
swerable for
her husband's
breach of duty.

R. v. Squire and Wife, Stafford Lent Assizes, 1799, *M.S.* 1 *Russ.* 16. S. C. See tit. *Homicide*.

A wife shall not be deemed accessory to a felony for receiving

Not an acces-
sary in receiv-

ing her husband, being guilty of felony.

Keeping a bawdy-house.

Keeping a gaming-house.

Wife may be indicted separately.

Husband to be joined where a penalty is incurred.

Wife uttering forged order in absence of husband, but by his incitement.

Crime completed in the absence of the husband, though the husband took part in it both before and after.

her husband who has been guilty of it, as her husband shall be for receiving her; because she is under the power of her husband, and she is bound to receive him. 1 *Haw. c. 1. § 10.* 1 *Hale*, 47.

But a wife may be indicted together with her husband, and punished with him, for keeping a bawdy-house; for this is an offence as to the government of the house, in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of her sex. 1 *Haw. c. 1. § 12.* 1 *Russ.* 16.

The same law was held to prevail in regard to keeping a gaming-house, where by the indictment the husband and wife and *uterque eorum* were charged with the offence. *R. v. Dison and wife*, 10 *Mod.* 395.; cit. 1 *Russ.* 17. n. (r)

And generally a married woman shall answer as much as if she were sole for an offence, not capital, against the common law or statute; and if it be of such a nature that it may be committed by her alone, without the concurrence of her husband, she may be punished for it without the husband by way of indictment; which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for an offence to which he is no way privy. But if a wife incur the forfeiture of a penal statute, the husband may be made a party to an action or information for the same (as he may generally to any suit for a cause of action given by his wife), and shall be liable to answer what shall be recovered thereupon. 1 *Haw. c. 1. § 13.*

Where a wife, by the incitement of her husband, but in his absence, knowingly uttered a forged order and certificate for the receiving of prize-money, it was holden by the court of K. B. that they might be indicted together; the wife as principal on the stat. 49 G. 3. c. 123., and the husband as an accessory before the fact at common law. *Morris's case*, 2 *Leach*, 1096. *E. T.* 1814, 1 *Russ.* 17. 2 *Russ.* 357. *C. C. R.* 270.

In *Martha Hughes's case*, *Lanc. Spring Assizes*, 1813, 1 *Russ.* 16. the question of the coercion of a husband upon a wife, in the offence of forgery, came under the consideration of a very learned judge. The prisoner, *Martha Hughes*, the wife of *Patrick Hughes*, was indicted for forging and uttering three two-pound bank of *England* notes. The principal witness stated, that in consequence of a conversation which he had had some time before with the prisoner's husband, he went to the husband's shop; that the husband was not present, but that he saw the prisoner, who beckoned him to go into an inner room; that she followed him into the room, and that he there told her what her husband had said to him; upon which they agreed about the business, and he bought of her three two-pounds, at one pound four shillings each; — that he paid her for the notes, and was to receive eight shillings in change. He further stated, that when he was putting the notes into his pocket-book, and before he had received the change, the husband put his head into the room and looked in; but did not come in, or interfere in the business, further than by saying, "Get on with you." After this the witness and prisoner returned into the shop, where the husband was; the prisoner gave him the change, and both the prisoner and her husband cautioned him to be careful. On these circumstances being proved, the counsel for the prisoner objected, that it clearly appeared that she acted under the co-

ercion of her husband; that in case both the husband and wife had been on their trial, this evidence would have been sufficient to have convicted him; and, therefore, he contended that the wife ought to be acquitted. And he referred to 2 *East's P. C.* 559. 1 *Hale*, 46. *Kel.* 37. — But *Thomson B.* stopped the counsel for the prosecution, saying, "I am very clear as to the law on this point. The law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption *primâ facie*, and *primâ facie* only, as is clearly laid down by *Lord Hale*, (1 *Hale*, 516.) that it was done under his coercion: but it is absolutely necessary that the husband should in such case be actually present and taking a part in the transaction. Here it is entirely the act of the wife; it is indeed in consequence of a communication previously with the husband that the witness applies to the wife; but she is ready to deal, and has on her person the articles which she delivers to the witness. There was a putting off before the husband came; and it was sufficient, if before that time she did that which was necessary to complete the crime. The coercion must be at the time of the act done, and then the law out of tenderness refers it *primâ facie* to the coercion of the husband. But when the crime has been completed in his absence, no subsequent act of his (although it might possibly make him an accessory to the felony of the wife) can be referred to what was done in his absence.

Martha
Hughes's case.

Husband and wife were indicted for disposing of forged country bank notes, and it appeared that the man disposed of them in the presence of the woman at a public-house, to which place they had gone for that purpose, and the woman had a bundle of the same notes in her pocket. It was held by *Gibbs C. J.*, that the woman was entitled to her acquittal. *R. v. Atkinson*, *O. B. Jan. 1814, MS. Bayley J.*; cit. 1 *Russ.* 20.

Husband and
wife disposing
of forged notes
together.

N. B. In the above case cohabitation and reputation were considered to be sufficient evidence of the parties being married.

Where a woman went from shop to shop uttering base coin, and her husband accompanied her to the door each time, but did not go in, *Bayley J.* directed an acquittal, upon the ground of coercion. *MS. Durham Spr. Assizes, 1829, R. v. Sarah Conolly, Matthews, Crim. L. 262.*

Evidence of
marriage.

Wife uttering
base coin at-
tended by her
husband.

Husband and wife were indicted as accessories after the fact in receiving stolen goods; it appeared that the articles in question were brought to the house where the husband and wife were living together, and that they must have been cognizant of what was going on. They were both found guilty, the judge (*Graham B.*) telling the jury, that if the wife took an active and independent part, and endeavoured to conceal the stolen goods more effectually than her husband could have done, she would be responsible. On case reserved, the judges held, that as it had not been found that she had received the goods in the absence of her husband, the conviction could not be supported, though she had been more active than her husband. *E. T. 1826, R. v. Eliza Archer and others, 1 R. & M. 143.*

Wife cannot be
convicted if the
husband has
been present,
though she may
have been more
active.

Of women carried away (*viz.* violently or against their wills, 2 *Inst.* 435.) with the goods of their husbands, the king shall have the suit for the goods so taken away. 13 *Ed. 1. st. 1. c. 34.* That is, it shall be felony. And so, if any man take another man's

Carrying her
away with the
husband's
goods.

wife, with her husband's goods, against the husband's will, this is also felony. *Dalt. c. 157.*

Wife taking the husband's goods.

But a wife herself cannot feloniously take her husband's goods; and though she take her husband's goods, and deliver them to a stranger, yet it is no felony in the stranger. *Hale's Sem. 65. 1 Haw. c. 33. § 19. 1 Russ. 19.*

But she may be guilty of felony in taking her husband's goods from the possession of another party.

And if the wife steal the goods of her husband and deliver them to *B.*, who knowing it carries them away, *B. being the adulterer of the wife*, this would be felony in *B.*, for in such case no consent of the husband can be presumed. *Dalt. c. 157. p. 353. 1 Russ. 19.*

Husband's property stolen by the wife's paramour, she assisting him in it.

In a case where the wife had assisted the prisoner in stealing her husband's property, and had cohabited with him afterwards, the court is stated to have ruled, that no conviction could be maintained where the goods were taken by the delivery of the proprietor's wife. *O. B. January Sess. 1818, R. v. Clark, 1 M. 376. n. (a)*

S. P.

But this decision appears to have been overruled in a subsequent case, and after argument, the question having been reserved for the consideration of the judges. The prisoner had been a lodger at the prosecutor's house, and made off with his property, prosecutor's wife at the same time going to reside with him, and passing as his wife; and the wife came forward as a witness at the trial, to say that the stolen goods had either been taken by herself or given by her to the prisoner. On case reserved, the judges held that this was larceny, for though the wife consented, it must be considered that it was done *invisio domino*, and that the conviction was right. *H. T. 1830, R. v. Tolfree, 1 R. & M. 243.*

The prisoner's husband kept a public-house, and was member of a Friendly Society which met there: the money belonging to the society was deposited in a box, which was always left at such public-house, with four locks to it, the keys of which were kept by other persons, who were the stewards. The publican's wife (the prisoner) broke open the box and stole the money: it was held, on case reserved, that she could not be properly convicted of stealing money in which her husband had a joint property. *E. T. 1833. R. v. Sarah Willis, 1 M. 375.*

It has also been ruled, that a wife cannot be convicted under 7 & 8 G. 4. c. 30. § 2., for setting fire to her husband's house, though she was living separate from him, and went by her maiden name, and had threatened to burn him to death. *E. T. 1828, R. v. Elizabeth March, 1 R. & M. 182. See S. C. ante, tit. Burning, § II. p. 111.*

Guilty of forcible entry.

A married woman by her own act (but not in respect of what is done by others at her command, because all such commands of hers are void) may commit a forcible entry or detainer; and upon the justice's view of the force, she shall be imprisoned therefor, and she may be fined in such case: but such fine set upon the wife shall not be levied upon the husband; for the husband shall never be charged for the act or default of his wife but when he is made a party to the action, and judgment given against him and his wife. *Dalt. c. 126. 9 Rep. 72. 11 Rep. 61.*

Guilty of slander, trespass, or assault.

Likewise, if she shall commit any riot, or do any trespass or other wrong, she is punishable for it; and for a trespass done by the wife, or for a scandal published by her, the action lieth against

both the husband and wife, and there the husband is chargeable to the damages or fine, because he is party to the action and judgment. But if a wife, without her husband, be indicted of a trespass, riot, or any other wrong, there the wife shall answer and be party to the judgment only; and in such case, the fine set upon the wife shall not be levied upon the husband; yet after the husband's death such damages or fines shall then be levied of the wife herself; and as for imprisonment or other corporal pain, it shall be inflicted upon the wife only, and not upon the husband for his wife's act or default. *Dalt. c. 139. p. 314.*

Pitt v. Meller and ux., 2 Str. 1167. In trover against both, and judgment and execution against both, the wife petitioned to be discharged out of custody; which the court refused, unless it could be shewn that there was fraud and collusion between the plaintiff and the husband to keep her there.

Wife taken in execution.

Finch and ux. v. Duddin and ux., 2 Str. 1237. In an action for a battery of the plaintiff's wife by the defendant's wife, there was judgment for the plaintiffs, and the wife of the defendant was alone taken in execution. She moved to be discharged, but upon affidavits of endeavours to take the husband, and it not appearing there was any design to screen him, the court refused it, on the authority of *Pitt v. Meller, supra.*

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Langstaff v. Rain and ux., 1 Wils. 149. On an action of assault and battery done by the defendant's wife, there was a verdict and judgment for the plaintiff, and both the husband and wife were taken in execution. It was moved to discharge the wife out of custody. But by the court, this matter has been determined in the case of *Finch v. Duddin*, that the wife is liable to be taken. And the court refused to discharge her.

S. P.

If a woman receive stolen goods into her house, knowing them so to be; or lock them up in her chest or chamber, her husband not knowing thereof; if her husband, so soon as he knoweth thereof, do forthwith forsake his house, and her company, and make his abode elsewhere, he shall not be charged for her offence; whereas otherwise the law will impute the fault to him, and not to her. *Dalt. c. 157. p. 353.*

Receiving stolen goods.

A prosecution for conspiracy is not maintainable against a husband and wife only; because they are esteemed but as one person in law, and are presumed to have but one will. 1 *Haw. c. 72. § 8.*

Guilty of conspiracy with her husband.

If a woman who is a servant shall marry, yet she must serve out her time, and the husband cannot take her out of her master's service. *Dalt. c. 58. p. 139.*

Woman servant marrying.

Also if a married man and his wife do bind themselves to serve, they shall be compelled to serve according to their covenant or agreement. *Dalt. c. 58. p. 139.*

Wife hiring to be a servant.

If the wife maliciously kill her husband, it was formerly petty treason; but if the husband maliciously kill his wife, it was but murder. *Dalt. c. 142. p. 324.*

Killing her husband, petty treason.

Husband and wife cannot be witnesses for one another; nor regularly against one another. 2 *Haw. c. 46. § 16.* See title *Evidence.*

Evidence for or against her husband.

But a wife may demand surety of the peace against her husband, threatening to beat her outrageously; and a husband also may

May demand surety for the peace against her husband.

Wife witness
against the
husband in
criminal cases.

Habeas corpus
against husband
for ill usage of
his wife.

Husband and
wife agreeing
to live separate,
in consequence
of her ill
usage.

Habeas corpus
by husband.

Selling wives.

A wife
cannot be
bound by re-
cognizance.
May surrender
a lease for a re-
newal.
Husband not
liable to the
wife's debts
after her death.

have it against his wife. 1 *Haw. c. 60. § 4. R. v. Doherty.* See tit. *Surety of the Peace.*

And in other criminal cases, the wife may be a witness against her husband, where she is the party grieved; but not in civil cases. *Dalt. c. 164. p. 378.*

R. v. Earl Ferrers, 1 Burr. 631. An *habeas corpus* was issued, commanding *Lawrence earl Ferrers* to bring up the body of his countess, that she might receive the protection of the court against the said earl, and swear the peace against him if she should think proper. The earl disobeying the writ of *habeas corpus*, an attachment was granted against him. Upon which he permitted her to come into court, and she exhibited articles of the peace against him. And the earl was obliged to enter into recognizance accordingly, himself in 5000*l.* and two sureties in 2500*l.* each.

And a recognizance to the same effect has been entered into by a peer of the realm, within a recent date.

R. v. Mary Mead, 1 Burr. 342. An *habeas corpus* having issued at the instance of *John Wilkes*, esquire, to bring up the body of *Mary Wilkes*, wife of the said *John Wilkes*, and daughter of the said *Mary Mead*; *Mrs. Mead* now brought her into court. The substance of the return was, that her husband (having used her very ill) did, in consideration of a great sum which she gave him out of her separate estate, consent to her living alone, executed articles of separation, and covenanted (under a large penalty) never to disturb her or any person with whom she should live; that she lived with her mother at her own earnest desire: and that the writ of *habeas corpus* was taken out with a view of seizing her by force, or some other bad purpose. The court held this to be a formal renunciation by the husband of his marital right to seize her or force her back to live with him. And they said that an attempt of the husband to seize her by force and violence would be a breach of the peace. They also declared that any attempt made by the husband to molest her in her present return from *Westminster-hall* would be a contempt of the court; and they told the lady she was at full liberty to go where and to whom she pleased.

It is extraordinary (says *Mr. Christian*) that prosecutions are not instituted against those who publicly sell their wives, and against those who buy them. Such a practice is shameful and scandalous in itself, and encourages other acts of criminality and wickedness. All such acts of indecency and immorality are public misdemeanors, and the offenders may be punished either by an information granted by the court of K. B., or by an indictment preferred before a grand jury at the assizes or quarter sessions. See 4 *Bla. Com.* 15th ed., 64. n. 12.

A wife cannot be bound herself by recognizance, but her sureties only. *Dalt. c. 117.*

She may surrender a lease in the court of chancery or exchequer, in order to renew the same. 29 *G. 2. c. 31.*

H. 1735. In chancery. *Heard v. Stamford, Cas. Temp. 1735. 3 P. Wms. 409.* The husband, as such, is not chargeable in a court of equity, any more than at law, with the debts of his wife after her decease; no, not even though he had a large fortune with her; as on the other hand he is, during the coverture, liable to all her debts, although he got nothing with her.

Where a husband, not separated from his wife, makes an allowance to her for the supply of herself and family with necessaries during his temporary absence, and a tradesman, with notice of his supplies her with goods, the husband is not liable for the debt. *Holt v. Brien*, 4 B. & A. 252.

Husband absent making an allowance to his wife.

Witchcraft.

[9 G. 2. c. 5.]

BY stat. 9. G. 2. c. 5, § 3., no prosecution, suit, or proceeding, shall be commenced or carried on against any person for witchcraft, sorcery, enchantment, or conjuration, or for charging another with any such offence, in any court whatsoever.

Prosecution for witchcraft abolished.

But by § 4., if any person shall pretend to exercise or use any kind of witchcraft, sorcery, enchantment, or conjuration; or undertake to tell fortunes; or pretend from his skill or knowledge, in any occult or crafty science, to discover where or in what manner any goods or chattels, supposed to have been stolen or lost, may be found; every person so offending, being convicted on indictment on information, shall suffer imprisonment for a year, without bail mainprise, and once in every quarter of the said year, in some market town of the proper county, upon the market day there, and openly on the pillory (a) for one hour, and also shall (if the court by which such judgment shall be given shall think fit) be obliged to give sureties for his good behaviour in such sum, and at such time, as the said court shall judge proper, according to the circumstances of the offence, and in such case shall be further imprisoned until such sureties shall be given.

Pretending to witchcraft, &c.

Women.

10 H. 6. c. 9. — 31 H. 6. c. 9. — 30 G. 3. c. 48. — 1 G. 4. c. 57. — 4 G. 4. c. 76. — 9 G. 4. c. 31.]

Concerning women considered as wives, or *femes covert*; see *Wife*.

Concerning women having two husbands, or men two wives; see title *Polygamy*.

Concerning the ravishment of women; see title *Rape*.

BY stat. 31 H. 6. c. 9., if any person take by force, or otherwise, any woman sole, having any substance of lands, tenements, or moveable goods, and enforce her before she be set at liberty to bind herself to him by statute or obligation; such bond shall be void.

31 H. 6. c. 9.
Forcing her to become bound.

1) See *vide* stat. 56 G. 3. c. 138., which abolishes the punishment of the clergy except in cases of perjury, &c. See tit. *Pillory*.

3 H. 7. c. 2.

Forcible abduction of women, &c. (repealed).

Stat. 3 H. 7. c. 2. (now repealed), reciting that "where women, as well maidens as widows and wives, having substances, some in goods moveable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances be oftentimes taken by misdoers, contrary to their will, and after married to such misdoers, or to others by their assent, or defiled," enacts, "that whatever person or persons from henceforth taketh any woman, so against her will, unlawfully, that is to say, maid, widow, or wife; such taking, procuring, and abetting to the same, and also receiving wittingly the same woman so taken against her will, and knowing the same, be felony; and that such misdoers, takers, and procurators to the same, and receivers, knowing the said offence in form aforesaid, be adjudged principal felons: provided that this act extend not to any person taking any woman, only claiming her as his ward or bond-woman."

Though the statute of 3 H. 7. c. 2. is no longer in force, yet it may be proper to retain some of the decisions which have taken place upon the subject of this offence, as being applicable to cases which may now occur in courts of justice.

The woman may be a witness.

In *Fulwood's case*, M. 13 C. 1. 1 Hale, 661. Cro. Car. 488. it was resolved that the woman taken away and married may be sworn and give evidence against the offender, who so took and married her, though she be his wife *de facto*.

Though she have consented to the marriage.

So it seems that she may be a witness even where the actual marriage is good by her having given her consent to it after the forcible abduction. 1 Russ. 576.

Though she assent subsequently. So, for her husband.

So, where the marriage was against her will, though she gave subsequent assent to it. *Ib.* 577.

It seems, too, that on a trial for this offence the woman may be a witness for her husband as well as against him, although she has cohabited with him from the time of the marriage. *Ib.* 577.

By 9 G. 4. c. 31. the statutes 3 H. 7. c. 2. and 4 & 5 P. & M. c. 8. § 3. are repealed.

Abduction of a woman on account of her property, against her will. 9 G. 4. c. 31. s. 19.

The same statute, 9 G. 4. c. 31. § 19., enacts, "That where any woman shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be an heiress presumptive or next of kin to any one having such interest, if any person shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or defile her, or to cause her to be married or defiled by any other person; every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and being convicted thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction for any term not exceeding four years."

Punishment.

Abduction of a girl under sixteen years. 9 G. 4. c. 31. s. 20.

§ 20. enacts, "That if any person shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; every such offender shall be guilty of a misdemeanour, and being convicted thereof shall be liable to suffer such punishment, by fine or imprisonment, or by both, as the court shall award."

Punishment.

By 4 & 5 P. & M. c. 8. § 3. (now repealed), the offence was made to consist in unlawfully taking, &c. a female unmarried under sixteen, "out of the possession and against the will of her father or mother or guardian."

4 & 5 P. & M. c. 8. (now repealed.)

Whether the child be legitimate or not *made* no difference on this section of the act.

R. v. Cornforth and others, 2 Str. 1162. The court granted an information against the defendants, for taking away a *natural* daughter under sixteen, under the care of her putative father; giving of opinion that it was within 4 & 5 P. & M. c. 8. § 3. (now repealed.)

Natural daughter.

By stat. 4 G. 4. c. 76. § 27., no suit shall be had in any ecclesiastical court, in order to compel a celebration of marriage *in facie ecclesie*, by reason of any contract of matrimony whatsoever, whether *per verba de presentii*, or *per verba de futuro*.

4 G. 4. c. 76. Marriage Act.

By stat. 20 H. 6. c. 9., peeresses shall be tried as peers for treason or felony.

20 H. 6. c. 9. Peeresses, how to be tried. Judgment in treason.

The judgment against a woman, in case of high treason, was not the same as against a man traitor, to be hanged, cut down alive, have the bowels taken out and the body quartered, but it was to be drawn to the place of execution, and there burned.

And this also was the judgment against a woman in case of petit treason; whereas the judgment against a man, for petit treason, was that he shall be hanged.

By 9 G. 4. c. 31. § 2., petit treason is to be treated in all respects as murder.

In case of capital felony, the judgment is the same against both man and woman, to be hanged by the neck till dead. 2 Haw. 48. § 7.

In capital felony.

It is clear, that if a woman quick with child be condemned either for treason or felony, she may allege her being with child in order to get the execution respited, and thereupon the sheriff shall be commanded to take her into a private room, and to impanel a jury of matrons, to try and examine whether she be quick with child or not; and if they find her quick with child, the execution shall be respited till her delivery. — But it is agreed that a woman cannot demand such respite of execution, by reason of her being quick with child more than once. 2 Haw. c. 51. § 9.

Plea of pregnancy.

By stat. 1 G. 4. c. 57. § 2. judgment or sentence shall in no case whatever be given and awarded against any female or females convicted of any offence whatsoever, that such female offender or offenders do suffer the punishment of being whipped, either publicly or privately; any law, statute, or usage to the contrary notwithstanding.

1 G. 4. c. 57. Judgment or sentence of whipping shall not be awarded on female offenders; but instead thereof imprisonment or solitary confinement.

§ 3. In all cases where the punishment of whipping, either publicly or privately, on female offenders, has hitherto formed the whole or part of the judgment or sentence to be pronounced, or as in any other case been inflicted, it shall and may be lawful for a court or justice of the peace before whom any such offender shall be tried or convicted, to pass sentence of confinement to hard labour in the common gaol or house of correction, for any space of time not exceeding six months, nor less than one month, of solitary confinement therein for any space not exceeding the space of seven days at any one time, in lieu of the sentence of being publicly or privately whipped, as to the said court or justice

shall seem most proper : Provided, that nothing herein contained shall extend, or be construed to extend, in any manner to change, alter, or affect any punishment whatsoever, which may now be by law inflicted in respect of any offence, save and except only the punishment of publicly or privately whipping on female offenders, in manner as herein-before is enacted.

Women are not obliged to appear at the torn or leet. 2 *Hew. c. 10.* § 11.

Attending the torn and leet.

Serving the office of constable by deputy, or overseer.

Mr. *Hawkins* seems to be of opinion, that a custom of the inhabitants serving the office of constable by turns, is good; and that when it comes to the turn of a woman inhabitant, she must procure one to serve for her. 2 *Haw. c. 10.* § 37. And she may be appointed an overseer of the poor. *R. v. Stubbs*, 2 *T. R.* 395.

Wood.

[41 G. 3. c. 109.—52 G. 3. c. 71. c. 72.—7 & 8 G. 4. c. 30.]

Statutes repealed.

7 & 8 G. 4. c. 29. c. 30.

Setting fire to woods, &c.

Punishment.

52 G. 3. c. 72. *Alice Holt* forest.

Penalties on persons damaging trees in the forest of *Alice Holt*.

Penalties for breaking down inclosures.

BY 7 & 8 G. 4. c. 27, a variety of statutes enacted for the preservation and encouragement of woods, plantations, and trees, and for the punishment of offences against that species of property, commencing from 13 *Ed. 1.*, and extending to the reign of G. 4, have been repealed, and by 7 & 8 G. 4. c. 29., for consolidating the laws relating to larceny, &c. and 7 & 8 G. 4. c. 30., for consolidating the laws relating to malicious injuries to property, enactments have been framed to meet offences of this description, which will be found under the titles *Larceny*, p. 453. *et seq.* and *Malicious Injuries*, § II. p. 551. *et seq.*

By 7 & 8 G. 4. c. 30. § 17., if any person shall (*int. al.*) unlawfully and maliciously set fire to any part of a wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, where-soever the same may be growing, every such offender shall be guilty of felony, and be liable at the discretion of the court to be transported for seven years, or to be imprisoned not exceeding two years, and in addition (if a male), to be once, twice, or thrice publicly or privately whipped (if the court shall think fit).

By stat. 52 G. 3. c. 72., the king is allowed to inclose not exceeding 1600 acres of land in the forest of *Alice Holt*, in the county of *Southampton*.

And by § 6., for the better preservation of the trees, woods, underwoods, heritors, and standils growing, or which may hereafter be planted and nourished to grow or be growing in or upon any part of the said inclosures, all persons whomsoever who shall from and after the passing of this act, unlawfully cut down, gird, bark, peel, damage, deface, destroy, or carry away any timber tree or other tree, woods, or covert, green stick, or any heritor or standil within the said forest as aforesaid, shall be subject to all such pains, penalties, and punishments, as are imposed upon any person committing the like offence in the lands, grounds, woods or coppices, being inclosed, and the private property of any of H. M.'s subjects.

And by § 7., every person who shall wilfully destroy or take

away, or shall break down any fence or inclosure, or any part thereof, made for the protection of any nursery of wood and timber as aforesaid, shall for the first offence forfeit the sum of 10*l.*, and for the second offence the sum of 20*l.* and for the third offence shall be deemed guilty of felony, and may be transported to any part beyond the seas for the term of seven years, or be subject to such other punishment by fine, imprisonment, or otherwise, as the court before which such person shall be convicted may direct; and such penalties may be recovered, and on non-payment thereof the person who shall forfeit the same may be committed to prison, in the manner and for the same periods as is specified in stat. 6 G. 3. c. 48., in relation to the penalties of 20*l.* and 30*l.* respectively, for wilfully cutting or breaking down any timber under the said act.

52 G. 3. c. 72.

And by stat. 52 G. 3. c. 71., similar provisions are enacted respecting the forest of *Woolmer*, in the county of *Southampton*; where the king is allowed to inclose 2000 acres.

52 G. 3. c. 71.

Woolmer forest

Stat. 52 G. 3. c. 71. contains provisions respecting the forest of *Woolmer*, and the timber growing there, and certain inclosures to be there made; and by § 7., every person who shall wilfully destroy or take away or shall break down any fence or inclosure, or any part thereof, made for the protection of any nursery of wood and timber as aforesaid, shall for the first offence forfeit 10*l.*, and for the second offence 20*l.* and for the third offence shall be accounted guilty of felony, and may be transported for seven years, or be subject to such other punishment by fine, imprisonment, or otherwise, as the court before which such person shall be convicted may direct; and such penalties shall be recovered, and on non-payment thereof, the person who shall forfeit the same may be committed to prison in the manner and for the same periods as are specified in stat. 6 G. 1. c. 48., intituled *An act for the better preservation of timber trees, and of woods and underwoods, and for the further preservation of roots, shrubs, and plants*, in relation to the penalties of 20*l.* and 30*l.* respectively for wilfully cutting or breaking down any timber under the said act.

Penalties for
breaking down
inclosures in
the forest of
Woolmer.

The General Inclosure Act 41 G. 3. (U. K.) c. 109. § 28. imposes a forfeiture not exceeding 5*l.* on any person who shall wilfully and unlawfully break down, destroy, carry away, or damage any fence, stile, post, rail, gate, bridge, or tunnel, put up under the authority and for the purposes of any inclosure act, upon conviction before a justice for the county, &c.

41 G. 3. (U. K.)
c. 109.

gives a forfei-
ture for de-
stroying any
fences, &c. put
up under in-
closure acts.

Wreck.

[3 Ed. 1. c. 4. — 17 Ed. 2. st. 1. c. 11. — 12 Ann. st. 2. c. 18. — 3 G. 1. c. 13. — 26 G. 2. c. 19. — 48 G. 3. c. 130. — 49 G. 3. c. 122. — 53 G. 3. c. 87. — 1 & 2 G. 4. c. 75. c. 76. — 7 & 8 G. 4. c. 29. c. 30. — 9 G. 4. c. 31.]

Wreck, what.

WRECK of the sea, in legal understanding, is applied to such goods as after shipwreck at sea are by the sea cast upon the land; and therefore the jurisdiction thereof pertaineth not to the lord admiral, but to the common law. 2 Inst. 167.

Jetsam, flotsam, and ligam.

None of those goods which are called *jetsam* (from being cast into the sea while the ship is in danger, and which there sink and remain under water), or those called *flotsam* (from floating on the surface of the water), or those called *ligam* (which lie in the bottom of the sea, but tied to a cork or buoy, in order to be found again), are to be esteemed wreck, so long as they remain in or upon the sea, and are not cast upon the land by the sea; but if any of them are cast upon the land by the sea, they are wreck. 1 Black. Com. 292.

3 Ed. 1. c. 4.
Living creature
escaping.

Also by stat. 3 Ed. 1. c. 4., where a man, a dog, or a cat, except quick out of the ship, the ship or any thing therein shall not be judged a wreck.

[A man, a dog, or a cat.] Which statute being but declaratory of the common law, these three instances are only put for examples; for besides these two kinds of beasts, all other beasts, fowls, and other living things are understood, whereby the property of the goods may be known. 2 Inst. 167.

Where the
ownership of
the goods is
ascertained, it
is not necessary
that any live
animal come
ashore.

And it is now holden, that not only if any live thing escape, but if proof can be made of the property of any of the goods or lading which came on shore, they shall not be forfeited as wreck. 1 Black. Com. 290. As in the case of *Hamilton v. Davis*, 5 Berr. 2732. The ship was lost. The goods cast on shore were sufficiently marked, so as that the owner might be known. But the lord of the manor refused to deliver them up, insisting that they were forfeited as wreck, because no living creature had come alive from the ship to the shore.—By *Ld. Mansfield C. J.* No case hath been produced in the argument of this cause, to prove that the goods were forfeited, because no dog or cat or other animal came alive to shore. I will therefore presume that there never was any such determination; and that no case could have been determined, so contrary to the principles of law, justice, and humanity. The very idea of it is shocking. And there is no ground for such a forfeiture, upon the distinction that hath been so much urged; between a man or other animal coming to shore alive or not alive. The coming to shore of a dog or a cat alive can be no better proof, than if they should come ashore dead. The escaping alive makes no sort of difference. If the owner of the animal were known, the presumption of the goods belonging to the same person would be equally strong whether the animal were living or not.—And the court were clear and unanimous that the owner was entitled to his goods again, on his paying & tendering a reasonable salvage.

By stat. 17 Ed. 2. st. 1. c. 11., the king shall have wreck of the sea throughout the realm.

The cause whereof originally wreck was given to the crown, stood upon two main maxims of the common law.

1. That the property of all goods whatsoever must be in some person. 2. That such goods, as no subject can claim any property in, do belong to the king by his prerogative. 2 Inst. 167.

The taking of goods whereof no one had a property at the time is not felony; and therefore he who takes away a wreck before it is seized by the person who has a right thereto is not guilty of felony, and shall only be punished by fine or the like. 1 Haw.

33. § 24. That is to say, he is not guilty of felony by the common law.

The correctness of this position, however, is questionable; for although the lord has no determinate property therein till seizure, yet the true owner, who has lost or been robbed of the things, as still a property in them. Further, it is well settled that larceny may be committed by stealing goods, the owner of which is not known, and that it may be stated in the indictment that the things stolen were the goods of a person to the jurors unknown; but some proof must be given sufficient to raise a reasonable presumption that the taking was felonious, or *invito domino*. 2 East, 2. C. 606.; cit. 2 Russ. 162.

To preserve ships stranded or in distress from being plundered by the country people, it is enacted by stat. 12 Ann. st. 2. c. 18. and stat. 26 G. 2. c. 19. as follows (which act of the 12 Ann. is required to be read in the church four times a year, in all sea-ports towns and on the coast):

By stat. 12 Ann. st. 2. c. 18. § 1., the sheriffs, justices of the peace, and also all mayors, bailiffs, and other head officers of corporations and port towns near adjoining to the sea, and all constables, head-wards, tythingmen, and officers of the customs in all such places, shall, on application to them, or any of them, by or on behalf of any commander or chief officer of any ship or vessel in danger of being stranded or run on shore, command the constables of the several ports nearest to the sea coasts where any such ship shall be in danger, to summon and call together as many men as shall be thought necessary, to the assistance and for the preservation of such ship or vessel so in distress, and their cargoes: And if there be any vessel, either man-of-war or merchant's ship, belonging to her majesty, or any of her subjects, riding at anchor near such place where the ship is so in distress, the officers of customs and constables above mentioned may demand of the superior officers of such ship assistance by their boats, and such arms as they can conveniently spare, for the said service and reservation of the said ship so in distress; and on such superior officer's refusal or neglect to give such assistance, he shall forfeit 100*l.*, to be recovered by the superior officer of the said ship so in distress, with costs, in any of her majesty's courts of record.

By stat. 26 G. 2. c. 19. § 6., the justices of the peace, mayors, bailiffs, collector of the customs, or chief constable who shall be nearest to where the ship, goods, or effects shall be stranded or cast away, shall forthwith give public notice for a meeting to be held as soon as possible of the sheriff or his deputy, the justices of the peace, mayors, or other chief magistrates of towns cor-

17 Ed. 2. st. 1. c. 11.

To whom the wreck belongs.

Seizing wreck not felony at common law.

Ownership of wreck.

Assisting ships in distress.

12 Ann. st. 2. c. 18. Sheriffs, justices, &c., and revenue officers, to summon assistance to vessels in distress.

Penalty for refusing assistance.

26 G. 2. c. 19. Justices, &c. to call a meeting in aid.

26 G. 2. c. 19.

porate, coroners, and commissioners of the land tax, or any five of them, who shall aid in the execution of this act, and that of 12 Ann., and who shall employ proper persons for saving the same.

§ 9. And also the deputy sheriff and the officers of excise shall be proper officers to put these acts in execution.

Officers, &c. of
cinque ports.

And by § 10., within the cinque ports, the lord warden of the cinque ports, the lieutenant of *Dover Castle*, the deputy warden of the cinque ports, the judge official and commissary of the court of admiralty of the cinque ports, shall put the same in execution there.

§ 12. And any justice of the peace, in the absence of the high sheriff, may take sufficient power of the county.

12 Ann. st. 2.
c. 18.

Persons enter-
ing ship with-
out leave;
impeding the
saving the ship,
&c.

By stat. 12 Ann. st. 2. c. 18. § 3., if any person besides those empowered by the said officer or his deputy, and the constables, shall enter or endeavour to enter on board any such ship so in distress, without leave of the commander or other superior officer of the said ship, or of the said officer of customs or his deputy, or of the said constable, or some or one of them employed for the service and preservation of the said ship; or if any person shall molest him, them, or any of them, in the saving of the said ship or goods, or shall endeavour to impede or hinder the saving thereof, or when any such goods are saved, shall take out or deface the marks of any such goods, before the same shall be taken down in a book to be provided for that purpose, by the commander or ruling officer, and the first officer of the customs, such person shall within 20 days make double satisfaction to the party grieved, at the discretion of the two next justices, or in default thereof, shall by them be sent to the next house of correction, where he shall continue and be employed in hard labour for 12 months then next ensuing. And the commander or superior officer of the said ship in distress, or the said officer of the customs, or constables on board the same, may repel by force any such person as shall, without such leave or consent, press on board the said ship so in distress, and thereby molest them in the preservation thereof.

To make double
satisfaction.

Commander
may repel them
by force.

26 G. 2. c. 19.
Who shall give
orders in order
to save a vessel.

And by stat. 26 G. 2. c. 19. § 13., to prevent confusion, or contradictory orders, the persons assembled to save any vessel or goods as aforesaid shall conform in the first place to the orders of the master or other officers or owners, or persons employed by them; and for want of their presence or directions, then to the order of the officers of the customs, next to those of the officers of excise, then of the sheriff or his deputy, then of a justice of the peace, then of a mayor or chief magistrate, then of the coroner, then of a commissioner of the land tax, then of a chief constable, then of a petty constable or other peace officer; and any person wilfully and knowingly acting contrary to such orders shall forfeit not exceeding 5*l.*, to be levied by warrant of one justice, and in case of non-payment, to be committed to the house of correction not exceeding three months.

Penalty for
acting contrary.

Allowance.

§ 6. Every such sheriff, justice, mayor, coroner, lord of a manor, under-sheriff, or commissioner of the land-tax, shall have 4*s.* a day during his attendance, out of the goods saved.

12 Ann. st. 2.
c. 18.

By 12 Ann. st. 2. c. 18. § 2., the said collectors, and the master or commanding officer of any ship or vessel, and all others who

shall act or be employed in the preserving of any such ship in distress, or their cargoes, shall within 30 days after service performed, be paid a reasonable reward for the same by the commander, master, or other superior officer, mariners, or owners of the ship in distress, or by the merchant whose ship or goods shall be so saved: And in default thereof, they shall remain in custody of such officer of the customs or his deputy, until all charges shall be paid, and until he or his deputy be reasonably gratified for their said assistance and trouble, or good security given for that purpose to the satisfaction of the parties who are to receive the same: And if after such salvage they disagree with the said officer of customs or his deputy, touching the monies deserved by any of the persons so employed, the commander of such ship so saved, or the owner of the goods, or the merchant interested therein, and also the said officer of customs or his deputy, may nominate three neighbouring justices, who shall adjust the *quantum* to be paid to the several persons acting or being employed in such salvage; such adjustment shall be binding to all parties, and recoverable by action by the parties to whom allotted: And if no person shall appear to claim any of the goods, the chief officer of customs of the nearest port to the place where the said ship was so in distress, shall apply to three of then earest justices, who shall put him or some other responsible person in possession of the said goods, such justices taking an account in writing of such goods, to be signed by such officer: And if they be not legally claimed within 12 months next ensuing, by the rightful owner, public sale shall be made thereof, and if perishable goods, forthwith to be sold; and after all charges deducted, the residue of the monies, with a fair account of the whole, to be transmitted to the exchequer, to remain there for the benefit of the owner when appearing, who, on affidavit or other proof of his right, to the satisfaction of one of the barons of the coif, shall upon his order receive the same out of the exchequer.

By 26 G. 2. c. 19. § 5., if any persons, not employed by the masters, mariners, or owners, or other persons lawfully authorised, shall, in the absence of persons so employed, save any vessel or goods, and cause them to be carried for the benefit of the owners into port, or any adjoining custom-house, or other place of safe custody, immediately giving notice thereof to a justice, magistrate, custom-house or excise officer, they shall be entitled to a reasonable reward for the same, to be adjusted by three neighbouring justices, which may be recovered by action at law (as in 12 *Ann.*); or the same may be adjusted by the officers above-mentioned. And by § 7., if the said salvage (and the charges of 4s. a-day, as above mentioned) shall not be paid in 40 days after the services performed, the officer of the customs concerned in the salvage may borrow or raise so much money as shall pay the same upon the bill or bills of sale, under his hand and seal, of the vessel or cargo, or part thereof; redeemable nevertheless on payment of the principal and interest at 4 per cent.

By stats. 1 & 2 G. 4. c. 75., intituled *An act to continue and amend certain acts for preventing frauds and depredations committed on merchants, shipowners, and underwriters, by boatmen and others; and also for remedying certain defects relative to the adjustment of*

12 *Ann.* st. 2. c. 18.

Provision for payment of proper salvage.

Where no one claims the goods wrecked, three justices to provide for the care of them.

26 G. 2. c. 19. Salvage, as to persons not employed under the authorities.

1 & 2 G. 4. c. 75.

1 & 2 G. 4. c. 75. *salvage in England, under an act made in the twelfth year of queen Anne.*

§ 1., after reciting stat. 49 G. 3. c. 122., intituled *An act for preventing frauds and depredations on merchants, ship-owners, and underwriters, by boatmen and others; and also for remedying certain defects relative to the adjustment of salvage in England, under an act made in the twelfth year of queen Anne*; which act was to continue in force for seven years, and from thence to the end of the next session of parliament; and that by an act passed in 53 G. 3. (viz. c. 87.) the said recited act (except so far as the same was altered and extended) was further continued for seven years, &c.; and it is fit and expedient that the said recited acts should be further continued, except so far as the same are altered by this act; it is enacted, that all pilots, boatmen, hovellers, or other persons, who shall take up any anchors, cables, tackle, apparel, furniture, stores, or materials, or any goods or merchandise which may have been parted with, cut from, or left by any ship or vessel within any harbours, rivers, or bays, or on any of the coasts of this kingdom, whether the same ship or vessel shall be or shall have been in distress or otherwise, and which shall have been weighed, swept for, or taken possession of by any such boatman, pilot, hoveller, or other person, shall send a report in writing of the articles so found, and stating the marks, if any, thereon, and also an accurate and particular description of the bearings, distances, and situations, and time when and where the same were so found, to a deputy vice-admiral or his agent, at or near to the port or place where such boatman, pilot, hoveller, or other person shall first arrive with such articles, within 48 hours after his arrival at such port, or before he shall leave the port, if he shall quit it before that time shall expire; and shall also, within such period as aforesaid, deliver such articles so found into a proper warehouse, or such other place as the vice-admiral of each county shall appoint, for safe custody, until the same shall be claimed by the owner or owners thereof, or his or their agent, and the salvage, together with such other charges and expenses as are herein-after directed to be paid in respect of such articles, paid by him or them, or security given for the payment thereof, to the satisfaction of the salvor or salvors thereof; and every such pilot, boatman, hoveller, or other person, who shall wilfully and fraudulently keep possession of, or retain, or conceal, or secrete any anchors or cables, tackle, apparel, furniture, stores, or materials, or any goods or merchandise, or deface, take out, or obliterate the marks and numbers thereon, or alter the same in any manner, with intent thereby directly or indirectly to prevent the discovery and identification of such article so found, weighed, swept for, or taken possession of as aforesaid, and shall not report and deliver the same at some proper warehouse or other place in the manner aforesaid, and within the time herein-before limited, shall forfeit all claim to salvage, and shall, on conviction, be adjudged guilty of receiving goods, knowing them to have been stolen, and shall suffer the like punishment as if the same had been stolen on shore. See a similar provision, stat. 49 G. 3. c. 122. § 1.

Pilots and others to deposit anchors, cables, and other ships' materials, taken possession of by them, in the places to be appointed by this act.

Concealing such article forfeits claims to salvage, and subjects the offender to punishment.

Deputy vice-admiral to send report of goods

§ 2. Every deputy vice-admiral or his agent, to whom any such report shall be sent, shall within two days forward the same, or a true copy thereof, to the secretary of the corporation of the Trinity

House of *Deptford Strond* in *London*, and the same shall be placed by the said secretary in some conspicuous situation, for the inspection of all persons choosing to inspect and examine the same: Provided that no report shall be forwarded by such deputy vice-admiral or his agent to the said corporation of the Trinity House of *Deptford Strond*, until the articles so to be deposited as aforesaid shall amount in value to the sum of 20*l*. See stat. 49 G. 3. c. 122. § 2. S. P.

§ 3. It shall be lawful for any deputy vice-admiral or his agent to seize and detain any such articles as shall not have been reported, and upon such seizure shall deposit the same in the warehouse or other place to be appointed as aforesaid, and shall within two days thereafter send a report in writing of the articles seized, and stating the marks (if any) thereon, to the said corporation of the Trinity House as before directed, to be made public as aforesaid; and every such deputy vice-admiral or his agent so seizing, who shall not make such report within two days after seizure, shall, on conviction before any justice of the peace or magistrate, upon the oath of one credible witness, or on the confession of the party offending, forfeit the sum of 20*l*. for every such neglect, together with double the value of the goods so seized, one half of which penalty shall be paid to the informer, and the other half to the poor of the parish or township where such offence shall be committed; and every deputy vice-admiral or his agent, who shall make any such seizure, without any previous information being given to such deputy vice-admiral or his agent, shall, on the same articles being claimed by and delivered to the owner thereof, or his or her agent, be entitled to receive such sum of money as shall be equal to one third part of the value thereof, after the payment of the duties, and charges incidental to the recovery and preservation of the same. See stat. 49 G. 3. c. 122. § 4. S. P.

§ 4. If the owner and deputy vice-admiral or agent so seizing, cannot agree on the value of the articles, such value shall be ascertained in like manner as is hereinafter directed with regard to salvage, or be referred to the decision of the high court of admiralty. See stat. 49 G. 3. c. 122. § 5. S. P.

§ 5. If any such seizure shall have been made in consequence of any information given to any such deputy vice-admiral or his agent, the deputy vice-admiral or his agent so seizing shall only be entitled to receive from the owners or their agents of the articles one-sixth part of the value thereof, and one other one-sixth of such value shall be paid to the person who shall have given the information, the value of such articles to be ascertained in manner aforesaid. See stat. 49 G. 3. c. 122. § 6. S. P.

§ 6. If any such articles, so reported and delivered into the warehouse or other place as aforesaid, shall not be claimed within a year and a day after such report shall have been transmitted to the said corporation of the Trinity House as before mentioned, the same shall be sold, and a certificate of such sale shall be delivered to the purchaser thereof, under the directions of the high court of admiralty, and the monies arising from the sale be applied in the manner directed in and by stat. 12 Ann. c. 18.; and if the same shall have been seized by the deputy vice-admiral or his agent, then the deputy vice-admiral or agent so seizing, and the person who shall have given such information as shall have led to the

1 & 2 G. 4. c. 75.

deposited to the Trinity House. No report made until the articles amount to 20*l*.

Deputy vice-admiral may seize goods not reported and deposited, and shall make report thereof to the Trinity House, on penalty of 20*l*. and double value of the seizure.

One-third of value of goods allowed on being claimed by the owner.

Mode of ascertaining the value of articles seized.

If deputy vice-admiral seize by previous information, he and informer to divide 2-6th parts.

If articles not claimed within a limited time, to be sold according to 12 Ann. c. 18., and if they shall have been seized, the deputy vice-admiral seizing and the person informing shall be

1 & 2 G. 4. c. 75.

equally entitled to salvage.

If the owners and salvors cannot agree respecting the salvage, *three justices* shall determine the difference.

If the justices cannot agree, they shall nominate a person, conversant in maritime affairs, who shall determine.

Justices may in like manner determine upon remuneration to be made for services rendered to ships in distress or otherwise.

Decision of justices final, unless an appeal to court of admiralty.

Persons dissatisfied may appeal to the high court of admiralty; but the goods to be restored to the owners on giving bail

seizure (if any such information shall have been given), shall be equally entitled to the salvage which shall be allowed by the high court of admiralty to the salvors in the case of unclaimed property. See stat. 49 G. 3. c. 122. § 7. S. P.

§ 7. If the salvors of any such articles, &c. so found, &c. and so lodged and reported, and the owners thereof, or their agent, cannot agree respecting the amount of salvage, or the value, then the matter in difference shall be determined by any *three justices* of the peace residing near to the place where such articles or goods shall be deposited, who shall begin to proceed in their inquiry, as to such matters in dispute, within 48 hours after such difference shall be referred to them; and if they cannot agree respecting the same, then it shall be lawful for them to nominate any third person conversant in maritime affairs, at their option, who shall ascertain the amount of the salvage to be paid, or the value thereof, within 48 hours after he shall have been so nominated; and the said justices, and such third person so nominated, shall have full power to examine the parties, or their witnesses, upon oath, which oath they are hereby authorised to administer. See stat. 49 G. 3. c. 122. § 8. S. P.

§ 8. It shall also be lawful for the said justices to decide, in the like manner, and within the same time, on all claims and demands whatsoever which shall be made by pilots, boatmen, and other persons, for service of any description (except pilotage) to be rendered by them to any ship or vessel, as well for carrying off from the shore to such ship or vessel any anchors, cables, or other stores, from any port of the coast of *England and Wales, and Berwick-upon-Tweed*, or for the saving and preserving any goods or merchandise which may have been wrecked, stranded, or cast away from any ship or vessel, or for being instrumental in saving the life or lives of any person or persons on board, the master, owner or owners, or his or their agent or agents, being present with such justices; and the said justices shall have full power to hear and determine on all cases whatever of services rendered by pilots, boatmen, and others, to ships or vessels (except pilotage), whether such ships or vessels shall at the time be in distress or not, and they shall have the like power of examining the parties or their witnesses upon oath; and the decision of such justices shall be final on all parties, except in such cases in which an appeal shall be interposed by either party to the high court of admiralty, such appeal to be interposed within 30 days after the award. See stat. 49 G. 3. c. 122. § 9. S. P.

§ 9. In case the party or parties so claiming to be entitled to salvage, or the party or parties who is or are to pay the same, or their agents, shall be dissatisfied with such award, it shall be lawful for either of them, within ten days after such award is made, but not afterwards, to declare to the justices, or person nominated by them, his or their desire of obtaining the judgment of the high court of admiralty respecting the said salvage, and thereupon he or they shall proceed, by taking out a monition within 30 days from the date of the award; but in such case the said justices are hereby required to deliver to the owners, or their agents, any such articles respecting which any claim for salvage shall be made upon the owners, or their agent, giving sufficient bail in the amount of the sum awarded for salvage or compensation, to be taken by a com

missioner for taking examinations in prize cases, if there shall be one in the port; but if there shall be no such commissioner there, then the said justices, or any other of H. M.'s justices of the peace, are and is hereby authorised to take the same; and the commissioner or justice who shall take such bail, shall certify the same according to the form contained in the schedule hereunto annexed, and transmit the same without delay to the high court of admiralty, together with a true certificate in writing, of the gross value of the whole of the articles, and also a copy of such proceedings and awards, on unstamped paper, certified under the hand of such commissioner or justice taking the bail: and the same shall be admitted by such court as evidence. See stat. 49 G. 3. c. 122. § 10. S. P.

§ 10. It shall be lawful for the person so to be named by the said justices, who shall decide on the amount of salvage to be paid, or on the value of the articles, or on the remuneration to be made to persons rendering assistance to ships or vessels, or persons as aforesaid, to demand and receive from the owner or owners of the articles saved, or of the ships or vessels in behalf of which the services may have been rendered, or his or their agents, a sum not exceeding 2*l.* 2*s.*; and such owner or owners, or his or their agents, shall pay to the person so to be nominated by the said justices such fee or reward, immediately after he shall have made his award or decision, and on delivery of the same. See stat. 49 G. 3. c. 122. § 11. S. P.

§ 11. "If any person or persons shall wilfully cut away, cast adrift, remove, alter, deface, sink or destroy, or shall do or commit any act with intent and design to cut away, cast adrift, remove, alter, deface, sink or destroy, or in any other way injure or conceal any buoy, buoy rope, or mark belonging to any ship or vessel, or which may be attached to any anchor or cable belonging to any ship or vessel whatever, whether in distress or otherwise, such person or persons so offending shall, on being convicted of such offence, be deemed and adjudged to be guilty of felony, and shall be liable to be transported for any term not exceeding seven years, or in mitigation of such punishment to be imprisoned for any number of years, at the discretion of the court in which the conviction shall be made." Stat. 49 G. 3. c. 122. § 12. S. P.

§ 12. "If any person shall knowingly and wilfully, and with intent to defraud and injure the true owner or owners thereof, or any person interested therein as aforesaid, purchase or receive any anchors, cables, or goods or merchandise which may have been taken up, weighed, swept for, or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck, if the directions herein-before contained with regard to such articles shall not have been previously complied with, such person or persons shall, on conviction thereof, be deemed guilty of receiving stolen goods, knowing the same to be stolen, as if the same had been stolen on shore, and suffer the like punishment as for a misdemeanor at the common law, or be liable to be transported for seven years, at the discretion of the court before which he, she, or they shall be tried." Stat. 49 G. 3. c. 122. § 13. S. P.

1 & 2 G. 4. c. 75.

Bail to be taken by a commissioner in prize cases, if there is one in the place, otherwise by a justice.

Persons named by justices to decide on the amount of salvage, &c. may demand from the owner 2*l.* 2*s.*

Persons cutting away or defacing buoy ropes, &c. to be deemed guilty of felony, &c.;

liable to transportation.

Persons fraudulently purchasing or receiving anchors, cables, &c. shall be considered receivers of stolen goods.

1 & 2 G. 4. c. 75.

Masters of ships bound to parts beyond the seas, finding or taking on board anchors and other articles, to make entry in the log book, and report the same to the Trinity House, and on their arrival in England deposit the articles.

If not claimed to be sold.

Penalty for making default, not exceeding 100*l.* nor less than 30*l.*

Application of penalty.

Fees to be paid for reports,—
1*l.* 1*s.* to the deputy vice-admiral, and
1*l.* 1*s.* to the secretary of the Trinity House.

Punishing pilots and others

§ 13. In case the master, mate, or crew of any ship or vessel bound to parts beyond the seas, shall find and take on board any anchor, cable, or any goods or merchandise, or shall receive any anchor, cable, or any goods or merchandise on board, from any other person or persons who may have found the same, knowing the same to have been so found, the master, mate, or other person having the command of such ship or vessel, shall make a true entry in the log book of such ship of the articles so found or taken on board, stating the marks (if any) thereon, and the bearings and distances, and other minute description, and the time when and where the same were found and taken on board; and also shall, at the first possible opportunity, transmit a report in writing, containing a true copy of such entry in the log book of the said ship or vessel, to the said corporation of the Trinity House, and on the return of such vessel to any port in *England or Wales*, or *Berwick-upon-Tweed*, he shall deliver the same articles into the possession of a deputy vice-admiral or his agent, in or nearest to such port at which he shall first arrive, and within 24 hours after his arrival, with the like report as is herein-before directed; and such deputy vice-admiral or agent is hereby required to transmit such report to the said corporation of the Trinity House, to be placed by the said corporation for inspection; and if the same shall not be claimed by the owners thereof, or their agent, within a year and a day after such report shall be transmitted, the same shall be sold and disposed of according to law with regard to unclaimed property; and in default thereof, or if the master of such ship or vessel shall sell or dispose of such anchor, cable, goods or merchandise to any person whomsoever, or shall not, upon his first return to any port within *England and Wales*, or *Berwick-upon-Tweed*, report and deliver the same according to the provisions of this act, he shall for every such offence forfeit all claim to salvage, and on being thereof lawfully convicted before any justice of the peace or magistrate, on the oath of one credible witness, or on the confession of the party offending, forfeit and pay any sum not exceeding 100*l.* nor less than 30*l.*; one half of which penalty shall be paid to the informer, and the other half to the president and governors, for the relief and support of such maimed and disabled seamen, and of the widows and children of such as shall be killed, slain, or drowned in the merchants' service, under stat. 20 G. 3. c. 38.; and shall also forfeit double the value of such articles to the owners. Stat. 49 G. 3. c. 122. § 14. S. P.

§ 14. It shall be lawful for the deputy vice-admiral or his agent who shall make the report required by this act to the said corporation of the Trinity House, to receive from the owners of the articles in respect of which the report shall be made, or, if the same are not claimed, then out of the produce of the sale thereof, the sum of 1*l.* 1*s.* for each report; and it shall also be lawful for the secretary or other proper officer of the said corporation of the Trinity House to receive in like manner as last mentioned, the sum of 1*l.* 1*s.* for each report received, to be made public by them as aforesaid, which last-mentioned sum shall be paid to the said deputy vice-admiral or his agent, before the delivery of the goods and accounted for by him to the Trinity House. Stat. 49 G. 3. c. 122. § 15. S. P.

By § 15., and whereas pilots, hovellers, boatmen, and others

persons in small vessels have for many years conveyed anchors and cables which may have been weighed, swept for, or taken possession of by them as aforesaid, or which they may have purchased of other persons, knowing them to have been weighed, swept for, or taken possession of, without being reported as aforesaid, to foreign countries, and there sold and disposed of, to the manifest injury and loss of the owners thereof; for remedying whereof it is enacted, "that every pilot, hoveller, boatman, or the master of any such vessel, who shall convey any such anchor or cable to any foreign port, harbour, creek, or bay, and there sell and dispose of the same, shall be deemed and adjudged guilty of felony, and shall be transported for any term not exceeding seven years." Stat. 19 G. 3. c. 122. § 16. S. P.

By § 16., all persons who shall trade or deal in buying and selling anchors, cables, sails, or old junk, old iron, or marine stores of any kind or description, shall have their names, with the words "*Dealer in Marine Stores*," painted distinctly in letters of not less than six inches in length, upon the front of all their storehouses, warehouses, and other deposits for such goods; and in default of their so doing, they shall, on conviction before any justice or justices of the peace, or magistrate or magistrates of any jurisdiction where such storehouse, warehouse, and depôt shall be, upon the oath of one credible witness, or on confession of the party offending, forfeit a sum not exceeding 20*l.* nor less than 10*l.*, one half of which penalty shall be paid to the informer and the other half to the poor of the parish or township where such offence shall be committed; and it shall not be lawful for such dealers or traders to cut up any cable, or any part of a cable exceeding five fathoms in length, or uncant, untwine, or unlay the same into junk or raper stuff, on any pretence whatsoever, without first obtaining a permit from some justice of the peace or magistrate residing near to the residence of such dealer, which permit shall not be granted, unless an affidavit shall have been made that the cable so intended to be cut up had been *bonâ fide* purchased, and without fraud, by the party so intending to cut up the same, and without any knowledge or suspicion on his or her part, that the same had been or were dishonestly come by; and in which affidavit shall also be specified the particular quality and description of such cable, and the name or names of the seller or sellers thereof, which affidavit shall be recited and set forth at length in the permit thereupon granted, on pain of forfeiting for the first offence any sum not exceeding 20*l.* nor less than 10*l.*; and for every second or further offence, any sum not exceeding 50*l.* nor less than 20*l.*, to be recovered before any justice of the peace; and one half thereof to go to the informer, and the other half to the poor of the parish in which such offence shall have been committed. Stat. 19 G. 3. c. 122. § 17. S. P.

By § 17. And for the more effectual prevention of such frauds, all dealers in such marine stores shall keep a book or books, fairly written, in which entries shall be from time to time regularly made of all such old marine stores as shall be by them from time to time bought, containing a true account and description of the times when the same were so respectively bought by them, and of the names and places of abode of the respective sellers thereof; and before any person who shall obtain such permit for the cutting

1 & 2 G. 4. c. 75.

selling or disposing of anchors or cables in foreign countries.

Penalty on dealers in marine stores not having their names painted on their storehouses, or cutting up any cable without a permit from magistrate.

First offence.
Second offence.

Dealers to keep an account of old stores bought by them;

1 & 2 G. 4. c. 75.

to advertise
before cutting
up of cordage.

Persons may
demand inspection
of books.

Penalty on
refusing inspection,
&c.

For first offence
not exceeding
20*l*. nor less
than 10*l*.
For second, &c.
not exceeding
50*l*. nor less
than 20*l*.
Recovery of
penalties.

Manufacturers
of anchors to
place marks on

up of any such cable (as herein-before required to be obtained), shall proceed to cut up the same by virtue thereof, there shall be published, by the space of one week at least before the cutting up the same, one or more advertisement or advertisements in some public newspaper printed nearest to the storehouse, warehouse, or depôt where the articles shall be deposited, notifying that such party had obtained such permit, for the purpose of cutting up such cable, and of such kind and quality as therein described, and also specifying the place where such articles shall be deposited; whereupon it shall be lawful for all and every person or persons who may have just cause to suspect that such articles are the property of such person or persons, and shall have verified upon oath the fact of such his or their suspicion before any justice of the peace or magistrate residing near to the said storehouse, warehouse, or depôt, by warrant for that purpose thereupon granted, to require of and from such dealer, who shall have so advertised, and shall be so sworn to be suspected as aforesaid, the production and examination of the book or books of entries hereby required by him or her to be kept, and inspect and examine the cables described in such permit; and in case any such dealer, when so thereunto required as aforesaid, shall neglect or refuse to produce to the person named in such warrant, as the person on whose oath the same shall have been obtained, the book or books containing the entries of such dealer so required to be made therein as aforesaid, or shall neglect to keep any such book or books in which entries, containing accounts of the several particulars herein-before required to be entered, shall be made, or to permit such inspection or examination as aforesaid, or shall, after obtaining such permit for the cutting up of any such cable, and before the cutting up of the same, neglect to publish such one or more advertisement or advertisements relative thereto as is herein-before directed and required, the dealer or dealers so offending in all or any of the particulars herein-before mentioned shall forfeit and pay for every such offence, being his, her, or their first offence, any sum not exceeding 20*l*. nor less than 10*l*., and for every second or further offence any sum not exceeding 50*l*. nor less than 20*l*.; one half of which penalty shall, on conviction before any justice of the peace or magistrate residing near as aforesaid, be paid to the informer, and the other half to the poor of the parish or township in which such offence shall be committed; and in case any of the penalties by this act imposed shall not be paid, with the charges incident to the conviction, immediately upon such conviction, the same shall and may be levied by warrant under the hand and seal of such justice of the peace or magistrate, upon the goods and chattels of any such offender or offenders; and in case no sufficient distress shall be found, then every such offender or offenders shall and may be committed by any justice of the peace or magistrate as aforesaid to gaol, in case of any first offence, for the space of six calendar months, and in case of any second or further offence for the space of twelve calendar months, unless the said penalty and the charges shall be sooner paid. Stat. 49 G. 3. c. 122. § 18. S. P.

§ 18. All manufacturers of anchors and kedge anchors shall place his, her, or their name or names, together with a progressive number, and also the weight of the anchor, in legible characters

upon the crown, and also upon the shank under the stock of each anchor which he, she, or they shall manufacture, and shall also place his, her, or their name or names, together with a number, and also the weight of the kedge anchor upon the crown, and also upon the shank near to the stock of every kedge anchor which he, she, or they shall manufacture; and in case any such manufacturer shall neglect to place such name, number, or weight in the manner herein-before directed and required, every such person or persons so offending shall, on conviction before any justice of the peace or magistrate, on the oath of one credible witness, or on the confession of the party so offending, forfeit any sum not exceeding £. nor less than 40s., one half of which penalty shall be paid to the informer, and the other half to the poor of the parish or township in which such offence shall be committed. Stat. 49 G. 3. c. 122. § 19. S. P.

1 & 2 G. 4. c. 75.

anchors and
kedge anchors.Penalty on
neglect.Not exceeding
5*l*. nor less than
40*s*.

§ 19. And for the more easy and speedy conviction of offenders against this act, every justice or justices of the peace before whom any person shall be convicted of any offence against this act, shall and may cause the conviction to be drawn up according to the following form; *videlicet*,

Form of con-
viction.

BE it remembered that on the _____ day of _____, in the year of our Lord _____, A. B. is convicted before me [or, us], _____ one [or, two, as the case may be] of his majesty's justices of the peace for the _____, [here specify the offence, and the time and place when and where committed, as the case may be,] contrary to an act passed in the second year of the reign of King George the fourth, intituled [here insert the title of this act, ante.] Given under my hand and seal [or, our hands and seals,] the day and year first above written.

And no certiorari, or other writ or process for the removal of any such conviction, or any proceedings thereon, into any of H. M.'s courts of record at *Westminster*, shall be allowed or granted. Stat. 49 G. 3. c. 122. § 20. S. P.

§ 20. It shall and may be lawful to and for any person or persons so convicted by any justice or justices of the peace before mentioned of any offence or offences against this act, within three calendar months next after such conviction, to appeal to the justices of the peace assembled at the general quarter sessions holden for the county, city, or place where the matter of appeal shall arise, first giving ten days' notice of such appeal to the person or persons appealed against, and of the matter thereof, and entering into a recognizance before some justice of the peace for such county, city, or place, with two sufficient sureties, conditioned to try such appeal, and for abiding the determination of the court herein; and such justices at the general quarter sessions shall, upon due proof of such notice having been given and recognizance entered into, hear and determine the matter of such appeal, and may either confirm or quash and annul the said conviction, and award such costs to either party as to them shall seem just and reasonable; and the decision of the said justices therein shall be final, binding, and conclusive; and no proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form only, or be removed by *certiorari*, or any other writ or

Appeal from
conviction to
the general
quarter sessions.Power to award
costs.

1 & 2 G. 4. c. 75.

Inhabitants
may be com-
petent wit-
nesses.

Offences may
be tried in the
county where
articles found,
or, if sold in
foreign parts,
where offenders
reside.

Act not to alter
the statute of
48 G. 3. c. 130.
Reservation of
the statute of
48 G. 3. c. 104.

Reservation of
the rights of the
high court of
admiralty, &c.

Reservation of
the rights of the
crown, and of
lords and ladies
of manors.

Reservation of
the rights of the
Trinity Houses
of Kingston-
upon-Hull,
Newcastle-
upon-Tyne,
and Scarbo-
rough.

Trinity House.

Reservation of
the rights of the
city of London.

Scotland and
Ireland.

process whatsoever, into any of H. M.'s courts of record at *Westminster* or elsewhere. Stat. 49 G. 3. c. 122. § 21. S. P.

§ 21. The inhabitants of any parish, township, or place, shall be deemed to be competent witnesses, notwithstanding the penalty or any part thereof, may be given or applicable to the poor of such parish, township, or place, or in aid thereof. Stat. 49 G. 3. c. 122. § 22. S. P.

§ 22. All felonies, misdemeanors, and other offences under this act, may be laid to be committed, and shall be tried in any city or county (being a county) where any such article, matter, or thing, in relation to which such offence shall have been committed, shall have been found in the possession of the person committing the offence; or if the same shall have been sold in foreign parts, then in the county or place in which the person selling the same shall reside. Stat. 49 G. 3. c. 122. § 23. S. P.

§ 23. Nothing in this act contained shall extend to or be in force within the limits specified in stat. 48 G. 3. c. 130., or in any manner to affect any of the provisions of the said act; also, nothing in this act contained shall extend to repeal or alter any of the clauses, powers, or provisions contained in stat. 48 G. 3. c. 104.: but the said act shall remain in full force as if this act had not been passed.

§ 24, 25. Also this act shall not extend to taking away, abridging, prejudicing, or impeaching, in any manner whatever, the jurisdiction of the high court of admiralty of *England*, or the jurisdiction of the admiralty court of the *Cinque Ports*, two ancient towns, and their members, or of the admiralty court of the borough of *Great Yarmouth*, in the county of *Norfolk*, or of the admiralty court of the borough of *Dunwich*, in the county of *Suffolk*, or of the admiralty court of the borough of *Southampton*, in the county of *Hants*, or of the admiralty court of the borough of *Southwold*, in the county of *Suffolk*, or of the admiralty court of the borough of *Lynn Regis*, in the county of *Norfolk*; nor to deprive or in any ways prejudice the rights of H. M., or any patentee or grantee of the crown, or any lord or lords, or lady or ladies of any manor or manors whatever. Stat. 49 G. 3. c. 122. § 26, 27. S. P.

§ 34. Nor to the taking away, abridging, hindering, prejudicing, or impeaching of any grant, liberties, franchises, and privileges heretofore granted to and vested in the corporation of the *Trinity House of Kingston-upon-Hull*, or in the commissioners acting under the provisions of any act relating to the adjustment of salvage for anchors, cables, and other ships' materials found in the river *Humber*, or in the masters, wardens, and brethren of the *Trinity Houses of Newcastle-upon-Tyne and Scarborough* respectively. Stat. 49 G. 3. c. 122. § 28. S. P.

[Note.—Stat. 49 G. 3. c. 122. § 29. contains a similar saving for the *Trinity House of Deptford Strond*, which is not repeated in stat. 1 & 2 G. 4. c. 75.]

By § 35., nor to prejudice or take away any right of the masters of the city of *London*, or of the mayor and commonalty and citizens of the city of *London*, in and upon the rivers of *Thames* and *Medway*. Stat. 49 G. 3. c. 122. § 30. S. P.

By § 36., nothing in this act contained shall extend to *Scotland* and *Ireland*. Stat. 49 G. 3. c. 122. § 31. S. P.

§ 26. No lord or lady of any manor, or other person who may be entitled to wreck of the sea, or to any goods found jetsam, flotsam, or ligam, shall be entitled to appropriate such wreck or goods to his, her, or their own use, until he, she, or they shall have caused a report thereof in writing to be given to the deputy vice-admiral of that part of the coast where the same shall have been stranded, wrecked, or found, or to his agent; or if there shall be no such deputy vice-admiral or agent residing within the distance of 50 miles, then to the corporation of the Trinity House; which report shall contain an accurate and particular description of the wreck or goods found, and of the place or places and time or times where and when the same may have been found, and of any marks that may be thereon, and of such other particulars as may be better enable the owner or owners to recover the same, and also of the place where the same are deposited and may be found and examined by any person claiming any right to such wreck or goods, nor until the full expiration of a year and a day after the delivery of such notice; and the deputy vice-admiral or agent aforesaid shall, within 48 hours after receiving such report, transmit a copy thereof to the secretary of the corporation of the Trinity House, upon pain of forfeiting for any neglect to transmit such account the sum of 50*l.* to any person who will sue for the same; and the said secretary shall cause such account to be placed in some conspicuous situation, for the inspection of all persons claiming to inspect and examine the same. Stat. 53 G. 3. c. 87. § 2. S. P.

§ 27. When any goods which shall be found or taken possession of by any lord or lady of any manor, or person entitled to wreck of the sea, or to goods found flotsam, jetsam, or ligam, or his or her agent or servant, or by any vice-admiral, or his deputy or agent, or by any officer or other person whatsoever acting by or under the authority of this act, or of stat. 1 & 2 G. 4. c. 76. (*post*, . 985.), shall be of so perishable a nature, or so much injured or damaged, that the same cannot be kept, then such goods shall, at the request of any of the persons interested therein, or in the saving and preserving thereof, with the consent and approbation of some justice of the peace, not interested or concerned in the same, and in the presence of such justice, or of some person specially appointed by such justice, be sold by public auction or private contract, as such justice may direct by some writing under his hand, which writing shall contain an accurate account of the goods, and of the marks thereon, or other particulars, and of the times and places of the finding and sale thereof; and the money raised by such sale, after defraying the reasonable expenses, to be settled by such justice, shall be deposited in the hands of the lord or lady of the manor, or other person, or deputy vice-admiral, to abide the claims of all persons, in like manner as the goods themselves would be subject if remaining unsold: Provided that all persons required to transmit reports to the deputy vice-admiral of the finding of any goods, shall, in case of any such sale, likewise transmit to such deputy vice-admiral an account of such sale, and of the proceeds thereof; and the said deputy vice-admiral shall forward such reports to the secretary of the Trinity House, within the like periods and under the like penalties for neglect, as in cases of any goods found and required to be reported under the

1 & 2 G. 4. c. 75.

Lords of manors not to lay claim to wrecks till report of the same be made to the deputy vice-admiral of the coast, &c.

Deputy vice-admiral to transmit a copy of report to the secretary of the Trinity House. Penalty, 50*l.*

Perishable goods may be sold with consent of a justice.

Money to be deposited in the hands of the lord of the manor, &c.

An account of sale to be transmitted to the deputy vice-admiral.

1 & 2 G. 4. c. 75. provisions of the said recited act and this act. Stat. 53 G. 3. c. 87.
 § 3. S. P.

Goods saved from vessels wrecked to be forwarded to the ports of their original destination.

§ 28. It shall be lawful for the commissioners of customs and excise, and they are hereby required to permit all goods, wares, and merchandise saved from any vessels on their homeward voyage, to be forwarded to the port of their original destination; and also to permit goods, wares, and merchandise saved from any vessels stranded or wrecked on their outward voyage, to be returned to the port at which the same were shipped; but such commissioners are to take security for the due protection of the revenue in respect of such goods, &c.

Carriages may pass over the lands near the coast where vessels are wrecked, for the preservation of the wreck, &c.

§ 29. It shall be lawful for the deputy vice-admiral of the port of the coast where any ship or vessel shall be stranded or wrecked, or where any wreck of the sea or goods shall be cast on shore, and for his agent, and also for the owner or master of such ship or vessel, and for the owners of such goods, and for any officer of customs or excise, and other officer, and for all persons employed or acting in aid of any such deputy vice-admiral, officer, master, or owner, in the saving or recovering any such ship or vessel, or the cargo, stores, tackle, or other articles, or the preserving the lives of the crew, &c. or of any wreck, to pass and repass with their horses, carts, carriages, or servants, over any lands near to the part of the sea coast where such vessel shall be so wrecked or stranded, or on which such wreck shall be cast, without interruption or obstruction by the owner or occupier thereof, for the purpose of rendering assistance in saving, recovering, and preserving any such ship or vessel, or goods or stores, or any cables, anchors, spars, masts, cordage, or other tackle or articles belonging to any ship or vessel, or for saving or otherwise assisting in preserving the lives of the crew, or of any persons on board of any such ship or vessel, or for the taking possession of and securing for the benefit of the owners thereof of any wreck or goods, or other things cast on shore, or found on shore, or found near thereto, provided there shall be no road by which the parties may pass and repass with as much convenience and expedition as over such lands; and also to place any planks, timber, or any part of the wreck, or any goods or stores removed or saved from any such ship or vessel, or any other wreck or goods as aforesaid, upon any such land for a reasonable time, until they can be removed to some warehouse or other place of deposit, making compensation to the occupier of such lands, which compensation shall be a charge upon the wreck or goods in respect whereof the damage may be done, in like manner as salvage; and in case the parties cannot agree as to the amount thereof, then the same shall be settled by two justices of the peace or (a) of a third person to be named by them, in such manner as within such times as the amount of salvage is directed to be settled by the said recited act of 49 G. 3. c. 122. — Stat. 53 G. 3. c. 87.
 § 4. S. P.

Compensation to the land occupiers.

If parties do not agree, two justices to settle it.

(a) *Sic.*

Penalty on refusing persons so employed from passing over lands, &c. 100*l.*

§ 30. If any owner or occupier of any land or premises, over which any person is authorised by this act to pass and repass, or any of the purposes in this act before mentioned, shall intentionally impede, or hinder any such person from passing over his land or premises, with horses, carts, carriages, and servants, for the purposes before mentioned, or either of them, by locking his gates or refusing upon request to open the same, or otherwise, or shall do

struct or hinder the placing of any wreck, goods, stores, or other articles upon his land, or shall prevent their remaining there for a reasonable time, until the same can be removed, such occupier shall forfeit and pay to any person who will sue for the same the sum of 100*l.*, to be recovered by action of debt. Stat. 53 G. 3. c. 87. § 5. S. P.

§ 31. And whereas questions have arisen as to the jurisdictions of the courts of record at *Westminster*, and of the high court of admiralty, in cases of salvage of ships and goods performed between high and low water mark; it is enacted, that any question in relation to salvage of any ship or vessel, or of any goods, which shall be performed between high and low water mark, shall be and be deemed to be within the jurisdiction or cognizance of the high court of admiralty, or of H. M.'s courts of record at *Westminster*. Stat. 53 G. 3. c. 87. § 6. S. P.

§ 32. In every case in which any damage shall be done by any foreign ship or vessel to any *British* ship or vessel, barge, boat, or other craft, or any buoy or beacon in any harbour, port, river, or creek, and it shall appear on a summary application, made to any judge of any of H. M.'s courts of record at *Westminster*, or to the judge of the high court of admiralty, that such damage or loss has probably been sustained or arisen by the misconduct or negligence of the master or mariners, then and in such case it shall be lawful for such judge to cause such foreign ship or vessel, being in any harbour, port, river, or creek, to be arrested and detained until the master, or owner, or consignee, or some agent shall undertake to appear and be defendant in any action which may be brought for such loss or damage, and give such sufficient security, by bail or otherwise, for all costs and damages, if recovered, as shall be ordered by such judge, if it shall upon the trial of such action or suit appear that such loss or damage shall have arisen from such negligence or misconduct; and in such action or suit the person giving security shall be made defendant, and shall be stated to be the owner of the foreign ship or vessel doing such damage; and it shall not be necessary in any such action or suit to give any other evidence of the liability of such person to such action or suit than the production of the order of the judge. Stat. 53 G. 3. c. 87. § 7. S. P.

§ 33. All penalties and forfeitures above 20*l.*, or which by this act, or by stat. 1 & 2 G. 4. c. 76. (*post*), or either of them, are made to be recoverable by action or suit, may be sued for and recovered in any of H. M.'s courts of record at *Westminster*. Stat. 53 G. 3. c. 87. § 8. S. P.

By § 37., reciting, whereas it is expedient, that the like means conclusively adjusting and recovering the *quantum* of the monies or gratuities to be paid to the said several persons acting or being employed in the salvage of any ship or vessel, or the materials or stores belonging thereto, or goods or persons on board thereof, should subsist, and be by law applicable in cases where the salvors all have acted under and by the employment and authority of any magistrate, or of the commander or other superior officers, mariners, or owners of any ship or vessel in distress, as are now by law provided for adjusting the *quantum* of such monies or gratuities, which shall have become due in cases where application shall have been first made to the officers of the customs, or other

1 & 2 G. 4. c. 75.

Questions of salvage within the jurisdiction of the high court of admiralty or the courts of record at *Westminster*.

In case of damage done by a foreign vessel in harbour, &c. any of the judges may cause the vessel to be arrested until the owners, &c. shall undertake to appear defendant in any action.

Penalties, how recoverable.

For the better adjustment and payment of salvage pursuant to 12 Ann. c. 18.

1 & 2 G. 4. c. 75. the officer or officers in that behalf named and appointed in and by stat. 12 Ann. c. 18., and where such assistance shall thereupon have been rendered, in pursuance of the provision of that statute; it is enacted, that all and every the means which in virtue of the said last-mentioned act subsist, and may now be by law applied for the conclusively adjusting, and for the recovering of the *quantum* of the monies or gratuities to be paid to the several persons acting or being employed in the salvage of any ship or vessel, or the materials or stores belonging thereto, or goods, in cases where application shall have been first made, pursuant to the said act, to officers of the customs, or other the officer or officers in that behalf mentioned, and assistance shall have been thereupon rendered in pursuance of the said act, shall be by law applicable in like manner, in cases where the salvors shall have acted under any magistrate, or (a) of the commander or other superior officers, mariners, or owners of any ship or vessel in distress, although no such application shall have been made to, nor any authority or assistance derived from, any officer of the customs, or other the officers in the said statute mentioned; and thereupon, upon payment or tender and refusal of the *quantum* of the monies or gratuities to be paid to the persons who shall have acted in such salvage, or in case such payment or tender cannot be made, on security being given for the true payment thereof, to the satisfaction of the justices who shall have adjusted such *quantum* or gratuities, it shall not be lawful for any officer of the customs, or other person having the possession of such ship, vessel, materials, stores, or goods, any longer to retain the possession of the same, by reason or pretence of any claim or right to a compensation or gratuity of such salvage, or for having acted therein. Stat. 49 G. 3. c. 122. § 32. S. P.

(a) *Sic.*

Public act.

§ 39. This act is declared to be a public act.

Schedule to which stat. 1 & 2 G. 4. c. 75. refers.

ON the ——— day of ———, in the year of our Lord ———, before me ———, at ———, in the county of ———, [signature] name,] A. B. [here insert the names of the salvors against, and name the stores and other articles, (*id est*), anchors, and cables, &c. as the case may be] certain goods and merchandises lately found and taken possession of, and belonging to the said ship, whereof ——— was master, and also against the said ——— master, and the owners [or, if the owners alone appear by themselves or agents, then leave out the master's name] of the said goods and merchandise, as a cause of salvage [master's name] on which day appeared personally ——— of ———, and ——— of ———, who produced themselves as sureties for the said ———, the master, and the owners of the said goods and merchandise, and submitting themselves to the jurisdiction of the high court of admiralty of England, bound themselves, their heirs, executors, and administrators, for the master and owners of the said goods and merchandise, in the sum of ——— of lawful money of Great Britain, unto the said ———, to answer such salvage and expenses, or the value of the goods, as the case may be] as shall be herein-after decreed by the said court, according to the tenor of the act in that case made and provided.

and unless they shall so do, they hereby consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, wherever the same shall be found, to the value of the sum above mentioned. 1 & 2 G. 4. c. 75

This bail was duly taken, acknowledged and received, at the time and place above written, before me, the undersigned commissioner; and I do believe and consider the persons above mentioned sufficient security for the said sum of ———.

[See a similar form, stat. 49 G. 3. c. 122. schedule.]

By 26 G. 2. c. 19. § 5., if any person shall discover to any justice, magistrate, custom-house or excise officer, where any such goods are wrongfully bought, sold, or concealed, he shall be entitled to a reasonable reward, to be adjusted in case of disagreement as to quantum as the salvage is by 12 Ann.

By 12 Ann. st. 2. c. 18. § 7., if the officer of customs or his deputy by fraud or wilful neglect abuse his trust, and be convicted thereof in due form of law, he or his deputy shall respectively forfeit treble damages, to be recovered in any action in any court of record, and shall be disabled from the same or any other employment relating to the customs.

By stat. 26 G. 2. c. 19. § 15., the officer of the customs who shall act in preserving any such vessel or her cargo shall, as soon as conveniently may be, cause or procure all persons belonging to the vessel, and others who can give an account thereof, to be examined on oath before a justice, as to the name or description of the vessel, the names of the master, commander, chief officer and owners, and of the owners of the cargo, and of the places from or to which the vessel was bound, and the occasion of the distress; which examination the justice shall take in writing, and shall deliver a copy thereof, together with a copy of the account of the goods, to the said officer of the customs, who shall forthwith transmit the same to the secretary of the admiralty, who shall publish the same in the next *London Gazette*, or so much thereof as shall be necessary for the information of the persons interested or concerned therein.

By stat. 12 Ann. st. 2. c. 18. § 9., but this shall not prejudice the right of any lords of manors, or others, lawfully claiming wreck, or goods *flotsam, jetsam, or ligan*.

By stat. 3 G. 1. c. 13. § 6., and several subsequent acts, the lord warden of the Cinque Ports was empowered to appoint commissioners for adjusting differences respecting salvage.

By stat. 1 & 2 G. 4. c. 76., intituled *An act to continue and amend certain acts for preventing the various frauds and depredations committed on merchants, shipowners, and underwriters, by boatmen and others, within the jurisdiction of the Cinque Ports; and also for remedying certain defects relative to the adjustment of salvage, under a statute made in the 12th year of the reign of her late majesty queen Anne*.

§ 1. After reciting stat. 48 G. 3. c. 130., intituled *An act for*

26 G. 2. c. 19.
Reward to persons discovering goods wrongfully bought, &c.

12 Ann. st. 2. c. 18.
Officer of customs abusing his trust.

26 G. 2. c. 19.
Examination an oath of persons belonging to the vessel, &c.

Copy transmitted to secretary of admiralty.

12 Ann. st. 2. c. 18.

3 G. 1. c. 13.
Salvage, — lord warden of Cinque Ports.
1 & 2 G. 4. c. 76.

1 & 2 G. 4. c. 76. *preventing frauds and depredations committed on merchants, ship-owners, and underwriters, by boatmen and others, within the jurisdiction of the Cinque Ports; and also for remedying certain defects relative to the adjustment of salvage, under a statute made in the 12th year of her late majesty queen Anne; which act was to continue in force for seven years, &c.; and that by stat. 53 G. 3. c. 87., the said act, except so far as the same was altered, was further continued in force for seven years from the passing of the said act, &c., and whereas it is expedient that the said recited acts should be further continued, except so far as the same are altered by this act; it is enacted, that it shall be lawful for the lord warden of the Cinque Ports to appoint, by any instrument under his hand and seal, three or more substantial persons in each of the Cinque Ports, two ancient towns, and their members, to determine any difference relative to salvage (which may arise) between the master of any vessel and the person or persons bringing cables and anchors ashore; and in case any ship or vessel shall be either forced or cut from her cables and anchors, by extremity of weather, or by any other accident whatever, and leave the same in any roadstead, or other place within the jurisdiction of the Cinque Ports, two ancient towns, and their members, and the salvage cannot be adjusted between the persons concerned, then the same shall be determined by any three or more of the said persons so to be appointed, within the space of 24 hours after such difference shall be referred to them for their determination thereof: Provided that such commissioners shall, immediately after their nomination, proceed to elect some proper person, who shall be a notary or master extraordinary in chancery, as their secretary or register, except to the port of *Dover*, where the register (a) for the time being of the court of admiralty of the Cinque Ports shall be the register (a); and which secretary, or register (a), shall enter in a book all the proceedings of such commissioners, and also a copy of the awards which they shall make; but such election shall be subject to the approbation of the lord warden. Stat. 48 G. 3. c. 130. § 1. S. P.*

Lord warden to appoint commissioners to determine differences relative to salvage.

Commissioners to appoint a secretary or register, subject to the approbation of the lord warden. Proceedings to be entered.

(a) *Sic.*

Power to commissioners to settle all differences which may arise.

§ 2. It shall be lawful for the said commissioners to decide on all claims and demands made by pilots, hovellers, boatmen, and other persons, for services of any sort or description rendered to any ship or vessel, as well for carrying off from the shore to such ship or vessel any anchors, cables, or other stores from any part or port of the coast of *Kent*, *Sussex*, *Essex*, or the isle of *Thanet*, within the jurisdiction aforesaid, as for the conducting and conveying such ships and vessels from the *Downs*, and other bays and roadsteads on the coast of *Kent*, *Sussex*, and *Essex*, and the island of *Thanet*, or from the sea or any other place, to *Ramsgate*, *Dover*, or any other harbour, &c. on the said coasts, within the jurisdiction aforesaid, or for the saving and preserving, within the jurisdiction aforesaid, any goods or merchandise wrecked, stranded, or cast away from any ship or vessel, the master or owners thereof, or their agents, being present at the place where the commissioners shall be sitting; and the said commissioners shall have full power to hear and determine on all cases whatever of services rendered by pilots, boatmen, and others, to shipping within the jurisdiction aforesaid, whether such ships or vessels

shall be in distress or not; and it shall be lawful for the said commissioners to examine the parties or their witnesses upon their oath, which oaths may be administered by the said secretary or register. (a) Stat. 48 G. 3. c. 130. § 2. S. P.

§ 3. It shall be lawful for the commissioners and their secretary or register to demand and receive of and from the owners of such ships or vessels, or the proprietors of any such goods, against whom any pilot, boatman, or other person shall make any claim or demand for services, and such owners and proprietors are hereby required to pay to them such fee or reward for deciding on every such claim as shall be adjudged by the lord warden: Provided that no person to be appointed a commissioner by virtue of this act shall have power to act in any other port than that in which he is resident, or from which his usual place of residence is not distant more than one mile; and before such commissioners shall in any case proceed to act, they shall severally take the following oath before a magistrate or a commissioner of the court of K. B. or C. P., or a master extraordinary in chancery; [stat. 48 G. 3. c. 130. § 3, 4. S. P.]; (viz.)

I A. B. do swear, that I have not, neither will I in any way, directly or indirectly, take or receive any fee, emolument, or reward, from any of the parties whose interests are referred to my decision (save and except such fee or reward as shall be allowed by the lord warden to be paid to me by the shipowners or proprietors of the cargo, or their agents); and that I will not accept or receive any fee whatever from the persons claiming reward or salvage; but that I will decide according to the best of my judgment, on the evidence to be brought before me, without favour or affection to either party.
So help me God.

§ 4. In case the party claiming salvage or compensation for services rendered, or the parties who are to pay the same, or their agents, shall be dissatisfied with such award, it shall be lawful for either of them, within eight days after such award is made, but not afterwards, to declare to the commissioners their desire of obtaining the judgment of some competent court of admiralty respecting the said salvage or compensation, and thereupon such parties shall be required by the commissioners to declare whether they will proceed in the court of admiralty of the Cinque Ports, or the high court of admiralty of England, and they shall so proceed within 20 days from the date of such award, by taking out a motion against the adverse party; but in such case the said commissioners are hereby empowered to permit the said ship and her cargo, notwithstanding such declaration and proceeding, to depart on her voyage, or to deliver to the owners and proprietors, or their agents, any goods or merchandises respecting which any claim for salvage shall be made upon the owners or proprietors or their agents, giving sufficient bail in double the amount; and which bail the said commissioners are authorised to take and certify according to the form contained in the schedule hereunto annexed, and to transmit the same without delay to the court of admiralty, in which the intention of proceeding shall be so declared, together with a true certificate in writing of the gross value of the whole ship and cargo, or other goods and merchandises respecting which salvage

1 & 2 G. 4. c. 76.

(a) *Sic.*

Commissioners to be paid by the owners, &c. for their trouble such fees as shall be allowed by the lord warden.

No commissioner shall act out of the place where he is resident.

Commissioners to take the following oath.

Form of oath.

Parties dissatisfied may appeal to the high court of admiralty, or the admiralty of the Cinque Ports; but the ship to be liberated, on giving bail in double the amount of the award.

Bail to be taken and certified according to schedule annexed.

1 & 2 G. 4. c. 76. shall be claimed, and also an official copy of such proceedings and awards, certified by the secretary or register; and the same shall be admitted by such court of admiralty as evidence. Stat. 48 G. 3. c. 130. § 5. S. P.

The appeal to be conclusive. § 5. On an appeal so made to the court of admiralty of the Cinque Ports, or to the high court of admiralty, the same shall be final, and no ulterior appeal shall lie to the king in chancery.

Persons cutting away or defacing buoy-ropes, &c. deemed guilty of felony. § 6. If any person or persons shall wilfully cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall do or commit any act with intent and design to cut away, cast adrift, remove, alter, deface, sink, or destroy, or in any other way injure or conceal any buoy, buoy-rope, or mark belonging to any ship or vessel, or which may be attached to any anchor or cable belonging to any ship or vessel whatever, within the jurisdiction aforesaid, with intent thereby to defraud or injure any person or persons whatsoever, or body corporate, such person or persons so offending shall, on being convicted of such offence, be deemed and adjudged guilty of felony, and shall be liable to be transported for any period not exceeding 14 years. Stat. 48 G. 3. c. 130. § 6. S. P.

Liable to transportation.

§ 7. All anchors, cables, buoys, ropes, or other ships' stores or materials, or any goods or merchandises of any sort whatever, which may have been parted with, cut from, or left by any ship or vessel in the *Downs*, or elsewhere, within the jurisdiction aforesaid, whether the same shall be in distress or otherwise, and which shall have been weighed, swept for, or taken possession of by any pilots, boatmen, hovellers, or other person or persons, shall be by them delivered either at *Ramsgate*, *Deal* or *Dover*, *Harwich*, *Brightlersea*, or *Wivenhoe*, six public places of deposit declared by this act for the reception of all such articles, or such other places as shall be declared by the lord warden, in the same state in which they are found, to the serjeants of the admiralty of the Cinque Ports aforesaid, their deputy, or such other person as he shall authorise to receive the same; but if any such articles shall not be so delivered immediately, or duly reported to such serjeants, or their deputies, on the finding thereof, and shall afterwards be discovered in the possession or power of such pilots, boatmen, hovellers, or other person, he or they shall, on conviction, be adjudged guilty of receiving goods knowing them to have been stolen, and shall suffer the like punishment as if the same had been stolen on shore. Stat. 48 G. 3. c. 130. § 7. S. P.

All wrecked merchandise and ship stores to be also deposited in like manner.

§ 8. All merchandise, materials of any sort, or marine stores of every description, whether belonging to H. M. or to any British subjects, or foreigners, which may be preserved from any ship or vessel stranded, deserted by her crew, or wrecked, either on shore, or on the *Goodwin* or any other sand or shoal, or any part of the main land, or any port or place within the jurisdiction aforesaid, shall be landed and delivered at one of the six places of deposit, belonging to the lord warden's deputies at *Ramsgate*, or *Deal* or *Dover*, *Harwich*, *Brightlersea*, or *Wivenhoe*, or such other place as shall be appointed by the lord warden; and if any person who shall have preserved or taken possession of any such merchandise or marine stores, shall sell, dispose of, or otherwise make away with the same, or shall in any manner conceal, deface,

If sold, or marks defaced by the

take out, or obliterate the marks or numbers thereon, or alter the same in any manner, with intent thereby to prevent the discovery and identity of such articles by the owner thereof, such person shall be guilty of felony. Stat. 48 G. 3. c. 130. § 8. contains the same provision, except as to *Harwich, Brightlersea, and Wivenhoe*.

§ 9. Nothing herein contained shall extend to the preventing the serjeant's deputies, or any other officer of the lord warden, from seizing all such anchors, cables, buoys, buoy-ropes, or other ships' stores or materials as aforesaid, and likewise all such merchandise and marine stores as aforesaid, which they shall find concealed, or attempted to be concealed, or which they shall find in the possession of any person who shall be conveying, or in the act of preparing to convey the same out of the said jurisdiction, or from any place where the same shall have been landed, to any other place, other than to one of the said public places of deposit; but it shall be lawful, in all such cases, for the officers aforesaid to seize the same as well on shore as at sea, and to take and carry the same to one of the said public places of deposit. Stat. 48 G. 3. c. 130. § 9. S. P.

§ 10. If any person within the jurisdiction aforesaid shall knowingly and with intent to defraud and injure the true owner thereof, purchase or receive any anchors, cables, ropes, or other ships' stores or materials of any description whatever, or any merchandise or lading which may have been taken up, weighed, swept for, or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck within the jurisdiction aforesaid, such person shall on conviction be deemed guilty of receiving stolen goods knowing the same to be stolen, as if the same had been stolen on shore, and suffer the like punishment as for a misdemeanor at the common law, and be also liable to be transported for seven years, in the discretion of the court before which he shall be tried. Stat. 48 G. 3. c. 130. § 10. S. P.

§ 11. And whereas it frequently happens, that anchors, cables, and other marine stores or merchandise, which have been weighed, swept for, or taken possession of within the jurisdiction aforesaid, are, for fraudulent purposes, carried away to *Rochester, London, Portsmouth*, and other places not within the jurisdiction aforesaid, and the officers of the lord warden cannot, by reason of such removal, recover the same; it is enacted, that it shall be lawful for the serjeants of the admiralty of the Cinque Ports, deputies, or any other officer of the lord warden to seize such anchor, cable, or other marine stores or merchandise, out of the jurisdiction aforesaid, and to carry the same to some one of the aforesaid public places of deposit. Stat. 48 G. 3. c. 130. § 11. S. P.

Or (by stat. 1 & 2 G. 4. c. 76. § 11., *only*) to place the same in a place of security, till proceedings shall be instituted, either in the court of admiralty of the Cinque Ports, or in the high court of admiralty.

By stat. 48 G. 3. c. 130. § 12., every pilot, boatman, or other person, within the above jurisdiction, who shall counsel, instruct, direct, advise, or procure any master or other person on board any vessel within the above jurisdiction, whether she be at the time in distress or otherwise, to cut such vessel's cable or buoy-rope, or to do any other act whatever which shall or may tend to

1 & 2 G. 4. c. 76.

salvors, they shall be adjudged guilty of felony.

Officers of the lord warden may seize anchors, stores, &c. concealed within their jurisdiction, &c.

Receivers to be subject to the same punishment as though the goods had been stolen on shore.

Liable to transportation.

Lord warden's officers authorised to seize anchors, &c. taken up within the limits of the Cinque Ports, though removed out of such limits.

48 G. 3. c. 130. Pilot, &c. counselling act tending to wreck of ship.

48 G. 3. c. 130. the destruction or wreck of such ship, with intent thereby to prejudice any owner or person, body politic or corporate, that hath underwritten or shall underwrite any policy or policies of insurance on such vessel, or her freight, or on any goods laden on board her, shall on conviction be deemed guilty of felony, and shall be liable to not exceeding 14 years' transportation.

Transportation. By stat. 1 & 2 G. 4. c. 76. § 12., all persons who shall trade or deal in buying and selling anchors, cables, sails, old junk or paper stuff, old iron, or marine stores of any kind or description, within the jurisdiction aforesaid, shall have their names, with the words "*Dealer in Marine Stores*," painted distinctly in letters of not less than six inches in length, upon the front of all their storehouses, warehouses, and other depôts for such goods; and in default they shall, on conviction before any magistrate within the limits aforesaid, forfeit any sum not exceeding 20*l.* nor less than 10*l.*, one half to the informer, and the other moiety to the poor of the parish where such offence shall be committed; and it shall not be lawful for such dealers or traders to cut up any cables or part of the same, or to uncant, untwine, or unlay the same, or cordage of any description, into junk or paper stuff, nor any wounding, or worming, or any cable matting on the same, or on rigging, on any pretence whatsoever, without first obtaining a permit from the lord warden's deputies, or one of them, which permit shall not be granted unless an affidavit shall have been first made before some one of the magistrates, and shall have been delivered to and left with the person granting such permit, in which affidavit there shall be sworn that the cable and cordage so intended to be cut up had been purchased fairly and without fraud, and without any knowledge or suspicion on his part that the same had been dishonestly come by; and in which affidavit shall also be specified the particular quality and description of such cable or cordage, and the names of the sellers thereof, which affidavit shall be set forth at length in the permit. Stat. 48 G. 3. c. 130. § 13. S. P.

Penalty.

No cables, &c. to be cut up without a permit from one of the lord warden's deputies.

Dealers to keep an account of the marine stores bought by them.

Notice to be advertised before cutting up cable or cordage.

§ 13. And for the more effectual prevention of fraud in this respect, it is enacted, that all dealers in such marine stores, within the limits of the Cinque Ports, &c. shall keep books, in which entries shall be regularly made of all such marine stores as shall be by them from time to time bought, containing a true account and description of the times when the same were so bought, and of the names and places of abode of the sellers thereof; and before the party who shall have obtained such permit for the cutting up of any such cable or cordage (as herein-before required to be obtained) shall proceed to cut up the same, there shall be published by the space of one week at least before the time of cutting up of the same, one or more advertisements in some public newspaper printed within the counties of *Kent*, *Sussex*, and *Essex*, and near to the usual place of abode of such party, notifying that such party had obtained such permit for cutting up such quantity of cable or cordage, and of such kind and quality as therein described, a true copy of which permit shall be inserted in such advertisement; whereupon it shall be lawful for every person who may have just cause to suspect, and shall have verified upon oath the fact of such his suspicion before any of the magistrates within the limits aforesaid, by warrant of such magistrate, to require of

ake out, or obliterate the marks or numbers thereon, or alter the same in any manner, with intent thereby to prevent the discovery and identity of such articles by the owner thereof, such person shall be guilty of felony. Stat. 48 G. 3. c. 130. § 8. contains the same provision, except as to *Harwich, Brightlersea, and Wivenhoe*.

§ 9. Nothing herein contained shall extend to the preventing the serjeant's deputies, or any other officer of the lord warden, from seizing all such anchors, cables, buoys, buoy-ropes, or other ships' stores or materials as aforesaid, and likewise all such merchandise and marine stores as aforesaid, which they shall find concealed, or attempted to be concealed, or which they shall find in the possession of any person who shall be conveying, or in the act of preparing to convey the same out of the said jurisdiction, or from any place where the same shall have been landed, to any other place, other than to one of the said public places of deposit; but it shall be lawful, in all such cases, for the officers aforesaid to seize the same as well on shore as at sea, and to take and carry the same to one of the said public places of deposit. Stat. 48 G. 3. c. 130. § 9. S. P.

§ 10. If any person within the jurisdiction aforesaid shall knowingly and with intent to defraud and injure the true owner thereof, purchase or receive any anchors, cables, ropes, or other ships' stores or materials of any description whatever, or any merchandise or lading which may have been taken up, weighed, swept for, or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck within the jurisdiction aforesaid, such person shall on conviction be deemed guilty of receiving stolen goods knowing the same to be stolen, as if the same had been stolen on shore, and suffer the like punishment as for a misdemeanor at the common law, and be also liable to be transported for seven years, in the discretion of the court before which he shall be tried. Stat. 48 G. 3. c. 130. § 10. S. P.

§ 11. And whereas it frequently happens, that anchors, cables, and other marine stores or merchandise, which have been weighed, swept for, or taken possession of within the jurisdiction aforesaid, are, for fraudulent purposes, carried away to *Rochester, London, Portsmouth*, and other places not within the jurisdiction aforesaid, and the officers of the lord warden cannot, by reason of such removal, recover the same; it is enacted, that it shall be lawful for the serjeants of the admiralty of the Cinque Ports, deputies, or any other officer of the lord warden to seize such anchor, cable, or other marine stores or merchandise, out of the jurisdiction aforesaid, and to carry the same to some one of the aforesaid public places of deposit. Stat. 48 G. 3. c. 130. § 11. S. P.

Or (by stat. 1 & 2 G. 4. c. 76. § 11., *only*) to place the same in a place of security, till proceedings shall be instituted, either in the court of admiralty of the Cinque Ports, or in the high court of admiralty.

By stat. 48 G. 3. c. 130. § 12., every pilot, boatman, or other person, within the above jurisdiction, who shall counsel, instruct, direct, advise, or procure any master or other person on board any vessel within the above jurisdiction, whether she be at the time in distress or otherwise, to cut such vessel's cable or buoy-rope, or to do any other act whatever which shall or may tend to

1 & 2 G. 4. c. 76.

salvors, they shall be adjudged guilty of felony.

Officers of the lord warden may seize anchors, stores, &c. concealed within their jurisdiction, &c.

Receivers to be subject to the same punishment as though the goods had been stolen on shore.

Liable to transportation.

Lord warden's officers authorised to seize anchors, &c. taken up within the limits of the Cinque Ports, though removed out of such limits.

48 G. 3. c. 130. Pilot, &c. counselling act tending to wreck of ship.

1 & 2 G. 4. c. 76.

Reservation of
the rights of
the admiralty
court, and of
the admiralty
of the Cinque
Ports.

Reservation of
the rights of the
Trinity House.

Boundaries of
the jurisdiction
of the lord
warden of the
Cinque Ports.

sion, by the oaths of 12 lawful inhabitants in the shire limited in the said commission, whether the said offences shall have been committed within the jurisdictions of the lord admiral of *England*, or of the lord warden of the Cinque Ports; and every trial, conviction, judgment, and proceeding whatsoever under such commission, shall be as good and effectual in law, and shall be followed by the same consequences to the offenders, as if the same were had by virtue of any separate commission to be issued under the provisions of the aforesaid act of king *Henry 8.*: Provided that this act shall not extend to the taking away, abridging, prejudicing, or impeaching, in any manner whatever, the jurisdiction of the high court of admiralty of *England*, or the jurisdiction of the admiralty court of the Cinque Ports, &c. Stat. 48 G. 3. c. 130. § 17, 18. S. P.

§ 17. Also this act shall not extend to the taking away, abridging, hindering, prejudicing, or impeaching of any grant, liberties, franchises, and privileges heretofore granted to and vested in the corporation of the Trinity House of *Deptford Strond*. Stat. 48 G. 3. c. 130. § 19.

§ 18. And whereas doubts have arisen as to the exact boundaries of the jurisdiction of the lord high admiral and the lord warden of the Cinque Ports, it is declared and enacted, that the boundaries of the jurisdiction of the lord warden of the Cinque Ports, in regard to any matter contained in this act, shall be deemed to be as follows; (that is to say,) from a point to the westward of *Senford*, in the county of *Sussex*, called *Red Cliff*, including the same; thence passing in a line one mile without the sand or shoal called *The Horse of Willingdon*, and continuing the same distance without the ridge and new shoals; and thence in a line within five miles of *Cape Grisnez* [*Crisnes*, 48 G. 3. c. 130. § 20.] on the coast of *France*; thence round the shoal called *The Overfalls*, two miles distant from the same; thence in a line without, and the same distance along the eastern side of the *Gallopier Sand*, until the north end thereof bears west-north-west true bearing from the west-north-west bearing of the *Gallopier*; it runs in a direct line across the shoal called *The Thwart Middle*, till it reaches the shore underneath the *Maze Tower*; from thence following in a line of the shore up to *Saint Orsyth*, in the county of *Essex*, and following the course of the shore up [to in stat. 1 & 2 G. 4. c. 76. § 18. only] the river *Coln* to the landing-place nearest *Brightlingsea*; from thence in a direct line to *Slue Bacon*; from thence to the point of *Shellness*, on the isle of *Shippay*; and from thence across the waters to *Feversham*; and from thence following the line of coast round the *North* and *South Forelands*, and *Beachy Head*, till it reaches the said *Red Cliff*, including all the waters, creeks, and havens comprehended between them; Provided, that it is hereby declared, that nothing in this act contained shall extend to enlarge or abridge the local limits of the ancient jurisdiction, rights and privileges of the lord high admiral of *England*, or the lord warden or admiral of the Cinque Ports, or their representatives, but that the same shall remain according to ancient usage, and the description herein-before contained shall only be deemed applicable to the purposes of this act. Stat. 48 G. 3. c. 130. § 20. S. P.

§ 19. All and every the means which, in virtue of the stat.

For the better
adjustment and

12 Ann. c. 18., subsist, and may now be by law applied for the conclusively adjusting, and for the recovering of the quantum of the monies or gratuities to be paid to persons acting or being employed in the salvage of any ship, vessel, or goods, in cases where application shall have been first made pursuant to that statute, to officers of the customs, or other the officers therein mentioned, and assistance shall have been thereupon rendered in pursuance of the provisions of that statute, shall be applicable and available, in like manner, in cases where the salvors shall have acted under and by the mere employment and authority of the commander or other superior officers, mariners, or owners of any ship or vessel in distress, although no such application shall have been made to, nor any assistance derived from, any officers of the customs, or other the officers in the said statute mentioned; and upon payment or tender and refusal of the quantum of monies or gratuities to be paid in such salvage, or in case such payment or tender cannot be made, or security being given for the due payment thereof, to the satisfaction of the commissioners who shall have adjusted such quantum of gratuities, it shall not be lawful for any officer of the customs, or other person having the possession of such ship, vessel or goods, any longer to retain the possession or custody of the same, or any part thereof, by reason of any claim to a compensation for such salvage as aforesaid, or for having acted or been employed therein. Stat. 48 G. 3. c. 130. § 21. S. P.

By stat. 48 G. 3. c. 130. § 22., in all cases when the salvors have acted without application made to, and without authority or assistance derived from, any officer of customs or other officer in 12 Ann. st. 2. c. 18. § 1. mentioned, and the superior officers, mariners, or owners of such vessel so saved, or the merchant or other person whose goods are so saved, or their agents, shall disagree with the salvors touching the quantum of the monies or gratuity deserved by any persons so employed as above, the commander of the vessel so saved, or the owner or merchant interested in the goods, or their agents, and such salvors, may nominate three of the neighbouring justices of the peace to adjust the quantum of the monies or gratuities to be paid to such salvors; and if the parties shall not agree in such nomination, then on application of any of the parties to any one neighbouring justice, he shall nominate two other like justices, who shall thereupon adjust the quantum of the monies and gratuities to be paid to all and each of such salvors, who shall disagree with such superior officer, &c. touching the quantum of monies or gratuity to be paid to him or them respectively, for his having been employed and acted in such salvage.

By 1 & 2 G. 4. c. 76. § 21., nothing herein contained shall extend to affect or impeach the jurisdiction to be exercised within the Cinque Ports, or to affect or abridge in any degree the jurisdiction or authority of the high court of admiralty.

§ 22. This act is declared to be a public act, &c.

1 & 2 G. 4. c. 76.

payment of
salvage under
12 Ann. c. 18.

48 G. 3. c. 130.
Where salvors
having acted
without au-
thority from
officer of cus-
toms, &c.

1 & 2 G. 4. c. 76.
Jurisdiction of
Cinque Ports
not to be
affected.
Public act.

1 & 2 G. 4. c. 76. The Schedule to which stat. 1 & 2 G. 4. c. 76. (§ 4.) refers.

On the _____ day of _____, in the year of our Lord _____
before, &c. _____ at _____ in the county of _____.

[Ships' Names.]

A. B. [here insert the name of the salvors] against the said ship _____, whereof _____ was master, her tackle, apparel, and furniture, and the goods, wares, and merchandises on board the same; and also against the said _____ master, and the owners of the said ship and cargo [or, as the case may be, against certain goods and merchandises lately laden on board the said ship, whereof _____ was master; and also against the said _____ master and the owners (or, if the owners alone appear by themselves or agents, then leave out the master's name,) of the said goods and merchandises,] in a cause of salvage.

[Masters' Names.]

On which day appeared personally W. X. of _____ and X. Z. of _____, who produced themselves as sureties for the said _____ the master and for the owners of the said ship and cargo, [or, as the case may be,] for the said _____ master and owners of the said goods and merchandises, and submitting themselves to the jurisdiction of the high court of admiralty of England, [or, the court of admiralty for the Cinque Ports, as the case may be,] bound themselves, their heirs, executors, and administrators, for the said master and owners of the said ship and cargo, [or, as the case may be,] for the said _____ master and owners, or, for the owners of the said goods and

merchandises, in the sum _____ pounds of lawful money of Great Britain, unto the said A. B. &c. to answer the salvage and expenses of the said ship and cargo, [or, as the case may be,] for the said goods and merchandise, as shall hereafter be decreed by the said court, according to the tenor of the act in that behalf made and provided; and unless they shall so do, they hereby consent the execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, wheresoever the same shall be found, to the value of the sum above mentioned.

This bail was duly taken, acknowledged, and received at the time and place above written, before me the undersigned commissioner; and I do hereby further certify that I do believe and consider the persons above mentioned sufficient security for the sum of _____ pounds. } W. I.
Y. L.

53 G. 3. c. 87.
Statutes continued.

By stat. 53 G. 3. c. 87., stats. 48 G. 3. c. 130. and 49 G. 3. c. 122. except so far as the same are altered by this act, shall continue in force for seven years from the passing of this act, and from thence to the end of the then next session of parliament, and so longer.

1 & 2 G. 4.
c. 75. & 76.
Stats. continued.

By virtue of 1 & 2 G. 4. c. 75. and of 1 & 2 G. 4. c. 76., the three above-mentioned acts are further continued, except so far as the same are altered by those acts.

7 & 8 G. 4.
c. 29.

By the 7 & 8 G. 4. c. 29. § 18., it is enacted, "That if any person shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or

any goods, merchandise, or articles of any kind belonging to such ship or vessel, every such offender, being convicted thereof, shall suffer death as a felon: Provided always that when articles of small value shall be stranded or cast on shore, and shall be stolen without circumstances of cruelty, outrage, or violence, it shall be lawful to prosecute and punish the offender as for simple larceny; and in either case the offender may be indicted and tried either in the county in which the offence shall have been committed, or in any county next adjoining."

§ 19. also enacts, "That if any goods, merchandise, or articles of any kind belonging to any ship or vessel in distress, or wrecked, stranded, or cast on shore as aforesaid, shall, by virtue of a search-warrant, to be granted as herein-after mentioned, be found in the possession of any person, or on the premises of any person with his knowledge, and such person, being carried before justice of the peace, shall not satisfy the justice that he came lawfully by the same, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof; and the offender, on conviction of such offence before the justice, shall forfeit and pay, over and above the value of the goods, merchandise, or articles, such sum of money, not exceeding 20*l.*, as to the justice shall seem meet."

By § 20. it is enacted, "That if any person shall offer or expose for sale any goods, merchandise, or articles whatsoever, which shall have been unlawfully taken, or reasonably suspected so to have been, from any ship or vessel in distress, or wrecked, stranded, or cast on shore as aforesaid, in every such case any person to whom the same shall be offered for sale, or any officer of the customs or excise, or peace-officer, may lawfully seize the same, and shall, with all convenient speed, carry the same, or give notice of such seizure, to some justice of the peace; and if a person who shall have offered or exposed the same for sale, being duly summoned by such justice, shall not appear and satisfy the justice that he came lawfully by such goods, merchandise, or articles, then the same shall, by order of the justice, be forthwith delivered over to or for the use of the rightful owner thereof, upon payment of a reasonable reward (to be ascertained by the justice) to the person who seized the same; and the offender, on conviction of such offence by the justice, shall forfeit and pay, over and above the value of the goods, merchandise, or articles, such sum of money, not exceeding 20*l.*, as to the justice shall seem meet."

By 7 & 8 G. 4. c. 30. § 11., if any person shall exhibit any false light or signal, with intent to bring any ship or vessel into danger, or shall unlawfully and maliciously do any thing tending to the immediate loss or destruction of any ship or vessel in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, or shall by force prevent or impede any person endeavouring to save his life, from such ship or vessel (whether he shall be on board, or shall have quitted the same), every such offender shall be guilty of felony, and being convicted thereof, shall suffer death as a felon.

7 & 8 G. 4. c. 29.

Plundering any part of the tackle or cargo of a ship-wrecked vessel. Capital felony. Proviso. Place of trial.

Persons in possession of ship-wrecked goods, not giving a satisfactory account.

Penalty.

If any person offers ship-wrecked goods for sale, the goods may be seized, &c.

And delivered to rightful owner.

Penalty on offenders.

7 & 8 G. 4. c. 30. Exhibiting false signals to a ship, &c., destroying a shipwrecked vessel or cargo, &c.

Capital felony.

1 & 2 G. 4. c. 76. The Schedule to which stat. 1 & 2 G. 4. c. 76. (§ 4.) refers.

On the _____ day of _____, in the year of our Lord _____
before, &c. _____ at _____ in the county of _____.

[Ships' Names.]

A. B. [here insert the name of the salvors] against the said ship _____, whereof _____ was master, her tackle, apparel, and furniture, and the goods, wares, and merchandises on board the same; and also against the said _____ master, and the owners of the said ship and cargo [or, as the case may be, against certain goods and merchandises lately laden on board the said ship, whereof _____ was master; and also against the said _____ master and the owners (or, if the owners alone appear by themselves or agents, then leave out the master's name,) of the said goods and merchandises,] in a cause of salvage.

[Masters' Names.]

On which day appeared personally W. X. of _____ and X. Z. of _____, who produced themselves as sureties for the said _____ the master and for the owners of the said ship and cargo, [or, as the case may be,] for the said _____ master and owners of the said goods and merchandises, and submitting themselves to the jurisdiction of the high court of admiralty of England, [or, the court of admiralty for the Cinque Ports, as the case may be,] bound themselves, their heirs, executors, and administrators, for the said master and owners of the said ship and cargo, [or, as the case may be,] for the said _____ master and owners, or, for the owners of the said goods and

merchandises, in the sum _____ pounds of lawful money of Great Britain, unto the said A. B. &c. to answer the salvage and expenses of the said ship and cargo, [or, as the case may be,] the said goods and merchandise, as shall hereafter be decreed by the said court, according to the tenor of the act in that behalf made and provided; and unless they shall so do, they hereby consent the execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, wheresoever the same shall be found, to the value of the sum above mentioned.

This bail was duly taken, acknowledged, and received at the time and place above written, before me the undersigned commissioner; and I do hereby further certify that I do believe and consider the persons above mentioned sufficient security for the sum of _____ pounds. } W. I.
Y. Z.

53 G. 3. c. 87.
Statutes continued.

By stat. 53 G. 3. c. 87., stats. 48 G. 3. c. 130. and 49 G. 3. c. 129. except so far as the same are altered by this act, shall continue in force for seven years from the passing of this act, and from thence to the end of the then next session of parliament, and no longer.

1 & 2 G. 4.
c. 75. & 76.
Stats. continued.

By virtue of 1 & 2 G. 4. c. 75. and of 1 & 2 G. 4. c. 76., the three above-mentioned acts are further continued, except so far as the same are altered by those acts.

7 & 8 G. 4.
c. 29.

By the 7 & 8 G. 4. c. 29. § 18., it is enacted, "That if any person shall plunder or steal any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or

the services of every description rendered by the said A. C. as afore-said.] Given under our hands and seals, at ———, in the said county of ———, the day and year first above written.

J. P. (L. S.)

K. P. (L. S.)

N. P. (L. S.)

[As to the Burial of dead human bodies cast on shore, see stat. 48 G. 3. c. 75., tit. Burial, in another Volume.]

ADDENDA.

THE following supplementary matter consists, for the most part, of statutes which have been enacted, and of cases which have been adjudged, since the sheets of this volume were passing through the press: it is scarcely necessary to observe that they supply, therefore, the latest legal information upon the subjects to which they apply, and as such are presented to the reader's notice, together with references to the parts of the work in which the corresponding topics are treated of.

Assault and Battery.

[9 G. 4. c. 31. s. 27. & 30. pp. 54, 55.—See 5 & 6 W. 4. c. 19 tit. *Seamen, infra.*]

Bail.

[See p. 64.]

AN important change has been introduced by the legislature since 7 G. 4. c. 64. § 1., for which see tit. *Bail*, § III. p. 65., with respect to the taking of bail by magistrates in cases of felony.

5 & 6 W. 4.
c. 59.

Extending provisions of act 7 G. 4. c. 64. as to taking of bail in cases of felony.

By 5 & 6 W. 4. c. 33. § 3., reciting that "whereas in many cases the taking bail for the appearance of persons charged with felony may be safely admitted without endangering the appearance of such persons to take their trial in due course of law, and it is therefore expedient in such cases to amend and extend the provisions in that respect of an act passed in the seventh year of King George the fourth, intituled *An act for improving the administration of criminal justice in England*;" it is enacted, "that it shall be lawful for any two justices of the peace, if they shall think fit, of whom one or other shall have signed the warrant of commitment, to admit any person or persons charged with felony, or against whom any warrant of commitment for felony is signed, to bail, in the manner and according to the provisions directed by the said recited act, in such sum or sums of money and with such surety or sureties as they shall think fit, and notwithstanding such person or persons shall have confessed the matter laid to his or their charge, or notwithstanding such justices shall not think that such charge is groundless, or shall think that the circumstances are such as to raise a presumption of guilt."

Burning.

[See p. 110. and pp. 115, 116.]

THOMAS Tottenham and **Geo. Cornell** were tried before **Gaselee J.** on an indictment for setting fire to a stack of straw. It appeared on the trial, that the stack consisted partly of cole seed straw and partly of wheat stubble, after the reaping and carrying the straw, and the greater part of the stack was of the latter description. The jury said the stubble was haulm; upon which, after consulting with **Lord Denman C. J.**, **Gaselee J.** directed an acquittal. (*a*) — *Rex v. Thomas Tottenham and Geo. Cornell, Hertford spring assizes 1835, MS.*

Prisoner was indicted for unlawfully, maliciously, and feloniously setting fire to a certain outhouse, in the possession of **Joseph Chettle**, with intent thereby to injure **J. C.**, and to a certain stack of straw, of the value of 3*l.*, of and belonging to the said **J. C.**, then and there standing, and being against the statute and against the peace, &c.: second count, for setting fire to the outhouse: third count, for unlawfully, &c. setting fire to a certain stack of straw, of the value, &c., of and belonging to said **J. C.**, then and there standing, &c.; not saying with intent (*b*) to injure. The evidence was, that the building was a shelter hovel for cows to go under one door; there was a partition inside, one side open, into which the cows could go at pleasure; the other with a door was for the pigs; the walls were stone, the roof with straw laid on, and thatch laid on the straw. The stack was principally wheat straw, the greatest part of it was so; the bottom part was of wheat straw, made up after the wheat was carried — half a load; the whole about three loads. There was stubble at the top, to keep the straw from blowing away; it is not usual to put stubble on all straw stacks, but just as the farmer pleases. The building and stack belonged to **Chettle** the prosecutor, and it appeared there had never been any quarrel between him and the prisoner, but the prisoner had had a quarrel the very day of the fire, and on former occasions, with one **Smith**, a neighbour, and had endeavoured to throw the suspicion on **Smith**, to charge him with the offence, and had also written a threatening letter to him. The learned judge reserved the point as to whether the outhouse was properly described, and told the jury that, with respect to the intent to injure, the law was, that a person, who did an act wilfully, necessarily intended that which must be the consequence of the act, and that the consequence here was injury to the prosecutor, who was injured by the destruction of his property. The jury, in giving their verdict, said they were very sorry, but they must find the prisoner guilty, with intent to injure **Smith**; and further they found no intent to injure **Chettle**, except so far as by law it must be so considered. The case being laid before ten judges, who met *Jan.* 16. 1836, they were unanimously of opinion that the indictment was right as to the intent (*c*) to injure **Chettle**;

Charge of setting fire to a straw stack, part of it cole seed straw, the rest, being the greater part, stubble: Held, not a stack of straw within the statute.

Indictment for setting fire to an outhouse with intent to injure **A.** the owner; verdict, that it was with intent to injure **C. S.**, on whom prisoner tried to throw the suspicion: Held, that the intent was nevertheless properly averred.

Stack of straw properly laid as such, it being principally of wheat straw, though stubble was laid on the top to prevent its blowing away.

(a) See 4 C. & P. 245.

(b) These words are not in the clause of the statute.

(c) See *Farrington's case*, p. 113.

1 & 2 G. 4. c. 76. shall be claimed, and also an official copy of such proceedings and awards, certified by the secretary or register; and the same shall be admitted by such court of admiralty as evidence. Stat. 48 G. 3. c. 130. § 5. S. P.

The appeal to be conclusive. § 5. On an appeal so made to the court of admiralty of the Cinque Ports, or to the high court of admiralty, the same shall be final, and no ulterior appeal shall lie to the king in chancery.

Persons cutting away or defacing buoy-ropes, &c. deemed guilty of felony. § 6. If any person or persons shall wilfully cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall do or commit any act with intent and design to cut away, cast adrift, remove, alter, deface, sink, or destroy, or in any other way injure or conceal any buoy, buoy-rope, or mark belonging to any ship or vessel, or which may be attached to any anchor or cable belonging to any ship or vessel whatever, within the jurisdiction aforesaid, with intent thereby to defraud or injure any person or persons whatsoever, or body corporate, such person or persons so offending shall, on being convicted of such offence, be deemed and adjudged guilty of felony, and shall be liable to be transported for any period not exceeding 14 years. Stat. 48 G. 3. c. 130. § 6. S. P.

Liable to transportation.

Anchors, &c. found within the jurisdiction, to be deposited in either of the places herein mentioned, &c. or the persons having them in possession shall be adjudged guilty of receiving stolen goods. § 7. All anchors, cables, buoys, ropes, or other ships' stores or materials, or any goods or merchandises of any sort whatever, which may have been parted with, cut from, or left by any ship or vessel in the *Downs*, or elsewhere, within the jurisdiction aforesaid, whether the same shall be in distress or otherwise, and which shall have been weighed, swept for, or taken possession of by any pilots, boatmen, hovellers, or other person or persons, shall be by them delivered either at *Ramsgate*, *Deal* or *Dover*, *Harwich*, *Brighton*, or *Wivenhoe*, six public places of deposit declared by this act for the reception of all such articles, or such other places as shall be declared by the lord warden, in the same state in which they are found, to the serjeants of the admiralty of the Cinque Ports aforesaid, their deputy, or such other person as he shall authorise to receive the same; but if any such articles shall not be so delivered immediately, or duly reported to such serjeants, or their deputies, on the finding thereof, and shall afterwards be discovered in the possession or power of such pilots, boatmen, hovellers, or other person, he or they shall, on conviction, be adjudged guilty of receiving goods knowing them to have been stolen, and shall suffer the like punishment as if the same had been stolen on shore. Stat. 48 G. 3. c. 130. § 7. S. P.

All wrecked merchandise and ship stores to be also deposited in like manner.

§ 8. All merchandise, materials of any sort, or marine stores of every description, whether belonging to H. M. or to any British subjects, or foreigners, which may be preserved from any ship or vessel stranded, deserted by her crew, or wrecked, either on shore, or on the *Goodwin* or any other sand or shoal, or any part of the main land, or any port or place within the jurisdiction aforesaid, shall be landed and delivered at one of the six places of deposit, belonging to the lord warden's deputies at *Ramsgate*, or *Deal* or *Dover*, *Harwich*, *Brighton*, or *Wivenhoe*, or such other place as shall be appointed by the lord warden; and if any person who shall have preserved or taken possession of any such merchandise or marine stores, shall sell, dispose of, or otherwise make away with the same, or shall in any manner conceal, deface,

If sold, or marks defaced by the

take out, or obliterate the marks or numbers thereon, or alter the same in any manner, with intent thereby to prevent the discovery and identity of such articles by the owner thereof, such person shall be guilty of felony. Stat. 48 G. 3. c. 130. § 8. contains the same provision, except as to *Harwich, Brightlersea, and Wivenhoe*.

§ 9. Nothing herein contained shall extend to the preventing the serjeant's deputies, or any other officer of the lord warden, from seizing all such anchors, cables, buoys, buoy-ropes, or other ships' stores or materials as aforesaid, and likewise all such merchandise and marine stores as aforesaid, which they shall find concealed, or attempted to be concealed, or which they shall find in the possession of any person who shall be conveying, or in the act of preparing to convey the same out of the said jurisdiction, or from any place where the same shall have been landed, to any other place, other than to one of the said public places of deposit; but it shall be lawful, in all such cases, for the officers aforesaid to seize the same as well on shore as at sea, and to take and carry the same to one of the said public places of deposit. Stat. 48 G. 3. c. 130. § 9. S. P.

§ 10. If any person within the jurisdiction aforesaid shall knowingly and with intent to defraud and injure the true owner thereof, purchase or receive any anchors, cables, ropes, or other ships' stores or materials of any description whatever, or any merchandise or lading which may have been taken up, weighed, swept for, or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck within the jurisdiction aforesaid, such person shall on conviction be deemed guilty of receiving stolen goods knowing the same to be stolen, as if the same had been stolen on shore, and suffer the like punishment as for a misdemeanor at the common law, and be also liable to be transported for seven years, in the discretion of the court before which he shall be tried. Stat. 48 G. 3. c. 130. § 10. S. P.

§ 11. And whereas it frequently happens, that anchors, cables, and other marine stores or merchandise, which have been weighed, swept for, or taken possession of within the jurisdiction aforesaid, are, for fraudulent purposes, carried away to *Rochester, London, Portsmouth*, and other places not within the jurisdiction aforesaid, and the officers of the lord warden cannot, by reason of such removal, recover the same; it is enacted, that it shall be lawful for the serjeants of the admiralty of the Cinque Ports, deputies, or any other officer of the lord warden to seize such anchor, cable, or other marine stores or merchandise, out of the jurisdiction aforesaid, and to carry the same to some one of the aforesaid public places of deposit. Stat. 48 G. 3. c. 130. § 11. S. P.

Or (by stat. 1 & 2 G. 4. c. 76. § 11., *only*) to place the same in a place of security, till proceedings shall be instituted, either in the court of admiralty of the Cinque Ports, or in the high court of admiralty.

By stat. 48 G. 3. c. 130. § 12., every pilot, boatman, or other person, within the above jurisdiction, who shall counsel, instruct, direct, advise, or procure any master or other person on board any vessel within the above jurisdiction, whether she be at the time in distress or otherwise, to cut such vessel's cable or buoy-rope, or to do any other act whatever which shall or may tend to

1 & 2 G. 4. c. 76.

salvors, they shall be adjudged guilty of felony.

Officers of the lord warden may seize anchors, stores, &c. concealed within their jurisdiction, &c.

Receivers to be subject to the same punishment as though the goods had been stolen on shore.

Liable to transportation.

Lord warden's officers authorised to seize anchors, &c. taken up within the limits of the Cinque Ports, though removed out of such limits.

48 G. 3. c. 130. Pilot, &c. counselling act tending to wreck of ship.

48 G. 3. c. 130.

Transportation.

1 & 2 G. 4. c. 76.

Dealers in ship's stores to have their names painted on their storehouses.

Penalty.

No cables, &c. to be cut up without a permit from one of the lord warden's deputies.

Dealers to keep an account of the marine stores bought by them.

Notice to be advertised before cutting up cable or cordage.

the destruction or wreck of such ship, with intent thereby to prejudice any owner or person, body politic or corporate, that hath underwritten or shall underwrite any policy or policies of insurance on such vessel, or her freight, or on any goods laden on board her, shall on conviction be deemed guilty of felony, and shall be liable to not exceeding 14 years' transportation.

By stat. 1 & 2 G. 4. c. 76. § 12., all persons who shall trade or deal in buying and selling anchors, cables, sails, old junk or paper stuff, old iron, or marine stores of any kind or description, within the jurisdiction aforesaid, shall have their names, with the words "*Dealer in Marine Stores*," painted distinctly in letters of not less than six inches in length, upon the front of all their storehouses, warehouses, and other depôts for such goods; and in default they shall, on conviction before any magistrate within the limits aforesaid, forfeit any sum not exceeding 20*l.* nor less than 10*l.*, one half to the informer, and the other moiety to the poor of the parish where such offence shall be committed; and it shall not be lawful for such dealers or traders to cut up any cables or part of the same, or to uncant, untwine, or unlay the same, or cordage of any description, into junk or paper stuff, nor any wounding, wounding, or worming, or any cable matting on the same, or on rigging, on any pretence whatsoever, without first obtaining a permit from the lord warden's deputies, or one of them, which permit shall not be granted unless an affidavit shall have been first made before some one of the magistrates, and shall have been delivered to and left with the person granting such permit, in which affidavit there shall be sworn that the cable and cordage so intended to be cut up had been purchased fairly and without fraud, and without any knowledge or suspicion on his part that the same had been dishonestly come by; and in which affidavit shall also be specified the particular quality and description of such cable or cordage, and the names of the sellers thereof, which affidavit shall be set forth at length in the permit. Stat. 48 G. 3. c. 130. § 13. S. P.

§ 13. And for the more effectual prevention of fraud in this respect, it is enacted, that all dealers in such marine stores, within the limits of the Cinque Ports, &c. shall keep books, in which entries shall be regularly made of all such marine stores as shall be by them from time to time bought, containing a true account and description of the times when the same were so bought, and of the names and places of abode of the sellers thereof; and before the party who shall have obtained such permit for the cutting up of any such cable or cordage (as herein-before required to be obtained) shall proceed to cut up the same, there shall be published by the space of one week at least before the time of cutting up of the same, one or more advertisements in some public newspaper printed within the counties of *Kent*, *Sussex*, and *Essex*, and near to the usual place of abode of such party, notifying that such party had obtained such permit for cutting up such quantity of cable or cordage, and of such kind and quality as therein described, a true copy of which permit shall be inserted in each advertisement; whereupon it shall be lawful for every person who may have just cause to suspect, and shall have verified upon oath the fact of such his suspicion before any of the magistrates within the limits aforesaid, by warrant of such magistrate, to require of

and from such dealer the production and examination of the books of entries hereby required by him to be kept, and to inspect and examine the cable or cordage described in such permit; and in case any such dealer shall, when so required, neglect or refuse to produce to the person named in such warrant the books containing the entries of such dealer, or shall neglect to keep any such books, or to permit such inspection and examination as aforesaid, or shall, after obtaining such permit for the cutting up of any cable or cordage, and before the cutting up of the same, neglect to publish such one or more advertisements, the dealer or dealers so offending in all or any of the particulars herein-before mentioned shall forfeit for every such offence, being his or their first offence, any sum not exceeding 20*l.* nor less than 10*l.*; and for every second and further offence, any sum not exceeding 50*l.*, nor less than 30*l.*; one half of which penalties shall, on conviction before any of such magistrates duly authorised to act within the limits aforesaid, be paid to the informer, and the other half to the poor of the parish in which such offence shall be committed; and in case any of the penalties by this act imposed shall not be paid, with the charges incident to the conviction, immediately upon such conviction, the same shall be levied by distress upon the goods and chattels of every such offender or offenders; and in case there shall be no sufficient distress, then every such offender or offenders shall be committed by such magistrate as aforesaid to the common gaol within the limits aforesaid, in the case of any first offence for the space of three months, and in the case of any second or further offence for the space of six months, unless the said penalty and charges shall be sooner paid. Stat. 48 G. 3. c. 130. § 14. S. P.

§ 14. The inhabitants of any parish, township, or place within the jurisdiction aforesaid, shall be competent witnesses, notwithstanding the penalty, or any part thereof, may be given to the poor of such parish, &c. or otherwise in aid or exoneration of such parish, &c. Stat. 48 G. 3. c. 130. § 15. S. P.

§ 15. The lord warden of the Cinque Ports, and the lieutenant of *Dover Castle*, and the deputy wardens of the Cinque Ports, and the judge official and commissary of the court of admiralty of the Cinque Ports, &c. and any other officer who shall be specially appointed by the lord warden, may execute, within the jurisdiction aforesaid, all the acts, matters, and things contained in this act, in like manner as any magistrate, or any commissioner appointed by virtue of this act, is authorised to execute. Stat. 48 G. 3. c. 130. § 16. S. P.

§ 16. And for the more speedy administration of justice, as often as H. M. shall direct a commission, according to the provisions of stat. 28 H. 8. c. 15., to the admiral or admirals, or his or their lieutenant deputy and deputies, it shall be lawful for H. M., on the application of the lord warden, to direct such commission jointly to the admiral or admirals, or his or their lieutenant deputy and deputies, and also to the lord warden of the Cinque Ports, and to his deputy; and the commissioners who shall sit by virtue of such commission, so jointly addressed, to whatever shire or place in the realm the same shall be limited, shall have full power to inquire into, try, and determine all offences named in the said act, or in any other act relating to proceedings under such commis-

1 & 2 G. 4. c. 76.

Penalty for refusing to produce the book of entries, or neglecting to give notice before cutting up cable or cordage.

Penalties how to be levied.

Inhabitants to be competent witnesses.

The lord warden and his deputies, judge, &c. to have the like power as justices or commissioners under this act.

Manner of issuing commissions for the punishment of offences, agreeably to 28 H. 8. c. 15.

5 W. 4. c. 1.

may make an order upon the sheriff of the county to execute such criminals in any place not within the jurisdiction of the sheriffs of the city.

county of *Chester*, that such criminal should be executed at any place not within the jurisdiction of the sheriffs of the city of *Chester*, but within the county of *Chester*, it shall be lawful for such judge to make any order which he may think fit upon the sheriff of the county of *Chester* to execute such criminal at such place, and also upon the constable of the castle of *Chester* to deliver such criminal to the sheriff of the county, and to do and perform, and suffer to be done and performed, all such matters and things as may be necessary for carrying into effect and executing such sentence; and the said sheriff and constable shall be liable and are hereby required to obey all such orders."

Forcible Entry and Detainer.

[See *Rex v. Oakley and others*, p. 228.]

Where it appears on the face of a conviction for a forcible detainer that it took place upon the view, and no mention is made of the justices having received any evidence at the time, the court of K. B. will not, on its removal thereof by certiorari, call for a further return of facts or evidence connected with the transaction.

REX v. Wilson, *T. 4 W. 4., 1 Ad. & E. 627. S. C. 3 Nev. & Murr.* 753. By writ of *certiorari* the record of conviction of defendant for a forcible detainer, with the inquisition thereon, and also a memorandum of restitution by the convicting justices, were removed into K. B. The conviction stated the complaint by *T. B.* and *J. S.* that the defendant entered upon the messuage in question, and them the said *T. B.* and *J. S.*, being seised in fee, unlawfully ejected, &c. and unlawfully and with strong hand and armed power doth yet hold and from them detain, &c., and that the justices to the messuage aforesaid personally have come, and find defendant the aforesaid messuage with force and arms unlawfully and with strong hand and armed power detaining against the form of the statute, &c. according as *T. B.* and *J. S.* have to us complained: therefore it is considered by us, &c., that defendant of the detaining aforesaid with strong hand, by our own proper view then and there as aforesaid had, is convicted. The inquisition expressly found a lawful and peaceable seisin in fee of the premises by *T. B.* and *J. S.*, and an unlawful entry, ejection, expulsion, and removal, and an unlawful holding and detainer with strong hand and armed force by defendant. A rule nisi was afterwards obtained, calling upon the justices to return the informations on which the conviction was founded, and to set out the evidence given touching the entry into the premises, and also the facts touching the conduct of defendant on the view had by the justices, and on which facts they adjudged defendant to be guilty of the forcible detainer, and also the depositions taken on the inquisition. But the affidavits in support of the motion made no suggestion of any evidence having been received at the time of the view. The court discharged the R., on the ground that as the conviction professed to be made by the justices on their own view, by going to the place, under 8 H. 6. c. 9, it did not appear that there was any evidence or facts to return; and, further, that the information on which the conviction was founded appeared to be sufficiently set out in the recital.

Rex v. Wilson, T. 5 W. 4. 5 Nev. & Mann. 164. In the same case, motion was afterwards made for quashing the conviction; the objection being that the magistrates had not adjudicated the *entry* of defendant to have been unlawful as well as the *detainer forcible*.—*Per cur.* (after time taken to consider): The conviction is bad on the ground that no unlawful entry is averred even in the information, or proved by evidence or adjudged by the justices. In the conviction the party interested is said to have complained (not even on oath) that he was expelled, but the justices heard no evidence and decided on other fact than that finding and seeing defendant unlawfully with strong hand and armed force *holding possession*, it is considered that defendant of the *detaining* aforesaid with a strong hand, of his own proper view, is convicted, &c. In commenting on the facts. 5 R. 2., 15 R. 2., and 8 H 6., Lord Denman C. J., after saying that the earliest statute merely prohibits the offence of forcible entry on pain of imprisonment; the second gives summary power to the justices; the third extends the remedy to cases where the entry may have been peaceable but is followed up by a forcible detainer; proceeded to state that the foundation of the proceeding was not *the complaint*, but *the fact*; and that such fact ought to be proved to the satisfaction of those who exercise the power, and that it should appear on the face of the conviction. That the mere fact of the rightful owner in peaceable possession being seen defending his possession by force was in its nature indifferent, as he would be justified in so doing. If the possession so defended were an unlawful possession, that should be proved to the justices and should be adjudged by them. Adding that, in his opinion, where the keeping out is adjudged to be unlawful, the adjudication is bad if it does not specify the facts from which its unlawfulness is inferred.—On these grounds the court quashed the conviction and the inquisition founded upon it.

In conviction for a forcible detainer, there must be an adjudication of an unlawful entry.

The adjudication ought to set out the facts which shew the detainer to be unlawful. Semble.

The court also threw out that there was a substantial doubt respecting the goodness of the conviction, from its not shewing that the party was summoned or had the opportunity of defending himself against the *ex parte* charge.

Defendant ought to be summoned previous to conviction on the view. Semble.

The court also suggested that the record of conviction for a forcible detainer in *Rex v. Ellwell*, as given from 3 Ld. R. 360. (see p. 235.), was bad for a similar defect with that which prevailed in the present case.

Form of conviction, p. 235., bad.

In the course of the judgment the case of *Rex v. Layton*, 1 Salk. 53., was adverted to, and from the production of the original warrants of commitment in that case, it appeared doubtful whether defendant was imprisoned upon the summary conviction or for want of bail on an indictment for riot and assault.

Rex v. Layton, 1 Salk. 533.

Forgery.

[See p. 251.]

THE prisoner was convicted before the recorder in London, on an indictment for uttering a forged order for the payment of money as follows:—

Nov. 15. 1834.
Bill for payment of money

three days after the sailing of a ship: held, that it might be laid as an order for the payment of money.

"On receiving this check, I agree to sail in the ship *Mary Ann*, and to be on board within sixteen hours from the date of the check.—May 1st.

"Port of London, May 1. 1834.

Three days after the ship *Mary Ann* sails from *Gravesend*, please to pay to *William Banfield*, or his order, the sum of 4l. 5s., being a month's advance, and in part of his wages on an intended voyage to *Quebec* in the ship herein-before mentioned as *per* agreement with

Your humble servant,

G. Martin,
Master.

To R. Rayley, Esq.

No. 48. Fore Street, City."

On *ca. res.* after conviction, the question was whether this was an order for the payment of money within 1 W. 4., c. 66., § 3. It was held unanimously that the conviction was right.—M. T. 1834. *Rex v. W. Banfield, O. B.*, Sess. May 1834. (See *Shepherd's ca. p.* 285., MS.

Prisoner was tried before Gaselee J. for offering, uttering, &c. a forged bill of exchange, viz.:—

"No. 6811.

"£" due 7th December.

St. Petersburg le 4 Août, 1834.

B. P. 500l. Stg.

April 25. 1835.

Forgery of a foreign bill:

Held, to be a bill of exchange, though no express order to pay.

"Livers sterling" translated "pounds sterling" good.

F. 44

A quatre mois de date par cette lettre de change, à l'ordre de nous-mêmes, la somme de cinq cent livres sterling. Valeur en moi-même

N. 7800

Que passerez suivant l'avis de Sleiglitz & Co.

7497

Messrs. Brown Dan Hamming, Dublin.

Payable Londres."

Across the face of the bill was written—

"Accepted for

Five hundred pounds sterling,

Payable at Messrs. Ranson & Co. Bankers, London.
Brown Dan Hamming."

And which in *English* is as follows, &c. giving the translation, and rendering "livers sterling" pounds sterling, well knowing, &c. with intent to defraud G. F.; a second count stated it to be a bill of exchange with a forged indorsement, and other counts laid it in different ways. It was objected that it was not a bill of exchange for that it contained no order to pay, and that the word "livers" did not mean pounds. The learned judge thought, on the whole of the instrument taken together, that it was a bill of exchange, but reserved the point, and the prisoner was found guilty. The judges held unanimously that the conviction was right.—E. T. 1835. *Rex v. Szadursky, alias Count Alexander, Kent sp. ass.* 1835, MS. (See *Rex v. Goldstein*, p. 275.)

In a case of forgery on 1 *W. 4. c. 66. § 19.* (see p. 261.), the indictment contained 36 counts: the first charged that the prisoner feloniously, and without lawful excuse, knowingly had in his custody and possession two plates on which was engraved and made a certain promissory note for payment of money, purporting to be a promissory note for payment of money of a certain foreign prince, that is to say, of *Nicholas*, then being king of a certain foreign country called *Poland*, which said foreign note for payment of money so engraved and made upon the said plates as aforesaid is expressed in the *Polish* language, and is on the one side thereof as follows, that is to say (here the note was set out in the *Polish* language), and on the reverse side is as follows (here the reverse side was set out in *Polish*), and which promissory note so engraved and made upon the plates aforesaid, being translated into the *English* language, is on the one side thereof as follows, &c.; and the indictment proceeded to set out translations of both sides of the note. The nineteenth count charged that the prisoner feloniously, &c. had in his possession two other plates, upon which said last-mentioned plates was then and there engraved in the *Polish* language a certain other promissory note for payment of money, to wit, for the payment of five florins, purporting to be a promissory note for payment of money of a certain foreign prince, that is to say, of the said *Nicholas*, then being, &c. The other counts contained variations of the above. In those counts of the indictment which set out the notes, the *fac similes* of the notes were not engrossed on the parchment, but *fac similes* of the forged notes on blue paper were sewed with thread to the parchment of the indictment. It was objected to the first count that the translation of the note set out in the *Polish* language was not complete, as certain words which were on the rim and margin of the front plate of the note in the *Polish* language were not set out in the translation. And it was objected to the nineteenth, that it was not sufficient, and that the stat. 2 & 3 *W. 4. c. 123. § 3. (a)* did not apply to such a case. The prisoner being found guilty on his trial before *Littledale J.*, a case was reserved for the opinion of the judges. At a meeting of twelve judges (absent *Vaughan J.*, *Alderson B.* and *Patteson J.*), on *January 23.*, it was held that all the counts in which the *fac similes* of the notes were not engrossed on the parchment were bad. In regard to the nineteenth count, there was a discrepancy of opinion; and it was held by seven judges against five that it was not sufficient, on account of its not shewing what money florins were, and what was their value. However, on *January 28.*, at another meeting of the same judges, except *Park J.*, it was considered that this defect was cured by 7 *G. 4. c. 64. § 21. (b)*, the offence being described in the words of the stat.; and the conviction was held good.—*H. T. 1836. MS. Rex v. Marcus Warshauer, alias M. Warsower, alias Mordecai Moses. Central Criminal Court, December 1835.*

Where the plate of a forged instrument is set out on the indictment, and a *fac simile* of it is sewed upon the parchment, instead of being engrossed thereon, it is bad. Where the plate of a foreign note is described as being made for the payment of a certain number of florins, the indictment will be insufficient if it do not shew what money florins are, and what their value. But this defect will be cured after verdict by 7 *G. 4. c. 64.* if the offence be described in the words of the stat.

In another case connected with the same transaction, the indictment contained thirty-two counts under 1 *W. 4. c. 66. § 19.*, some for forging, others for uttering, foreign promissory notes. The fifth count charged the prisoner with offering, uttering, disposing of, and putting off a certain other forged promissory note for payment of money, which said last-mentioned forged promissory note for the

Indictment for uttering a forged foreign note for payment of foreign money, ought to set out note,

Rex v. Thomas Harris.

and translation, and value of the money, &c. Semble. But the defect cured after verdict if the offence be described in the words of the statute.

Indictment for uttering forged Polish notes: held, that it was admissible evidence, as proof of the *scienter* to shew that prisoner had offered, a short time before the imputed offence, to make some forged Austrian notes. So on counts for forging Polish notes, held to be admissible to shew that prisoner had had in his possession, a year before, plates for the engraving of other Polish notes different from those which were the subject of the prosecution.

payment of money is expressed in the *Polish* language, and on one side thereof, &c. &c.; and as in the preceding case of *Rex v. M. Warshawer*, a *fac simile* of the note on blue paper was sewed on the indictment instead of being engrossed on the parchment. The twenty-first count alleged that the prisoner offered, &c. a certain other forged promissory note for payment of money, that is to say, for the payment of five florins, he the prisoner at the time he so offered, &c., knowing, &c. The other counts contained variations not necessary to advert to. Objections were taken to this latter count, that the note ought to have been stated to be a note in a foreign language, and afterwards its meaning in the *English* language, and that it was for the payment of foreign money, and what the value of it was in *English* money, and that the stat. (2 & 3 W. 4. c. 123. § 3.) does not extend to foreign notes like the present. After a conviction before *Littledale J.* and *cas. res.*, it was held by the same judges at the same meeting, as in the last case, that the count in question was made good by 7 G. 4. c. 64. § 21., and that the conviction was right.—*H. T.* 1836. *Rex v. Thomas Harris*, Central Court, December 1835, MS.

In a third prosecution for the forgery of similar *Polish* notes, the prisoner was indicted for offering, uttering, &c., knowing, &c. (as in the two preceding cases), and like objections were made and disposed of in the same mode. A question also arose on the evidence. In order to prove the *scienter*, a witness named *Flaum*, who, together with another witness, named *Sallyman*, had been sent over by the *Austrian* government for the detection of forgeries of *Austrian* notes, proved that in August 1835 he had a meeting with the prisoner, and *Thomas Harris* and one *Turner*, at which prisoner agreed with *Flaum* to make him one thousand *Austrian* notes of fifty florins each at the price of 3s. for each note, and for which *Flaum* paid the prisoner 30*l.* in advance, and *Harris* said the notes should be ready in six weeks: *Flaum* was also to have security for the money, for which purpose a bill was drawn by the prisoner, accepted by *Turner*, and indorsed by the prisoner and *Harris*. It was contended that this was not admissible evidence, as it had reference to notes of a quite different description, and the *Austrian* notes were in fact never made, and this meeting took place a week before the time of the imputed offence for which the prisoner was on his trial. There were counts in the indictment for forging as well as uttering, and the prosecutor proved that in September 1834 the prisoner had gone to an engraver with the front plates and back plates of a *Polish* cash note, calling them mining tickets, and had got a new back plate made, and had employed the engraver to take off 500 impressions, and had paid him for them, and the engraver proved that the plates had been much used since that time: it turned out in the result that these plates could not have produced the notes on which the indictment proceeded. This evidence was also objected to, but *Littledale J.* admitted it, as well as the piece of evidence mentioned before, and, the prisoner having been found guilty, reserved the points; the matter was taken into consideration at the same times and before the same judges as the two preceding cases, and the evidence in both particulars was held admissible.—*H. T.* 1836. *Rex v. Robert Balls*, Central Court, December 1835, MS. (See as to the evidence of the *scienter* or guilty knowledge, p. 288. *et seq.*)

Indictment.

(See p. 360.)

THE prisoner was indicted for the wilful murder of *Eliza Waters* by suffocation, and one of the objections taken was that the deceased was not properly described; as to which it appeared that the deceased, a child about three weeks old, was the daughter of the prisoner, who was a single woman. A witness stated that she took the child to be baptized, and that it was baptized by the name of *Eliza*; the register was not at the trial, nor any copy of it, and no surname was mentioned at the time of baptism. It was left to the jury by *Ld. Denman C.J.* whether the child was properly called *Eliza Waters*; whether they would in conversation have called her by that name, and whether in hearing that name used they would have understood *Ellen Waters's* child to have been spoken of. The jury having found the prisoner guilty, and the point being reserved, it was held at a meeting of sixteen judges, *January 16. 1836*, that the child did not acquire the name of *Waters* by reputation, and that the conviction was wrong.—*H. T. 1836. Rex v. Ellen Waters, Shrewsbury Summer assizes, 1835. MS.*

(See *Rex v. Mary Smith*, and other cases, p. 386.)

The prisoner was indicted for receiving stolen goods; he pleaded *autrefois acquit* on an indictment, at the preceding *Spring assizes*, against two for breaking open a warehouse and stealing the goods, and against himself and four others jointly for receiving them, and a conviction of the two principals and one of the receivers, and sentence of transportation passed, and the acquittal of himself and the three other prisoners charged as receivers; to this the prosecutors demurred, and the demurrer was argued before *Gaselee J.*, who presided at the trial, by *Evans* for the prosecution, and by *Palmer* for the prisoner. The learned judge adjourned the case to the next assizes, and reserved it for the opinion of the judges; but they declined giving any opinion, as no judgment had been given, and as the case might come before them on a writ of error. At the next assizes the following (a) judgment was pronounced:—This is an indictment (b) which was found at the last *Easter sessions*, and came on at the last assizes for the city of *Norwich*, which charged the prisoner for that he on, &c., at, &c., twelve gross of yarn of the value &c., of the goods and chattels of *J. H.*, then lately before feloniously stolen, &c., then and there feloniously did receive and have, he (the prisoner) then and there well knowing the said goods and chattels to have been feloniously stolen, &c. The prisoner pleaded that at the general session of *oyer and terminer*, holden at the *Guildhall* of the city of *Norwich*, an indictment was found against *T. M.* and *I. K.* for breaking and entering the warehouse of the same prosecutor, and stealing thereout fifty gross of yarn; and against five persons, naming them, the prisoner being one, for receiving the same, knowing them to have been stolen; that the said prisoners pleaded not guilty, and the indictment

Bastard child, three weeks old, held not to have acquired the mother's surname by reputation, there being no proof that it was ever used.

Plea of *autrefois acquit*, by one prisoner, indicted singly for receiving stolen goods, on an indictment found at a former assizes against him and four others, on which one was convicted, and the prisoner and the three others were acquitted, good.

(a) The judgment was prepared by *Gaselee J.*, and was read in court by *Ld. Abinger C. B.*

(b) This indictment, and also the indictment and proceedings set out in the plea, were stated more fully in the judgment than is here given.

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Dann.

came on to be tried by a jury, who found the two principals and one of the receivers, naming them, guilty, and the four other receivers, naming them, among whom was the prisoner, not guilty: whereupon the two principals, naming them, were severally sentenced to be transported for life, and the convicted receiver for fourteen years, and the four others, naming them, the prisoner being one, were ordered to be discharged. The plea contained an averment of the identity of the prisoner, and of the offence. To this plea there was a demurrer which was argued before me, and I postponed the decision until the present assizes for the purpose of taking the opinion of the judges; but they declined giving any opinion, as no judgment had been given upon it, and the case might at some future period come before some of them upon a writ of error. I have since given the case the best consideration I can, and upon that consideration I am of opinion that the plea is good. The plea of *autrefois acquit* is grounded upon an ancient maxim of the common law of England, that no one ought to be brought into jeopardy of his life twice for the same offence. A great deal of learning is to be found upon the subject in 2 Hawk. P. C. c. 34. and Starkie on Crim. Plead. p. 316, and many other books: upon the result of all the authorities, the question is, whether the prisoner could have been convicted on the former indictment; for if he could he must be acquitted on the second; and the law is very correctly stated to the jury by Mr. Justice Burrough, in the case of *Rex v. Sheen*, 2 C. & P. 634., that "whether at the former trial the proper evidence was adduced before the jury or not, is immaterial; for if, by any possible evidence that could have been produced, he could have been convicted on that indictment, he is now entitled to be acquitted." It is argued for the prosecution, that an acquittal of a joint felony is not a bar to an indictment for a several felony. However that might be, if it clearly appeared upon the record that several felonies had been committed, in some of which the prisoner Dann had been jointly, and in another separately concerned, it does not appear the present indictment is confined to an offence committed by the prisoner separately; nor is it so. Upon it he is liable to be convicted of an offence committed separately or jointly with any other person, and consequently with *Whitehead*. (a) The plea alleges that the charge in the former indictment against *Whitehead* and the prisoner, and the other three, is the same offence as that charged in the present indictment; and this is admitted by the demurrer. The argument that the prisoner could not be convicted upon the former indictment is not true. The result of that indictment shews that it was not necessary to convict all the parties charged by that indictment. The prisoner might have been convicted either with *Whitehead* or without him. Nay, if the judge had called upon the prosecutor to elect against whom he would proceed (whether he did so or not I am not at liberty to consider, as nothing respecting it appears upon the record), and he had chosen to proceed against the prisoner, he might have been convicted alone; which shews he has been in jeopardy, and if the plea of *autrefois acquit* is not a bar, he may now be convicted of the

(a) *Whitehead* being the person convicted of receiving on the former indictment.

very offence committed jointly with *Whitehead*, of which *Whitehead* has been convicted. A replication that the charges were not the same, might possibly upon evidence have placed the case in a very different point of view. As the record now stands, I am bound to adjudge the plea to be good, and that the prisoner must be discharged. I have the less hesitation in coming to this decision, inasmuch as if the plea were overruled, and the prisoner on pleading over to the felony were found guilty, I am of opinion, as at present advised, that no judgment could be given upon this indictment, which is stated to have been found upon the oath or affirmation of *A. B. &c.*, then and there sworn or charged as jurors, &c., without saying who were sworn and who affirmed, and without shewing that the latter were entitled to serve upon their affirmation only. There are similar proceedings against the three other acquitted defendants (naming them), who must be also discharged.—*Rex v. Robert Dann, Spring Norwich assizes, 1835. MS.*

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Record of indictment stated to be found upon the oath or affirmation of *A. B., &c.* there sworn or charged as jurors, without saying more: *Semb., bad.*

(See p. 396. *et seq.*)

Larceny.

(See p. 412.)

IT was held in the following case, that under the peculiar circumstances of it, though there was an injurious and wrongful taking, yet that there was no larceny of the property as laid:—

The two prisoners were indicted and tried before *Patteson J.*, for stealing 100 lbs. weight of copper ore, the property of *Davey* and others, who were the adventurers in a mine: the prisoners and two others were tributers in the same mine, by which is meant persons who take of the adventurers a certain number of yards from which they dig out the ore, place it in a heap, and then convey it to a shaft, by which it is raised, and taken possession of by the adventurers, and the tributers are paid so much in the pound for the ore they have dug, on the current price of the ore. The tributers usually make their agreement in parties of four, and the prisoners had taken ore from the heap of another party of four tributers, and had added it to their own heap of ore, the tributers whose ore was taken being the prosecutors. After conviction two objections were taken; 1st, that the property was not properly laid; and 2d. that there was no larceny from the adventurers, as each of the heaps of ore was intended to pass, and did pass into their hands. On *ca. res.* the judges (nine), *diss. Patteson J.*, held the conviction wrong on the second objection, and the prisoners were pardoned.—*E. T. 1835. Rex v. William Webb and John Moyle, Cornwall Spr. ass. 1835. MS.*

April 2. 1835. Larceny. Workmen in a mine stealing ore from each other, but such ore being the beneficial property of the worker of the mine.

(See *Larceny*, § 1. p. 412.)

At the trial of the prisoner before *Patteson J.*, for stealing a check, it appeared that he had been occasionally employed by prosecutors (*Brooks and Co.*), two or three times a week to keep their books. When so employed, one of the prosecutors delivered to him a check, drawn by the firm on their bankers, payable to Messrs. *Caldecott* or bearer, with directions that he should

April 25. 1835. Check in the hands of the servant of the drawer, and stolen by him, larceny.

Rex v. F. Metcalf.

deliver it to Messrs. C., which he did not do, but appropriated it to his own use. After conviction a question was reserved, whether the check in the hands of the drawers, by their servant, was of any value, and could be the subject of larceny, the doubt arising from the report of *Rex v. Walsh*, C. C. R. 215.: held that the conviction was right, referring to the words of 7 & 8 G. 4. c. 28. § 5. (a) *Littledale J. dubitante.* — E. T. 1835. *Rex v. Metcalf*, central criminal court, February 1835. MS.

(See *Rex v. Walsh*, p. 435.)

The two following cases relate to embezzlement. (See p. 426. *et seq.*)

Clerk to a savings' bank, embezzlement by.

Prisoner being clerk to a savings' bank, was indicted for embezzlement, and was charged in the first count, that *being clerk to the trustees* (naming them), he received money for and on their account, and that he fraudulently, &c. embezzled the same; the second count stated him to be *employed in the capacity of a clerk to the trustees as before*; and the third and fourth counts contained the like charges, but named one trustee "and others." It appeared that the business of the bank was conducted by managers, a treasurer, and a clerk; that the trustees were *ex officio* managers, but that there were a great many other managers elected by ballot, and that the clerk was elected by ballot, annually, by such managers as happened to be present. The course of business was, that when a depositor brought money, a manager in rotation, and the clerk ought to be present, and the sum deposited is entered in the depositor's book, the clerk's book, and the manager's book; but if the manager is unavoidably absent, the clerk may act for him upon the manager's responsibility. Upon the occasion in question, the manager happened to be absent, and the clerk who received the money made a regular entry of it in the depositor's book, but omitted to make any entry of it either in his own book or in that of the manager, and appropriated it to his own use. It was objected, first, that the prisoner was not clerk to the trustees, but to the managers; second, that if, under the third and fourth counts, the word "others" might include the managers, still that the money could not be received to their use, as by 9 G. 4. c. 92. it was declared to be vested in the trustees only; and third, that as clerk, he had no authority to receive the money, as the rules required that he and a manager should receive it together. On *ca. res.* these points were argued, and the judges present (eleven) (except Lord Abinger C. B.) held that the first count was proved; Lord Abinger inclined to think that the second count was proved. — E. T. 1835. *Rex v. John Jenson, Northampton Spring assizes, cor. Tindal C.J.*, 1835. MS.

Clerk of a London banker making away with the property of the firm. Question of proof of embezzlement or of stealing.

Prisoner was a cashier in a London banking house, and the first count of the indictment charged, that he being a clerk to *Masterman* and others, received money on the 28th of August, viz. 500*l.* on account of his masters, and feloniously embezzled and stole the same; the second charged the like, only for stealing and embezzling 10*l.* on the 29th of August; the third, for stealing bank notes, sovereigns, half sovereigns, crowns, &c., on the 29th of August; the fourth, the like, but omitting to state that he was a

Rex v. John Grove.

clerk to *Masterman* and others. Prisoner's employment was to receive notes and cash deposited in the bank, handing over the notes to another clerk, and making an entry of the cash in the "money book," and to see at the end of each day that the account in the "money book" was correct; and the cash itself was to be placed either in a drawer of the counter or in a box in the banking house, of both of which prisoner kept the key. It appeared also that there was always one, and sometimes two or three other cashiers standing close to him during the hours of business. On the evening of the 28th of *August*, the cash in the money book was 1762*l.* and a fraction; and on the 29th, at the close of business, the balance, after crediting himself with the money he had paid, and debiting himself with the money received, appeared to be 1309*l.* and a fraction. On that evening one of the partners, suspecting the prisoner, required him to produce his money book, on which the prisoner acknowledged that he was short to the amount of about 900*l.*; it was found, however, upon examination, that the actual deficiency was 964*l.* and a fraction. This partner proved the whole of the above case, but had no manner of knowledge when the money, or any part of it, had been purloined, or from whom received, or what kind of money had been taken, or whether from the drawer, or upon its being received from customers. It was objected that there was no case to go to the jury; first, because the evidence given applied equally to embezzlement and larceny, and not particularly to either; second, that there ought to have been some proof of the money having been abstracted, when, from whom, and of what sort. — *Williams J.*, who tried the case, refused to stop the proceedings, and told the jury that if the money was taken from the possession of the master, it was larceny; and that if the prisoner abstracted it from the money paid to him before it reached his master's possession, it would be embezzlement. The jury found the prisoner guilty of embezzling to the amount charged, and not guilty of stealing. The question reserved was, whether the prisoner was entitled to an acquittal at the close of the case for the prosecution. After argument in the exchequer chamber, *November 21. 1835*, by *Mahon* for the prisoner, and by *Lee* for the prosecution, it was held by seven to six of the judges who met on that day (*a*), and on *January 16. 1836*, that the conviction was wrong. — *H. T. 1836. Rex v. John Grove*, central court, *September 1835. MS.*

Letters, Threatening.

[See p. 503. *et seq.*]

THE two prisoners were indicted for sending an unsigned threatening letter to prosecutor, by the name of "*Starve-gut Belcher*;" and the letter set out was as follows: — "*Starve gut* April 25. 1835. Threatening letter, construction of.

(a) On *Nov. 21.* the judges were equally divided, five and five; on *Jan. 16.*, one judge in addition thought the conviction right, and two thought it wrong.

*Rex v. Tyler
and another.*

Its meaning
may be left to
the jury. Semb.

Belcher, if you dont go on beter grate will be the consequence what do you think you must alter au (or) be set fire this came from London. i say your nose is as long rod qggg sharp as a flint. 1835 you ought to pay your men." The first count charged it as a threat to kill and murder prosecutor; the second, to burn his houses, &c. On the trial, before Lord *Denman* C. J., it was left to the jury to say, whether this was a letter threatening to put prosecutor to death, or to burn and destroy his houses, &c. The jury found the prisoner guilty, stating that the letter threatened to fire prosecutor's houses, &c., but not to put him to death. Doubts having arisen whether this question ought to have been left to the jury, and also whether the letter could be, in point of law, a threatening letter to the effect found, a case was reserved, and the judges held, unanimously, that the conviction was right.—*E. T. 1835. Rex v. W. Tyler and another, Chelmsford Spr. assizes, 1835.*

Indictment for
sending threat-
ening letter.
Letter proved
to be in pri-
soner's hand-
writing, and
that he had had
a quarrel with
prosecutor.
The letter was
brought by the
postman, and
addressed to
prosecutor:
Held, that the
sending was suf-
ficiently proved.

The prisoner was tried for sending a threatening letter to *Charles Smith*; and the indictment charged that the prisoner, knowing *C. S.* to be the owner of a certain house situate at, &c., knowingly, wilfully, and feloniously did send to the said *C. S.* a certain letter and writing, without any name or signature subscribed thereto, directed as follows; that is to say,—

charl'
Smith
Celveston
Northampton
shear near higham
Ferris,—

threatening to burn and destroy the said house of the said *C. Smith*, situate as aforesaid; which said letter and writing is as follows; that is to say,—

Sir

Mee & my father
And my grafather have
known this to bee a road
For one 183 years and
Now you have built it up
And i will burn it down
Before Oct^r 29 1834

a living
my father is withne B
know,—

against the statute and against the peace, &c. Second count called it "a letter;" third count, "a writing;" fourth, fifth, and sixth counts, like first, second, and third counts, except that after the words "built it up" was inserted (meaning that the said *C. S.* had built the said last-mentioned house on the said road), and after the words "i will burn it" (meaning the said last-mentioned house). It appeared that the prosecutor was the owner of six adjoining houses, in one of which he resided, and the prisoner resided in another of them: one of the houses had been built about a year and a half ago, and there had been a road through a gateway, which the prisoner had always used, and he complained of the new house being built over it; an agreement was entered into in consequence, that the prisoner was to have another bit of ground,

but they quarrelled, and this was not done. The prosecutor received the letter from his wife, and the wife received it from the lad that brings the letters from *Higham*. The *Kettering* postmark was upon the letter. The prisoner, in his examination before the magistrate, said that he had written it in disguise for the prosecutor, and "he knows it. I didn't put it into any post; I gave it to *Smith*, and he did what he liked with it. After I had written, he said, 'd—n you, now I have got you.'" He said further, that *Smith* was not present when he wrote it, but he had before told him what to write, and that he did not know why *Smith* got him to write the letter. The prosecutor was recalled, and denied that any thing of the kind occurred between the prisoner and him, and that he knew nothing of the letter till he received it from his wife. Both the prosecutor and his wife proved that the letter was in the prisoner's hand-writing. The jury found the prisoner guilty, and *Gaselee J.*, who presided, having reserved a case in an indictment for arson against the same prisoner (see tit. *Burning, supra*), respited the judgment in this case also, on the ground that there might be a question, whether the sending the letter was sufficiently proved. At a meeting of ten judges, *January 16. 1836*, it was held that the conviction was right. — *H. T. 1836. MS. Rex v. H. Newill, Northampton Summer assizes, 1835.*

(See *Paddle's case*, *C. C. R.* 484.; *Wagstaff's case*, *ibid.* 398.; *Lloyd's case*, 2 *East*, *P. C.* 1122.; *Jepson's case*, *ibid.* 1123.; *Rex v. Burdett*, 4 *B. & A.* 95.; *Plummer's case*, *C. C. R.* 264.; *Warren v. Warren*, 1 *C. M. & R.* 250.; *Girdwood's case*, 2 *East*, *P. C.* 1120.)

Malicious Injuries to the Person.

(See p. 534.)

PRISONER was indicted on 9 *G. 4. c.* 31. § 11., and the first count charged him with maliciously, &c., attempting to discharge certain loaded arms, to wit, a tin box loaded with gunpowder and peas, at prosecutor, with intent to murder, &c. &c. The second, the like, omitting the description of the arms. The third, with sending a tin box loaded with combustibles, &c., with intent that it should be received and opened by the prosecutor, thereby attempting, &c. At the trial before *Williams J.*, it appeared that the prisoner sent by an ordinary conveyance a package neatly folded up in paper, which prosecutor received the same day at his residence in *Birmingham*; the package contained a tin box, which was of the shape and size of a cigar box, with a lid to put on and pull off, and in it were placed about three pounds of gunpowder and peas in it, and the object was, that the prosecutor should set fire to the powder by the act of opening the box. This was to be effected by the means of "fulminating matches;" these were made of slips of very strong paper, strengthened with tape, containing in its folds detonating powder, on each side of which is placed pounded flint glass, or other hard substance, and the match is so contrived that, by pulling at each end, the flint, &c. is drawn into contact with the detonating powder, and occasions instant explosion. Two of these matches were introduced into the box, one end of which was fastened to the bottom and the other to the lid, by means of two tubes which

Rex v. Newill.

Nov. 14. 1835.
A box filled with gunpowder and so contrived that it would probably explode on being opened, and sent to a person with the intention of destroying him, held not to be "loaded arms" within 9 *G. 4. c.* 31. § 11.
Quære, whether the person so sending the box could be charged with attempting to discharge it, as the explosion must have been caused by the act of the person who

Rex v. John
Mountford.
attempted to
open it.

fitted over each other; and, being among the powder, it was intended that the explosion should take place by pulling off the lid. It happened, however, that the lid fitted too tight, which prevented the prosecutor from *pulling it off straight*, as he intended, and *tried to do*, and caused him to open it by a zig-zag motion, which, instead of stretching the matches, *broke them off*. It appeared, on the evidence of an experienced maker of fire-works who gave the particulars above stated, that, considering the quantity of powder, its confinement, and the necessary position of the person opening the box, the certainty of death was complete in the event of explosion, and it was stated to have been a thousand to one against the escape of the prisoner. The jury found the prisoner guilty, and found also, first, that he had sent the box in the same state in which it was when the prosecutor opened it. Secondly, that the gunpowder had been placed in contact with the matches in order that it might explode. Thirdly, that the machine was calculated by being opened by the prosecutor to kill him. A case was reserved for the opinion of the judges, and the points were, first, whether the thing in question came within the description of "loaded arms." Secondly, whether as the explosion was intended to have been, and must have been, effected by the agency of another, the indictment properly described the attempt to discharge to have been by the act of the prisoner himself. After argument it was held by the judges, of whom ten were present, that the box in question so prepared could not be considered as "loaded arms" within the meaning of the statute.—*M. T. 1835. Rex v. John Mountford, Stafford Summer assizes, 1835.*

(See *Rex v. Coales*, p. 537.)

Nov. 21. 1835.
Where a wound
was caused in
the face of the
prosecutor by
oil of vitriol
which was
thrown upon
him by the pri-
soner: Held,
that it did not
fall within
9 G. 4. c. 31.
§ 12., the
wound not be-
ing immediate;
and further,
6 G. 4. c. 26.
§ 2. having ex-
pressly provid-
ed for this spe-
cies of offence
in Scotland.

The prisoner was tried before Tindal C. J., being indicted under 9 G. 4. c. 31. § 12., for maliciously wounding Samuel Wade. In one count the act was stated to be done with intent to do him grievous bodily harm; and in another count, with intent to disfigure him. Upon the trial it was proved that the prisoner had maliciously thrown a quantity of concentrated sulphuric acid, commonly called oil of vitriol, into the face of the prosecutor, with intent to disfigure him; and the jury found, upon the evidence of the surgeons, that the effect of such act of the prisoner was a wound upon the face of the prosecutor. After conviction, a case was reserved upon the question, whether this was a wounding within the contemplation of the statute. On a meeting of ten judges it was held that the conviction was wrong, on the ground that the wound inflicted was not immediate: and further, by 6 G. 4. c. 126. § 2., the punishment of this particular offence was provided for in Scotland, the first section being a repetition of *Ld. Ellenborough's* act, thereby apparently shewing that this was not within that act.—*M. T. 1835. Rex v. Ann Marrow. Liverpool Summer assizes, 1835. MS.*

(See p. 542.)

Malicious Injuries to Property.

(See p. 549.)

WHERE the prisoner cut and plucked flowers from roots and plants growing in a garden, his object being to steal the flowers,

he may be charged with committing damage and injury upon roots and plants growing in a garden. *Semle.*

(See 7 & 8 G. 4. c. 30. § 21. p. 552.)

Prisoner was tried before *Littledale J.*, for maliciously cutting and wounding *John Cannon*. First count charged it to be with intent to kill and murder. Second count, to maim, disfigure, and disable. Third count, to do him some grievous bodily harm. Fourth count, for assaulting, &c., and wilfully, &c., cutting and wounding *J. C.* with intent to resist and prevent the lawful apprehension and detainer of prisoner for a certain offence by him committed, for which prisoner was then and there liable by law to be apprehended and detained, that is to say, for then and there wilfully and maliciously committing damage and injury upon certain plants and roots then and there growing in a certain garden of and belonging to *H. I.*, &c. Fifth count, that on, &c., at, &c., about the hour of twelve in the night of the same day, the said *J. C.* being then and there a constable of the police, &c., and being then and there on duty, &c., did then and there apprehend and take prisoner, whom he had just cause to suspect, and did suspect of certain evil designs, the said prisoner being then and there in a certain inclosed garden of and belonging to *H. I.* adjoining to the dwelling house of the said *H. I.* there situate, and not giving any good or satisfactory account of himself; and the jurors aforesaid further present, &c., that prisoner assaulted *J. C.*, and then and there wilfully, &c., cut and wounded *J. C.* in and upon the head, &c., with intent in so doing then and there to resist and prevent the lawful apprehension and detainer of prisoner for said last mentioned offence, for which prisoner was then and there liable by law to be apprehended and detained against the statute, &c. *Cannon* was a police constable, and on the 28th June, a little before twelve o'clock at night, he was on duty near an inclosed garden at *Battersea* of *H. Iner*, a market gardener. While he was there he found the prisoner in the garden, stooping down close to the ground. The prisoner jumped up and ran away. *Cannon* ran after him, and caught him getting over a hedge, and he was then in the garden; he caught him by the collar of the jacket, on which the prisoner drew a knife and cut *Cannon* on the forehead between his eyes. A scuffle ensued, in the course of which *Cannon* received several other cuts from the prisoner; then *Cannon* and the prisoner had a struggle, and the prisoner got from *Cannon*. *Iner* afterwards came up, and they searched for the prisoner round the garden, but did not find him that night; he was apprehended the next day. It appeared that the prisoner was cutting or plucking some picotees and carnations in *Mr. Iner's* garden; some were cut and some were broken. It was objected, on the part of the prisoner, that there was no evidence to go to the jury; and as to the last two counts, several particular objections were urged. The jury acquitted the prisoner upon the first three counts, and found him guilty on the last two counts. The jury further found, in answer to questions from the learned judge, that the prisoner wilfully and maliciously plucked or cut flowers from plants or roots in *Mr. Iner's* garden; that his object in so doing was to steal the flowers, and not to damage or spoil the plants or roots; that the prisoner was not an idle and disorderly person; that the prisoner knew that *Cannon* belonged to the police force; that *Cannon* had just cause to suspect and did sus-

Indictment for cutting and wounding to prevent lawful apprehension and detainer by a policeman for committing damage and injury to plants and roots in a garden. It appeared that he was cutting and plucking flowers with intent to steal them. Conviction right.

Rex v. Moses
Fraser.

pect prisoner of an evil design: but that *Cannon* did not require prisoner to give a satisfactory account of himself. On the fourth count the questions arose on 7 & 8 G. 4. c. 29. § 42, 43. and 63., and on 7 & 8 G. 4. c. 30. § 21, 22. 24. and 28.; and as to the fifth count it depended on 10 G. 4. c. 44. § 7. (the Police Act). A case being reserved for the opinion of the judges, it was held at a meeting 24th January 1835, at which all the judges were present, except *Gaselee J.*, *Alderson B.*, and *Patterson J.*, that the conviction was right on the fourth count. — *H. T.* 1835., MS. *Rex v. Moses Fraser, Guildford Summer assizes, 1834.*

Mines.

THE following enactments in regard to damaging mines and works connected with them appear to have been inadvertently omitted in the body of the work.

7 & 8 G. 4.
c. 30.

Damage by letting in water, obstructing ways, &c., felony.

By 7 & 8 G. 4. c. 30. § 6., "If any person shall unlawfully and maliciously cause any water to be conveyed into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall, with the like intent, unlawfully and maliciously pull down, fill up, or obstruct any air-way, water-way, drain, pit, level, or shaft of or belonging to any mine, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly whipped (if the court shall so think fit), in addition to such imprisonment: Provided always, that this provision shall not extend to any damage committed under ground, by any owner of any adjoining mine in working the same, or by any person duly employed in such working."

Provision as to owner of, or workman in, an adjoining mine. Damaging engine, &c. of mine, felony.

§ 7. "If any person shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy, or render useless, any steam engine or other engine for sinking, draining, or working any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, waggon-way, or trunk for conveying materials from any mine, whether such engine, staith, building, erection, bridge, waggon-way, or trunk be completed, or in an unfinished state, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to any of the punishments which the court may award, as herein-before last mentioned."

[As to the offence of setting fire to coal-mines, see tit. *Burnings*, p. 110.; and see further as to mines, tit. *Coal-mines*, in another volume.]

Misdemeanor.

[See p. 564.]

AS the courts of criminal jurisdiction have the power of allowing the expenses of prosecution in certain cases only of misde-

meanor, it may be convenient to insert in this place the enactment by which the same is regulated.

By 7 G. 4. c. 64. § 23., after reciting that "for want of power in the court to order payment of the expenses of any prosecution for a misdemeanor, many individuals are deterred, by the expense, from prosecuting persons guilty of misdemeanors, who thereby escape the punishment due to their offences;" it is enacted, "that where any prosecutor or other person shall appear before any court on recognizance or subpoena, to prosecute or give evidence against any person indicted of any *assault with intent to commit felony, of any attempt to commit felony, of any riot, of any misdemeanor for receiving any stolen property, knowing the same to have been stolen, of any assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer, of any neglect or breach of duty as a peace officer, of any assault committed in pursuance of any conspiracy to raise the rate of wages, of knowingly and designedly obtaining any property by false pretences, of wilful and indecent exposure of the person, of wilful and corrupt perjury, or of subornation of perjury*, every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are herein-before authorized and empowered to order the same in cases of felony; and although no bill of indictment be preferred, it shall still be lawful for the court where any person shall have *bond fide* attended the court, in obedience to any such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony: provided, that in cases of misdemeanor, the power of ordering the payment of expenses and compensation shall not extend to the attendance before the examining magistrate."

7 G. 4. c. 64.
Court may order payment of the expenses of prosecutions in certain cases of misdemeanor.

But not the expenses of attending before the magistrate.

Rex v. Richards and others, T. 9 G. 4., 8 B. & C. 420. An indictment for a riot having been found at the sessions in pursuance of a recognizance entered into by the prosecutor, he afterwards removed it by *certiorari*. Defendants being convicted, an application was made to K. B. that the prosecutor and witnesses might be allowed their costs and expenses. But *Ld. Tenterden* C. J. stated it to be the opinion of the twelve judges, that the act did not apply where the indictment had been removed into the court of K. B. by *certiorari*.

The act does not apply where the indictment has been removed by *certiorari*.

The following case has been decided in respect to the mode of compelling the payment of an order for the allowance of expenses, and also with respect to the right of a prosecutor to have his expenses, who, being bound over to prosecute for a riot at the town sessions, prefers his indictment at the assizes.

Rex v. Jeyes, T. 5 W. 4., 5 Nev. & Mann. 101. A rule *nisi* having been obtained, calling upon *Jeyes*, town clerk and town treasurer of the town of *Northampton*, to shew cause why a *mandamus* should not issue, commanding him to pay to the attorney of one *J. G.* the sums of 49*l.* 6*s.* and 53*l.* 12*s.* for the expenses of witnesses and other charges and expenses attending a prosecution for a riot, tried at the last assizes for *Northampton*, pursuant to the several orders made by the court for that purpose, the following facts appeared from the affidavits:—

The court of K. B. will not grant a *mandamus* to the treasurer of a town or county for the payment of the costs, &c. of prosecutor and witnesses on a

Rex v. Jeyes.

trial for a riot, pursuant to the order of the judge of assize under 7 G. 4. c. 64. § 23., on the ground that he is the officer of other persons, and that K. B. will not interfere with their authority over him. In such case the proper course of proceeding is by indictment. Where the prosecutor, being bound over to prosecute at a town sessions, preferred his indictment at the assizes, semble, that he is not entitled to his expenses, &c., but aliter as to the witnesses.

J. G. having made complaint to the magistrates of the town of *Northampton*, that certain persons had committed a riot and assault within the town, he was bound over to prosecute at the town quarter sessions. Instead, however, of prosecuting at the sessions, he preferred an indictment for a riot at the county assizes, which indictment being found, the defendants were tried thereupon before *Park J.* and convicted. The learned judge at first refused to make any order for the payment of the costs of the prosecution, on the supposition that such order could not be made, except when the prosecutor had entered into recognizances to appear and prosecute at the assizes, but subsequently the two orders above-mentioned were made under the direction of the judge; one of the orders being for the expenses of the witnesses who had been called and examined upon circuit-subpoenas, obtained from the clerk of the assize by the prosecutor, and the other order being for the expenses of the prosecutor. These orders being shewn to Mr. *Jeyes*, he refused to pay the sums mentioned in them. After cause shewn,—*Ld. Denman C. J.*: With respect to the validity of one of these orders I have some doubt; with respect to the other, which directs the payment of the costs of the witnesses, I have none. There is considerable doubt whether, when an inferior officer refuses to do his duty, he being amenable to other persons, this court will under any circumstances interfere by *mandamus*. It is not desirable to multiply applications of this sort, as would be the case if we were to make this rule absolute. In *Rex v. Bristol* (a), the court said that they would not descend so low as to grant a *mandamus* to an inferior officer to obey an order of justices. Here is another remedy by indictment. The indictment, though an imperfect remedy, must be considered as some remedy. The treasurer will, after one conviction, obey the order. It is true that in *Rex v. The Commissioners of Dean Inclosure* (b), and *Rex v. Severn and Wye Railway Company* (c), strong observations are made by *Ld. Ellenborough* and *Abbott C. J.*; but those cases are different, and do not govern that which is now before us. The case of *Rex v. The Treasurer of the County of Surrey* (d), is really directly in point; for the statute of 7 G. 4. c. 65. is founded upon 58 G. 3. c. 70.: the language in the two statutes is the same, and the same direct duty is cast on the county treasurer by either statute. I am of opinion that we ought not to proceed by *mandamus*. This party is the officer of other persons, and we must not interfere with their authority over him. We must not assume that an indictment would be no remedy. In one respect it would be a better remedy than a *mandamus*, for it would have the effect indirectly of producing obedience, and also of punishing the party in case of wilful disobedience. — *Littledale J.* In *Rex v. Bristol*, it is laid down distinctly that a *mandamus* will not lie to an inferior officer. I should feel much inclined to act on this rule; but here a difficulty occurs, owing to the act of parliament pointing out the treasurer as a distinct officer, which, I think, makes this case not to be exactly within the rule. But in *Rex v. The Treasurer of Surrey*, the court refused a *mandamus* under precisely the same circumstances. The treasurer is only the servant of the justices; and to

(a) 6 T. R. 168.
(c) 2 B. & A. 646.

(b) 2 M. & S. 80.
(d) 1 Chitty's Rep. 650.

such, a *mandamus* ought not to issue. In *Lord Boston's case* the application was against principals. Then with regard to the merits: I think that the witnesses are clearly entitled to their costs, but as to the prosecutor's right I have much doubt. The inclination of my mind is strongly that he is not entitled. Here the prosecutor was bound over to the sessions, and prosecuted at the assizes. The act intends only to give the prosecutor his costs, when he has previously been before magistrates who have thought it a case proper to be referred to the court. That cannot be said to have been the case here. — *Patteson J.* I entirely agree that we ought not to grant this *mandamus*. In *Rex v. Bristow* the court thought it necessary to decide on the broad ground that the party was a ministerial officer. This was followed up by *Rex v. Treasurer of Surrey*, which is a direct authority. It is said that an indictment would be no remedy in this case; that is not so: there may be a *fine*; and, in truth, the indictment is a quicker, and therefore, probably, a better remedy. In *Rex v. Severn and Wye Railway Company*, there was something to be done by the parties to whom the *mandamus* was sent, — not a mere payment of money. — *Williams J.* I entirely concur. It is said that a *mandamus* is a more speedy and complete remedy: the party might make a return and cause great delay. But the rule laid down in *Rex v. Bristow* has long been the prevalent doctrine, I observe that even in *Rex v. Severn and Wye Railway Company*, which is relied upon as somewhat relaxing the rule, *Ld. Tenterden* entertained considerable doubts during the discussion. That case is quite distinguishable. — Rule discharged.

(See further, tit. *Costs*, in another vol.)

[For cases of misdemeanor in which the court has the power of inflicting the punishment of hard labour as well as imprisonment, see tit. *Judgment*, p. 408.]

Hard labour in cases of misdemeanor.

Nuisance.

Highways.

(See p. 576.)

AN important change has been effected in regard to the obligation on the county to repair highways passing over and adjoining to bridges built subsequently to the passing of 5 & 6 W. 4. c. 50.

(See p. 621., and tit. *Highways*, in another vol.)

By 5 & 6 W. 4. c. 50. § 21., "if any bridge shall hereafter be built, which bridge shall be liable to be repaired by and at the expense of any county, or part of any county, then and in such case, all highways leading to, passing over, and next adjoining to such bridge, shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike road, who were by law before the erection of the said bridge bound to repair the said highways: Provided nevertheless, that nothing herein contained shall extend or be construed to extend to exonerate or discharge any county, or any part of any county

5 & 6 W. 4. c. 50.

As to repair of highways adjoining bridges hereafter to be built.

Raised causeways, &c.

5 & 6 W. 4.
c. 50.

from repairing or keeping in repair the walls, banks, or fences of the raised causeways and raised approaches to any such bridge, or the land arches thereof."

With reference to a highway made so by dedication to the public, and becoming thereby liable to be repaired by the parish in which it is situate, the following provision has been made by the same stat. (See p. 579. *et seq.*)

5 & 6 W. 4.
c. 50.

When new
highways are to
be kept in re-
pair by parishes.

By 5 & 6 W. 4. c. 50. § 23., "no road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be hereafter set out as a private driftway or horse-path in any award of commissioners under an inclosure act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public, shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made or shall make the same in a substantial manner, and of the width required by this act, and to the satisfaction of the said surveyor, and of any two justices of the peace of the division in which such highway is situate in petty sessions assembled, who are hereby required, on receiving notice from such person, or body politic or corporate, to view the same, and to certify that such highway has been made in a substantial manner, and of the width required by this act, at the expense of the party requiring such view, which certificate shall be enrolled at the quarter sessions holden next after the granting thereof, then and in such case, after the said highway shall have been used by the public, and duly repaired and kept in repair by the said person, body politic or corporate, for the space of twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate: Provided nevertheless, that on receipt of such notice as aforesaid the surveyor of the said parish shall call a vestry meeting of the inhabitants of such parish, and if such vestry shall deem such highway not to be of sufficient utility to the inhabitants of the said parish to justify its being kept in repair at the expense of the said parish, any one justice of the peace, on the application of the said surveyor, shall summon the party proposing to make the new highway to appear before the justices at the next special sessions for the highways to be held in and for the division in which the said intended highway shall be situate: and the question as to the utility as aforesaid of such highway shall be determined at the discretion of such justices."

Proviso.

By 5 & 6 W. 4. c. 50., the stat. of 13 G. 3. c. 78., and other acts relating to highways, are repealed.

The same stat. contains the following provision in regard to the allowance of costs on the trial of an indictment for the non-repair of a road. (See p. 599.)

Court may
award costs to
the prosecutor.

§ 98. "It shall and may be lawful for the court before whom any indictment shall be preferred for not repairing highways to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said court that the defence made to such indictment was frivolous or vexatious."

It is no longer competent to a justice of the peace, or other

person, to make a presentment of a highway on account of its being out of repair. (See p. 601.)

By 5 & 6 W. 4. c. 50. § 99., "from and after the commencement of this act it shall not be lawful to take or commence any legal proceeding, by presentment, against the inhabitants of any parish, or other person, on account of any highway or turnpike road being out of repair."

In *Rex v. Bishop Auckland*, T. 4 W. 4. 1 Ad. & E. 744., it was held that the rated inhabitants of a parish were not competent witnesses, under 54 G. 3. c. 170. § 9., on an indictment for the non-repair of a highway, thereby overruling the decision in *Rex v. Hayman*. (See p. 595.)

The competency of persons to give evidence in any legal proceedings under the present stat. is regulated by the following enactment.

By 5 & 6 W. 4. c. 50. § 100., "no person shall be deemed incompetent to give evidence or be disqualified from giving testimony or evidence, in any action, suit, prosecution, or other legal proceedings, to be brought or had in any court of law or equity, or before any justice or justices of the peace, under or by virtue of this act, by reason of being an inhabitant of the parish in which any offence shall be committed, or of being a treasurer, clerk, surveyor, district surveyor, assistant surveyor, collector or other officer appointed by virtue of this act, nor shall such testimony or evidence for any of the reasons aforesaid be rejected or liable to be questioned or set aside."

(See tit. *Highways*, in another Vol.)

Bridges.

[See *Rex v. Inhabitants of Oxfordshire*, p. 622.]

REX v. Whitney, E. 5 W. 4., 4 Nev. & Mann. 594. Indictment against the parish of *Whitney* for the non-repair of a certain highway, part of which, containing in length 374 yards from A. to B., was alleged to be out of repair. At the trial before *Parke J.*, at the last *Herefordshire* assizes, it appeared that, upon an indictment for the non-repair of the same road in 1828, the defendants having first pleaded not guilty, afterwards withdrew their pleas and pleaded guilty. It appeared, also, that within the limits of the part of the road alleged to be out of repair, there was a mill stream, over which there was a stone arch, nine feet broad and five feet and a half above the ordinary level of the water, which was ordinarily three feet deep, but occasionally, in consequence of rain, much deeper. The bridge appeared, by a date on the key-stone, to have been built in 1762. There were no parapets, nor was there any protection on either side. Surveyors, who were called on the part of the prosecution, and who described the state of the bridge and of the road adjoining it, said that the arch was a culvert, and not a bridge, because it had no parapets. It was contended, on the part of the defendants, that this was a public bridge, which, with the approaches, the county and not the parish were liable to repair. This was denied on the part of the prosecutor. It was also contended by the prosecutor, that the record of the conviction in 1828 was conclusive evidence of liability, on the part of the parish to repair the whole road, including the bridge, between the limits included in that indictment. These

5 & 6 W. 4. c. 50.

No presentment against inhabitants for highway.

On indictment for non-repair of road rated inhabitants not competent witnesses.

Inhabitants and officers in parishes may give evidence.

An arch thrown over a stream of water, usually about three feet deep, but much deeper in time of rain: held not to be such a bridge as the county are bound to repair, but part of a highway which is chargeable to the parish.

Judgment against a parish on a plea of guilty to an indictment for non-repair of a highway is not conclusive against them as to their liability to repair.

Semb.

See *contrà* as to the last point.

R. v. Whistler.
Reg. v. St. Pancras, p. 587.

two questions being argued before the learned judge, and put to him as questions for his decision, his lordship said, "I should say that the question as to whether this is a bridge or not, is a question for the jury; but if you throw it upon me, I should say that it was a culvert, and such a culvert as the county are not bound to repair. If I am to say that such a thing as this is part of the road, I am of opinion that it is. You have a right to move it if you like. I think you have concluded yourselves by the indictment of 1828." The only question left to the jury was, whether the road was out of repair? and they being of opinion that it was so, found the defendants guilty.—*Ld. Denman C. J.* I think that there is no ground for granting this rule. If the judge had laid it down as a point of law, that no bridge without a parapet could be such a bridge as the county would be liable to repair; his ruling would have been wrong. It is impossible to say that the mere absence of parapets can prevent a bridge from being such a bridge as the county are liable to repair. Nor, on the other hand, can it be said, that the mere fact of an arch passing over a stream is sufficient to constitute a bridge so as to charge the county. But the question whether this particular arch was a county bridge or not, appears to have been left to the judge, and he decided it as a question of fact, not of law. The question having been put to him, I see no objection to his deciding as he did. There must be an arbitrary power somewhere, either in the jury or the judge, to say whether a particular arch is a county bridge or not. The learned judge laid down no point of law. With regard to the question as to the judgment by default, when the learned judge said, "I think you have concluded yourselves by the indictment of 1828," he appears merely to have adverted to it as a strong fact.—*Littledale J.* If the learned judge had said that the absence of parapets to a bridge deprived it of the character of a county bridge, I should have thought he was wrong. But he laid down no such rule. And with regard to what he said about the former indictment, I apprehend that he did not say that *in point of law* it was conclusive.—*Patteson J.* I am of the same opinion. With regard to *Reg. v. Oxfordshire (a)*, I do not understand that case as laying down that every arch thrown over a *cursus aquæ* is a bridge, but only as deciding that, in order to constitute a bridge, there must be *cursus aquæ*.—*Coleridge J.* concurred.—*Rule refused.*

Perjury.

[See p. 656. *et seq.*]

THE following stat. for the abolition of unnecessary oaths contains enactments which are important with reference to this title. By 5 & 6 W. 4. c. 62. § 2., "In any case where, by any act or acts made or to be made relating to the revenues of customs or excise, the post office, the office of stamps and taxes, the office of woods and forests, land revenues, works, and buildings, the war office, the army pay office, the office of the treasurer of the navy, the accountant-general of the navy, or the ordnance, H. M.

5 & 6 W. 4.
 c. 62.

Lords of the
 treasury etc.
 empowered to sub-
 stitute a declaration
 in lieu
 of an oath, &c.
 in certain cases.

treasury, Chelsea hospital, Greenwich hospital, the board of trade, or any of the offices of H. M.'s principal secretaries of state, the India board, the office for auditing the public accounts, the national debt office, or any office under the control, direction, or superintendence of the lords commissioners of H. M.'s treasury, or by any official regulation in any department, any oath, solemn affirmation, or affidavit might, but for the passing of this act, be required to be taken or made by any person on the doing of any act, matter, or thing, or for the purpose of verifying any book, entry, or return, or for any other purpose whatsoever, it shall be lawful for the lords commissioners of H. M.'s treasury or any three of them, if they shall so think fit, by writing under their hands and seals, to substitute a declaration to the same effect as the oath, solemn affirmation, or affidavit which might but for the passing of this act be required to be taken or made; and the person who might under the act or acts imposing the same be required to take or make such oath, solemn affirmation, or affidavit shall, in presence of the commissioners, collector, or other officer or person empowered by such act or acts to administer such oath, solemn affirmation, or affidavit, make and subscribe such declaration, and every such commissioner, collector, other officer or person is hereby empowered and required to administer the same accordingly."

5 & 6 W. 4.
c. 62.

§ 3. "When the said lords commissioners of H. M.'s treasury or any three of them shall, in any such case as herein-before mentioned, have substituted, in writing, under their hands and seals, a declaration in lieu of an oath, solemn affirmation, or affidavit, such lords commissioners shall, so soon as conveniently may be, cause a copy of the instrument substituting such declaration to be inserted and published in the *London Gazette*; and from and after the expiration of 21 days next following the day of the date of the gazette wherein the copy of such instrument shall have been published, the provisions of this act shall extend and apply to each and every case specified in such instrument, as well and in the same manner as if the same were specified and named in this act."

Declaration substituted to be published in the Gazette, and after 21 days from the date thereof the provisions of this act to apply;

§ 4. "After the expiration of the said 21 days it shall not be lawful for any commissioner, collector, officer, or other person to administer or cause to be administered, or receive or cause to be received, any oath, solemn affirmation, or affidavit, in the lieu of which such declaration as aforesaid shall have been directed by the lords commissioners of H. M.'s treasury to be substituted."

and no oath to be administered in lieu of which such declaration has been directed.

§ 5. "If any person shall make and subscribe any such declaration as herein-before mentioned in lieu of any oath, solemn affirmation, or affidavit by any act or acts relating to the revenues of customs or excise, stamps and taxes, or post office, required to be made on the doing of any act, matter, or thing, or for verifying any book, account, entry, or return, or for any purpose whatsoever, and shall wilfully make therein any false statements as to any material particular, the person making the same shall be deemed guilty of a misdemeanor."

False declarations in matters relating to certain revenues a misdemeanor.

§ 6. "Provided always, and be it enacted, that nothing in this act contained shall extend or apply to the oath of allegiance in any case in which the same now is or may be required to be taken by any person who may be appointed to any office, but that such

Oath of allegiance still to be required in all cases.

*S & C W. 4.
c. 62.*

*Oaths in courts
of justice, &c.
still to be taken.*

*Universities of
Oxford and
Cambridge, and
other bodies,
may substitute a
declaration in
lieu of an oath.*

*Churchwar-
den's and sides-
man's oath abo-
lished, and a de-
claration to be
made in lieu
thereof.*

*Declaration
substituted for
oaths and affi-
davits by per-
sons acting in
turnpike trusts.*

oath of allegiance shall continue to be required, and shall be administered and taken, as well and in the same manner as if this act had not been passed."

§ 7. "Provided also, and be it enacted, that nothing in this act contained shall extend or apply to any oath, solemn affirmation, or affidavit which now is or hereafter may be made or taken, or be required to be made or taken, in any judicial proceeding in any court of justice, or in any proceeding for or by way of summary conviction before any justice or justices of the peace, but all such oaths, affirmations, and affidavits shall continue to be required, and to be administered, taken, and made, as well and in the same manner as if this act had not been passed."

§ 8. "It shall be lawful for the universities of *Oxford and Cambridge*, and for all other bodies corporate and politic, and for all bodies now by law or statute, or by any valid usage, authorized to administer or receive any oath, solemn affirmation, or affidavit, to make statutes, bye-laws, or orders authorizing and directing the substitution of a declaration in lieu of any oath, solemn affirmation, or affidavit now required to be taken or made: Provided always, that such statutes, bye-laws, or orders be otherwise duly made and passed according to the charter, laws, or regulations of the particular university, other body corporate and politic, or other body so authorized as aforesaid."

§ 9. "And whereas persons serving the offices of churchwarden and sidesman are at present required to take an oath of office before entering upon the execution thereof, and also an oath on quitting such office, and it is expedient that a declaration shall be substituted for such oath of office, and that the oath on quitting the same shall be abolished; be it enacted, that in future every person entering upon the office of churchwarden or sidesman, before beginning to discharge the duties thereof, shall, in lieu of such oath of office, make and subscribe, in the presence of the ordinary or other person before whom he would, but for the passing of this act, be required to take such oath, a declaration that he will faithfully and diligently perform the duties of his office, and such ordinary or other person is hereby empowered and required to administer the same accordingly: Provided always, that no churchwarden or sidesman shall in future be required to take any oath on quitting office, as has heretofore been practised."

§ 10. "In any case where, under any act or acts for making, maintaining, or regulating any highway, or any road, or any turnpike road, or for paving, lighting, watching, or improving any city, town, or place, or touching any trust relating thereto, any oath, solemn affirmation, or affidavit might, but for the passing of this act, be required to be taken or made by any person whomsoever, no such oath, solemn affirmation, or affidavit shall in future be required to be or be taken or made, but the person who might under the act or acts imposing the same be required to take or make such oath, solemn affirmation, or affidavit shall, in lieu thereof, in the presence of the trustee, commissioner, or other person before whom he might under such act or acts be required to take or make the same, make and subscribe a declaration to the same effect as such oath, solemn affirmation, or affidavit, and such trustee, commissioner, or other person is hereby empowered and required to administer and receive the same."

§ 11. "Whenever any person or persons shall seek to obtain any patent under the great seal for any discovery or invention, such person or persons shall, in lieu of any oath, affirmation, or affidavit which heretofore has or might be required to be taken or made upon or before obtaining any such patent, make and subscribe, in the presence of the person before whom he might, but for the passing of this act, be required to take or make such oath, affirmation, or affidavit, a declaration to the same effect as such oath, affirmation, or affidavit; and such declaration, when duly made and subscribed, shall be to all intents and purposes as valid and effectual as the oath, affirmation, or affidavit in lieu whereof it shall have been so made and subscribed."

5 & 6 W. 4.
c. 62.

Declaration substituted for oaths and affidavits heretofore required on taking out a patent.

§ 12. "Where by any act or acts at the time in force for regulating the business of pawnbrokers any oath, affirmation, or affidavit might, but for the passing of this act, be required to be taken or made, the person who by or under such act or acts might be required to take or make such oath, affirmation, or affidavit shall in lieu thereof make and subscribe a declaration to the same effect; and such declaration shall be made and subscribed at the same time, and on the same occasion, and in the presence of the same person or persons, as the oath, affirmation, or affidavit in lieu whereof it shall be made and subscribed would by the act or acts directing or requiring the same be directed or required to be taken or made; and all and every the enactments, provisions, and penalties contained in or imposed by any such act or acts, as to any oath, affirmation, or affidavit thereby directed or required to be taken or made, shall extend and apply to any declaration in lieu thereof, as well and in the same manner as if the same were herein expressly enacted with reference thereto."

Declaration substituted for oaths and affidavits required by acts as to pawnbrokers.

Penalties as to such oaths, &c. to apply to declarations.

§ 13. "And whereas a practice has prevailed of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace or other person by whom such oaths or affidavits have been administered or received: and whereas doubts have arisen whether or not such proceeding is illegal; for the more effectual suppression of such practice and removing such doubts, be it enacted, that from and after the commencement of this act it shall not be lawful for any justice of the peace or other person to administer, or cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being: Provided always, that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the houses of parliament or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively."

Justices not to administer oaths, &c. touching matters whereof they have no jurisdiction by statute.

Proviso.

§ 14. "In any case in which it has been the usual practice of the bank of *England* to receive affidavits on oath to prove the death of any proprietor of any stocks or funds transferable there, or to

Declaration substituted for oaths and affidavits required

5 & 6 W. 4.
c. 62.

by bank of
England on the
transfer of
stock.

Declaration
substituted for
oaths and affi-
davits required
by 5 G. 2. c. 7.
and 34 G. 3.
c. 15.

Declaration in
writing suffi-
cient to prove
execution of
any will, codi-
cil, &c.

identify the person of any such proprietor, or to remove any other impediment to the transfer of any such stocks or funds, or relating to the loss, mutilation, or defacement of any bank note, or bank post bill, no such oath or affidavit shall in future be required to be taken or made, but in lieu thereof the person who might have been required to take or make such oath or affidavit shall make and subscribe a declaration to the same effect as such oath or affidavit."

§ 15. "And whereas an act was passed in the fifth year of the reign of his late majesty king George the second, intituled *An act for the more easy recovery of debts in H. M.'s plantations and colonies in America*: and whereas another act was passed in the fifty-fourth year of the reign of his late majesty king George the third, intituled *An act for the more easy recovery of debts in H. M.'s colony of New South Wales*: and whereas it is expedient that in future a declaration should be substituted in lieu of the affidavit on oath authorized and required by the said recited acts; be it therefore enacted, that from and after the commencement of this act, in any action or suit then depending or thereafter to be brought or intended to be brought in any court of law or equity within any of the territories, plantations, colonies, or dependencies abroad, being within and part of H. M.'s dominions, for or relating to any debt or account wherein any person residing in Great Britain and Ireland shall be a party, or for or relating to any lands, tenements, or hereditaments or other property situate, lying, and being in the said places respectively, it shall and may be lawful to and for the plaintiff or defendant, and also to and for any witness to be examined or made use of in such action or suit, to verify or prove any matter or thing relating thereto by solemn declaration or declarations in writing in the form in the schedule hereunto annexed, made before any justice of the peace, notary public, or other officer now by law authorized to administer an oath, and certified and transmitted under the signature and seal of any such justice, notary public duly admitted and practising, or other officer, which declaration, and every declaration relative to such matter or thing as aforesaid, in any foreign kingdom or state, or to the voyage of any ship or vessel, every such justice of the peace, notary public, or other officer shall be and he is hereby authorized and empowered to administer or receive; and every declaration so made, certified, and transmitted shall in all such actions and suits be allowed to be of the same force and effect as if the person or persons making the same had appeared and sworn or affirmed the matters contained in such declaration *viva voce* in open court, or upon a commission issued for the examination of witnesses or of any party in such action or suit respectively; provided that in every such declaration there shall be expressed the addition of the party making such declaration, and the particular place of his or her abode."

§ 16. "It shall and may be lawful to and for any attesting witness to the execution of any will or codicil, deed or instrument in writing, and to and for any other competent person, to verify and prove the signing, sealing, publication, or delivery of any such will, codicil, deed, or instrument in writing, by such declaration in writing made as aforesaid, and every such justice, notary, or other officer shall be and is hereby authorized and empowered to administer or receive such declaration."

§ 17. "In all suits now depending or hereafter to be brought in any court of law or equity by or in behalf of H. M., his heirs and successors, in any of his said majesty's territories, plantations, colonies, possessions, or dependencies, for or relating to any debt or account, H. M., his heirs and successors, shall and may prove his and their debts and accounts and examine his or their witness or witnesses by declaration in like manner as any subject or subjects is or are empowered or may do by this present act."

3 & 6 W. 4.
c. 62.

Suits on behalf of his majesty to be proved by declaration.

§ 18. "And whereas it may be necessary and proper in many cases not herein specified to require confirmation of written instruments or allegations, or proof of debts, or of the execution of deeds or other matters; be it therefore further enacted, that it shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorized to administer an oath, to take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to this act annexed; and if any declaration so made shall be false or untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor."

Voluntary declaration in the form in the schedule may be taken.

Making false declaration a misdemeanor.

§ 19. "Whenever any declaration shall be made and subscribed by any person or persons under or in pursuance of the provisions of this act, or any of them, all and every such fees or fee as would have been due and payable on the taking or making any legal oath, solemn affirmation, or affidavit shall be in like manner due and payable upon making and subscribing such declaration."

Fees on oaths payable on declarations substituted in lieu thereof.

§ 20. "In all cases where a declaration in lieu of an oath shall have been substituted by this act, or by virtue of any power or authority hereby given, or where a declaration is directed or authorized to be made and subscribed under the authority of this act, or of any power hereby given, although the same be not substituted in lieu of an oath heretofore legally taken, such declaration, unless otherwise directed under the powers hereby given, shall be in the form prescribed in the schedule hereunto annexed."

Declarations to be in the form prescribed by schedule.

§ 21. "In any case where a declaration is substituted for an oath under the authority of this act, or by virtue of any power or authority hereby given, or is directed and authorized to be made and subscribed under the authority of this act, or by virtue of any power hereby given, any person who shall wilfully and corruptly make and subscribe any such declaration, knowing the same to be untrue in any material particular, shall be deemed guilty of a misdemeanor."

Persons making false declaration deemed guilty of a misdemeanor.

Schedule referred to by the foregoing Act.

*I A. B. do solemnly and sincerely declare, that _____
and I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of an act made and passed in the _____ year of the reign of his present majesty, intituled An act [here insert the title of this act].*

Polygamy.

[See *Rex v. Edwards*, p. 677.]

THE following case shews that the offence of bigamy may be committed, although the second marriage was contracted under circumstances which would render it invalid in all other respects:—

In a case of bigamy, where the prisoner married the second wife not by her real name, but by a false name purposely assumed, held, that the crime was nevertheless complete.

On an indictment for bigamy, it appeared that the prisoner, having been previously married in 1828, contracted, during the lifetime of his first wife, a second marriage with one *Eliza Brown*, under the name of *Eliza Thick*; and the second wife proved that she had never been known by the name of *Thick*, but had assumed it when the banns were published, that her neighbours might not know that she was the person intended. An objection was made that the offence was not complete; for that as the second marriage had been celebrated under a false name, it was void *ab initio*.—But *per Gurney B.* That only applies to the first marriage; and I am of opinion that the parties cannot be allowed to evade the punishment for an offence, by contracting a concertedly invalid marriage.—Verdict, guilty. *Rex v. Person*, *Maidstone Winter assizes*, 1832, 5 C. & P. 412.

[See *Rex v. Tibshelf*, 1 B. & Ad. 190. p. 676., and Vol. IV. p. 501.; *Rex v. Wroxton*, 4 B. & Ad. 640. p. 676., and Vol. IV. p. 503.; *Rex v. Allison*, C. C. R. 109. p. 674.]

Post Office, Offences relative to.

[See p. 687. *et seq.*]

5 & 6 W. 4 c. 81.

So much of the recited acts as inflicts the punishment of death for letter stealing and sacrilege repealed, and transportation substituted.

BY 5 & 6 W. 4. c. 81., reciting 52 G. 3. c. 143. (a) (see p. 693.), and also 7 & 8 G. 4. c. 29. § 10. (relating to sacrilege, see p. 790.) and also reciting, that “whereas it is expedient that a lesser punishment than that of death should be provided for the punishment of the offenders convicted of any of the offences so specified in the said act of the fifty-second year of the reign of his late majesty king *George* the third, and in the said act of the seventh and eighth years of the reign of king *George* the fourth,” it is enacted “that so much of each of the said acts as inflicts the punishment of death upon persons convicted of any of the offences therein and herein-before specified shall be and the same is hereby repealed, and that from and after the passing of this act every person convicted of any of the offences in the said act so specified, or of aiding or abetting counselling or procuring the commission thereof, shall be liable to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned, with or without hard labour, in the common gaol or house of correction for any term not exceeding four years.”

(a) By which stealing letters from the post, mail, &c. is made a capital felony.

By 6 W. 4. c. 4., Whereas by an act passed in the last session of parliament, intituled *An act for abolishing capital punishments in cases of letter stealing and sacrilege*, the punishment of death was taken away in cases of letter stealing and sacrilege; but by reason of a clerical error in copying the same, a doubt may be entertained whether persons guilty of such offences are now by law liable to any punishment: be it therefore enacted by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the same act shall be read as if, instead of the words 'in the said act so specified,' the words 'in the said acts so specified' had been inserted in the said act of the last session; and that all persons who may hereafter be duly convicted of any of the offences mentioned in the said act of the last session shall and may be sentenced, by the court or judge by or before whom such offenders may be tried, to transportation for life, or for any term of not less than seven, or to be imprisoned for any term not exceeding three years, with or without hard labour, and for any period of solitary confinement during such imprisonment, at the discretion of such court or judge.

6 W. 4. c. 4.

How recited act shall be read.

Persons convicted of offences under the same to be punished at discretion of the judge.

Sacrilege.

[See p. 790.]

[See 5 & 6 W. 4. c. 81. and 6 W. 4. c. 1. *suprà*.]

Seamen.

[See p. 791. *et seq.*]

THE following enactments have reference to offences committed in regard to seamen on board merchant ships:—

5 & 6 W. 4. c. 19. § 38. "Whereas by an act passed in the ninth year of the reign of his late majesty king George the fourth, for consolidating and amending the statutes in England relative to offences against the person, a summary jurisdiction (a) is provided for the punishment of persons guilty of common assaults and batteries: and whereas it is expedient that the provisions of the said act should be extended to similar offences committed on board merchant ships as herein-after provided; be it therefore further enacted, that in the case of any assault or battery which shall after the commencement of this act be committed on board any merchant ship belonging to any subject of the U. K. in any place at sea, or out of H. M.'s dominions, it shall be lawful for any two justices of the peace in any part of H. M.'s dominions, upon complaint of the party aggrieved, to hear and determine any such complaint, and to proceed and make such adjudication thereon as by the said act any two justices are empowered to do,

5 & 6 W. 4. c. 19.

Common assaults committed abroad on board merchant ships may be summarily punished by two justices at home.

(a) 9 G. 4. c. 31. § 27. (see p. 547.)

Police

[See *Reg.*

THE following case is hereby enacted, altho' it is expedient to amend respects: —

In a case of bigamy, where the prisoner married the second wife not by her real name, but by a false name purposely assumed, held, that the crime was nevertheless complete.

On an indictment, ship belonging to any subject of the U. K. having been and leave behind, or shall otherwise wilfully lifetime of H. M.'s dominions, any person belonging to his crew, she has' return to or arrival of such ship in the U. K., or before sume' completion of the voyage or voyages for which such per- mip' shall have been engaged, whether such person shall have w' formed part of the original crew or not, every person so offending shall be deemed guilty of a misdemeanor, and shall suffer such punishment by fine or imprisonment or both as to the court be- fore which he shall be convicted shall seem meet; and the said offence may be prosecuted by information at the suit of the at- torney-general on behalf of H. M., or by indictment or other proceeding in any court having criminal jurisdiction in H. M.'s dominions at home or abroad, where such master or other person as aforesaid shall happen to be, although the place where the offence may be therein averred to have been committed (which averment is hereby required to be substantially according to the fact), shall appear to be out of the ordinary local jurisdiction of such court; and such court is hereby authorized to issue a com- mission or commissions for the examination of any witnesses who may be absent or out of the jurisdiction of the court; and at the trial the depositions taken under such commission or commis- sions, if such witnesses shall be then absent, shall be received in evidence."

[See 9 G. 4. c. 81. § 30. p. 55.]

§ 41. "No such master shall discharge any individual person of his crew, whether *British* subject or foreigner, at any of H. M.'s colonies or plantations, without the previous sanction in writing of the governor, lieutenant-governor, secretary, or other officer appointed in that behalf by the government there, or in the absence of all such authorities at or near to the port or place at which the ship shall be then lying, then of the chief officer of cus- toms of such colony or plantation resident at or near to such port or place; nor shall he discharge any such person at any other place abroad without the like previous sanction in writing of H. M.'s minister, consul, or vice-consul there, or in the absence of any such functionary, then of two respectable merchants resi- dent there; all which said functionaries respectively are hereby authorized and required, and all which said merchants are hereby authorized, in a summary way to inquire into the grounds of any such proposed discharge by examination on oath, and thereupon to grant or refuse such sanction according to their discretion, having regard to the objects of this act."

Seamen not to be discharged abroad, with- out sanction of one of certain functionaries.

§ 42. "No such master shall be at liberty to leave behind at any place abroad, either on shore or at sea, any person of his crew as aforesaid, on the plea of such person not being in a condition to proceed on the voyage, or having deserted from the ship, or otherwise disappeared, unless upon a previous certificate in writing of one of such functionaries or merchants as aforesaid, if there be any such at or within a reasonable distance from the place where the ship shall then be, if there be time to procure the same, certifying that such person is not in such condition, or has deserted or disappeared, and cannot be brought back: and all such functionaries as aforesaid are hereby authorized and required, on the application of any such master, to inquire by examination on oath into the circumstances, and to give or refuse such certificate according to the result of such examination."

§ 48. "If any such master shall leave behind any one of his crew as aforesaid contrary to this act, in any indictment or proceeding the proof of his having obtained such certificate as aforesaid shall be upon him, it being the intention hereof that, except in the case of entering into H. M.'s naval service, no person of the crew shall be discharged, either with or without his consent, in any place abroad where such functionary can be found, unless he shall have given such sanction thereto."

5 & 6 W. 4.
c. 19.

Nor to be left abroad on the plea of incapacity to proceed, desertion, or disappearance, without a similar authority.

If any of the crew are left behind, the proof of sanction or authority shall be upon the master.

Sessions.

[See *Rex v. Justices of Leicestershire* and the following cases, p. 822.]

REX v. Justices of Suffolk, T. 5 W. 4., 5 Nev. & Mann. 139.

Robert Hewes was indicted at the *Easter* quarter sessions for the county of *Suffolk*, in 1835, for maliciously poisoning some horses belonging to his master. At the trial it appeared that the prisoner had administered to the horses a root, cut into pieces, called bank-break, which caused a slow inflammation, of which they died. The defence set up by the prisoner was, that this drug was of a stimulating nature, and was frequently administered to horses to improve their coats, and that he had given the root to the horses for this purpose, and had not acted from a malicious motive. At the conclusion of the case, the prisoner's counsel contended that the prisoner was entitled to an acquittal, as there was no proof that the act was done maliciously, and he cited a passage from third institute. (a) The chairman summed up the evidence, and the jury returned a verdict of "guilty by mischance." This verdict was entered by the clerk of the peace, in the minute book of the proceedings of the sessions. The counsel for the prisoner submitted that this finding of the jury was a good special verdict, and that the prisoner was upon that finding entitled to an acquittal. The chairman, however, told the jury that he could not receive this verdict, and that they must find in terms either that the prisoner was guilty or not guilty. The jury again retired, and after a short time returned and found the prisoner guilty, but recommended

On application for a mandamus, it being contended that on a trial at the quarter sessions the jury had found a special verdict which amounted to an acquittal, whereas the sessions entered a verdict of guilty; K. B. refused to interfere in requiring the minute of the verdict to be entered according to the fact. The proper entry of the verdict is matter for the consideration of the court before which the trial

(a) *Cap. 15. p. 67.* "Of Burning of Houses." If it be done by mischance or negligence, it is not felony.

Rex v. Justices of Suffolk.

takes place. Semble, that the proper course is to apply to the secretary of state for a pardon.

him to mercy: the chairman asked them upon what grounds they recommended the prisoner to mercy, and they said, "Because we think it was not done with any malicious intention, but to better the condition of the horses." The chairman then directed the clerk of the peace to enter a verdict of guilty, which was done, and the prisoner sentenced. An application was afterwards made to K. B. for a *mandamus* to the justices, commanding them to cancel the alteration made by the clerk of the peace in the minute of the verdict, or to alter the minute of the verdict so given according to the fact. — *Littledale J.* (a) I am of opinion that we have no power to issue this *mandamus*. The rule is for a *mandamus* to cancel the alteration made by the clerk of the peace, or to alter the minute of the verdict according to the fact. It may be admitted that this court has a species of superintending jurisdiction over inferior courts, but we must see that this jurisdiction has before been exercised in the manner now proposed. It is urged that we interfere with the court of quarter sessions, and oblige them by *mandamus*, in certain cases, to enter continuances and hear an appeal. In those cases this court merely puts the court of quarter sessions in motion, and obliges them to decide. In *Rex v. Bowman* (b) this court merely directed the court of quarter sessions to make up the record; and that was done after some difficulty. We have no authority to interfere with the practice of other courts in this way. At the assizes, disputes sometimes arise as to the mode of entering the verdict. If we interfere in this case, we may as well interfere with the proceedings at the assizes, or with the proceedings of any other court in the kingdom. Whether the verdict is entered properly or improperly, is matter for the consideration of the court in which the trial takes place. The finding of the jury might, perhaps, amount to something to be returned; but as no instance has been given of an exercise of jurisdiction in a similar case, this rule should, in my opinion, be discharged. — *Patteson J.* If there had been any authority for this course of proceeding, we should have been desirous to proceed to ascertain whether justice has been done in this case. But as no authority has been adduced, we ought not, in my opinion, to interfere. The cases cited, in which this court has by *mandamus* compelled the court of quarter sessions to enter continuances and hear an appeal, do not resemble this case. The court, by ordering continuances to be entered, is only supplying a defect, and the *mandamus* in such cases commands the court of quarter sessions to hear an appeal. It is necessary that there should be continuances entered, to give the court of quarter sessions jurisdiction, and for that purpose they are directed to be entered. So, if it were necessary, as in *Rex v. Bowman*, that a record should be made up, this court would interfere by *mandamus*, as it did in that case. But I have always understood that this court would send a *mandamus* in general terms, and would not require the inferior court to do a specific act in a particular mode. It would be wrong to issue a *mandamus* merely for the sake of a return. If the jury really did mean that the prisoner should be acquitted, the

(a) Lord Denman C. J. had left the court.

(b) See 6 Carr. & P. 101., and 3 Nev. & Mann. 110., reported as *Rex v. Justices of Middlesex*.

proper course is to apply to the secretary of state.—*Williams J.* I see no reason why we should interfere by *mandamus*. Where the court of quarter sessions altogether decline to hear a matter which is within their jurisdiction, this court has the power to issue a *mandamus* to compel them to do so. But we do not direct a *mandamus* to do a specific act. If parochial officers refuse to make a rate, this court will, if necessary, compel them to make one, but we do not command them to make an equal rate. (a) Were we to interfere in this case, we should be doing that for which no precedent can be adduced. I cannot distinguish this from any other point in practice. — Rule discharged.

[See further, as to the principle which regulates the interference of K. B. with the sessions, Vol. IV. p. 1224. *et seq.*, and Vol. IV. p. 1254. *et seq.*]

Rex v. Bloxam, E. 4 W. 4., 1 Ad. & E. 386. At the *Warwickshire January sessions, 1832*, James Smith, having been convicted by Dr. Bloxam of being an idle and disorderly person in refusing to support his wife and child, whereby they became chargeable to the parish of *Rugby*, appealed against the conviction, which was quashed by the sessions, subject to a case. Dr. Bloxam thereupon obtained a *certiorari* to remove such case, and the orders and proceedings of the sessions, into this court, and the usual recognizances were entered into for prosecuting the *certiorari*. On the hearing in this court, the case was sent back to the sessions to be restated. At the *July sessions 1833*, the appeal was reheard, and the court then confirmed the conviction, subject to a case reserved to the appellant. In *Michaelmas term 1833* a rule of this court was obtained, calling on the prosecutor of the appeal to shew cause why the recognizances of the defendant (Dr. Bloxam) and his bail should not be discharged, and why all further proceedings on the *certiorari* and the restated order of sessions returned therewith into this court should not be stayed until the prosecutor's attorney should undertake to pay the defendant or his attorney his costs if the last decision of the sessions should be affirmed by this court. It was stated on the affidavit, in answer to this application, that the ground on which the case was before sent back to the sessions, was their omission to state certain facts; that they had now specially found those and other facts, but that such their special finding was inconsistent with the determination they had come to in favour of the conviction; that at a subsequent session (*October 1833*) the appellant had moved that the case should be restated, and the proceedings returned to this court under the original *certiorari*, and an order had been made by the justices accordingly. A rule was thereupon granted by this court, enlarging the rule for discharging their recognizances, until the judgment of this court should be given upon the restated case and order of sessions, in the matter of the above-mentioned conviction. In *Hilary term 1834*, a rule was obtained, calling on the prosecutor of the appeal to shew cause why the rule last above-mentioned should not be discharged, and why the *certiorari* should not be quashed, and a *procedendo* awarded to carry back the record of conviction to the sessions. The affidavit in support of this rule professed to explain the finding and judgment of the sessions

Rex v. Justices of Suffolk.

Sessions on appeal quash a conviction, but grant a case, and the court of K. B. send it down to be restated on its being brought up by *certiorari*. On its going down to be re-stated, the sessions confirmed the conviction, subject to a case: Held, that the party who originally moved the *certiorari* was not bound to proceed with it after the judgment was reversed: Held also that under 13 G. 2. c. 18. the *certiorari* cannot issue after six months have elapsed, whatever may have been the cause of the delay.

Rex v. Blozam.

complained of by the appellant; and it stated that although the sessions had made an order for restating the case and returning the proceedings to this court, no case had ever been prepared or brought up on behalf of the appellant under the existing writ of *certiorari*, nor had he applied for any new *certiorari* for that purpose, and that six months had elapsed since the reservation of a case at the *July* sessions. It was therefore suggested that the prosecutor was now disabled from further carrying up such restated case or proceedings to this court, under the present or any other *certiorari*; that the conviction must remain in force, and that the object of the respondent in suing out the *certiorari* and giving the recognizances having thus been effected, the recognizances ought to be discharged. In an affidavit on the other side, it was represented that the delay in preparing the case had been occasioned by the defendant's refusal to settle one. — *Ld. Denman C.J.* By 13 G. 2. c. 18. § 5., a *certiorari* must be applied for within six months next after the conviction, order, or other proceeding, to be removed; and according to the authorities cited in 1 *Chitty's Statutes*, tit. *Certiorari*, p. 133. note c (a), the time is to be reckoned without regard to delays in drawing up the case, or from any such cause; and if this were not so held, the statute would in effect be repealed. It follows from the express words of the act, that the court has no power of extending indulgence to a party who, from whatever cause, is behind the proper time. Then, however, it is said that the original *certiorari*, is still in force. The question, therefore, is whether, when a party has obtained a *certiorari* to remove a judgment given against him, and the case has been sent back to the sessions, which implies a power given to them of rehearing the whole, he is afterwards bound, upon the sessions reversing their former judgment, to bring up proceedings which are then in his favour; or whether the *certiorari*, when originally issued, had the effect of removing those proceedings which had not then taken place? and I think this cannot be maintained. As to the question who should remove the ultimate proceeding of the sessions, it is often unnecessary to raise it, because if the second hearing convinces the justices that their former decision was right, the judgment is the same, and no such difficulty can arise. But where an opposite decision is come to, he who complains of it is the party to bring up the case. The appellant ought to have done so in the present instance, but he is out of time. The proper course will be, to discharge all the rules; the case will then stand as if there had been no appeal. — *Littledale J.* I am of the same opinion. The party who originally removed the proceedings has nothing to do with removing them now. They have changed sides. — *Patteson J.* I do not acknowledge the distinction between restating and rehearing. How is it possible for the sessions to restate the case without hearing it again? The bench may not consist of the same persons. If the *certiorari* were considered as operating upon the last order of sessions, there would be this absurdity, that the party who sued it out would be liable, under his recognizance, to pay costs unless he got a judgment set aside which was in his own favour. — *Williams J.* concurred. — The court made the rule absolute for discharging

When a case is sent down to be restated, it is implied that it is to be reheard.

the recognizances, but, with this exception, discharged all the rules.

[See 4 & 5 W. 4. c. 27. p. 835.]

By 5 & 6 W. 4. c. 76., intituled *An act to provide for the regulation of municipal corporations in England and Wales*, it is enacted —

§ 103. "The council of every borough (a) which shall be desirous that a separate court of quarter sessions of the peace shall be or continue to be holden in and for such borough shall signify the same by petition to H. M. in council, setting forth the grounds of the application, the state of the gaol, and the salary which they are willing to pay to the recorder in that behalf; and it shall be lawful for H. M., if he shall be pleased thereupon to grant that a separate court of quarter sessions of the peace shall be thenceforward holden in and for such borough, to appoint for such borough, or for any two or more of such boroughs conjointly, a fit person, being a barrister-at-law of not less than five years' standing; who shall be and be called the recorder of such borough or boroughs, and shall hold such office during his good behaviour, and upon any vacancy in any such office to appoint another fit person, being a barrister-at-law of not less than five years' standing, to be the recorder in the place of the person so making such vacancy; and the council of every such borough shall appoint a fit person to be clerk of the peace during his good behaviour; and the recorder for the time being of any borough shall be a justice of the peace of and for such borough, although he may not have such qualification by estate as is required by law in the case of any other person being a justice of the peace for a county; and such recorder shall have precedence in all places within the borough of which he may be the recorder next after the mayor thereof; and in such case it shall be lawful for H. M. to direct that an annual salary, not exceeding the sum stated in the petition of the council, shall be paid to such recorder, by the treasurer of such borough out of the borough fund: Provided always, that no person being such recorder as aforesaid shall be eligible to serve in parliament for such borough, nor shall he be an alderman, councillor, or police magistrate of such borough: provided nevertheless, that nothing in this act contained shall be construed to disqualify any such recorder from being appointed a barrister to revise any list of voters under the provisions of an act passed in the second year of H. M., intituled *An act to amend the representation of the people in England and Wales*, or from being eligible to serve in parliament, otherwise than is herein-before provided: Provided also, that in every borough in and for which a separate court of general or quarter sessions of the peace is now holden, and of which the present recorder or deputy recorder is a barrister of five years' standing, such recorder or deputy recorder being qualified as aforesaid, shall be continued or appointed recorder under the provisions of this act: Provided also, that in the case of sickness or unavoidable absence, the recorder of any borough shall be empowered under his hand and seal, with the consent of the council of such borough, to appoint a deputy recorder,

5 & 6 W. 4. c. 76.

His majesty may grant a separate court of quarter sessions, and appoint a recorder in certain boroughs.

Recorder to be a justice of the peace for the borough;

but not a member of parliament for the borough, alderman, councillor, or police magistrate.

2 W. 4. c. 45.

(a) By § 142., in the construction of this act, the word "boro" shall be construed to mean city, borough, port, cinque port, or town corporate named in one of the said Schedules (A.) and (B.)

5 & 6 W. 4.
c. 76.

Recorder and
justices to
make declara-
tion before act-
ing.

being a barrister of five years' standing, to act for him at the quarter sessions of the peace then next ensuing, and no longer or otherwise."

§ 104. " Provided nevertheless, that no recorder or person assigned to keep the peace within any such borough shall be capable of acting as recorder or justice of the peace within such borough until he shall have taken the oaths provided to be taken by justices of the peace, except the oath as to qualification by estate, and until he shall have made before the mayor or before any two or more of the aldermen or councillors of such borough (who is and are hereby authorized and required to administer the same), a declaration in the following form ; (that is to say,)

I A. B. do hereby declare, that I will faithfully and impartially execute the office of recorder [or, justice of the peace] for the borough of ——— according to the best of my judgment and ability."

Sessions of the
peace to be
held for the
borough, of
which the re-
corder to be the
sole judge.

§ 105. " The recorder of every borough shall hold once in every quarter of a year, or at such other and more frequent times as the said recorder in his discretion may think fit, or as H. M. shall think fit to direct, a court of quarter sessions of the peace in and for such borough, of which court the recorder of such borough shall sit as the sole judge ; and such court of quarter sessions of the peace shall be a court of record, and shall have cognizance of all crimes, offences, and matters whatsoever cognizable by any court of quarter sessions of the peace for counties in England, and the said recorder shall have power to do all things necessary for exercising such jurisdiction, notwithstanding his being such sole judge, as fully as any such last-mentioned court : Provided nevertheless, that no recorder, by virtue of his office, shall have power to make or levy any county-rate, or rate in the nature of a county-rate, or to grant any licence or authority to any person to keep an inn, alehouse, or victualling house, to sell excisable liquors by retail, or to exercise any of the powers herein specially vested in the council of such borough."

Recorder not
to make or levy
county-rate, &c.
nor to grant
licences, &c.

Mayor, in the
absence of the
recorder and
deputy re-
corder, may
open and ad-
journ the court.

§ 106. " In the absence of the recorder and deputy recorder, the mayor shall be authorized and required, at the proper times appointed for the holding of such court of quarter sessions of the peace in and for such borough, to open the said court, and to adjourn over the holding of the same, and to respite all recognizances conditioned for appearing at the same, until such further day as such mayor then and there, and so from time to time, shall cause to be proclaimed : Provided nevertheless, that nothing in this act contained shall authorize or require any such mayor to sit as a judge of the said court for the trial of offenders, or to do any other act in the character of a judge of such court, save only in opening and adjourning the same, and respiting the said recognizances in manner aforesaid."

Capital juris-
dictions, and
all other crimi-
nal jurisdic-
tions in
boroughs, other
than are speci-
fied in this act,
abolished.

§ 107. " After the 1st day of May 1836, all powers and jurisdictions to try treasons, capital felonies, and all other criminal jurisdictions whatsoever granted or confirmed by any law, statute, letters patent, grant, or charter whatsoever, to any mayor, bailiff, alderman, recorder, or other corporate or chartered officer, or corporate or chartered justice of the peace whomsoever, in any borough, and all right of any body corporate in any borough, or

any of the members thereof, by virtue of any law, statute, letters patent, grant, or charter whatsoever, to elect or nominate any justices to keep the peace in or for any borough, or by any members of any such corporate body to act as such justices of the peace in or for any of the last-named boroughs other than is herein declared, shall cease: Provided nevertheless, that nothing in this act contained shall be construed to restrain or prevent the holding of any court of gaol delivery or general or quarter sessions of the peace in and for any borough for which such court may now be holden, until the said 1st day of *May*, but every such court may be holden in like manner, and with the same powers, until the said 1st day of *May*, as if this act had not been passed."

§ 111. "After the said 1st day of *May* 1836, the justices assigned or hereafter to be assigned to keep the peace in and for the county in which any borough is situated, to which H. M. shall not have granted that a separate court of quarter sessions of the peace shall be holden in and for the same, shall exercise the jurisdiction of justices of the peace in and for such borough as fully as by law they and each of them can or ought to do in and for the said county; and no part of any borough in and for which a separate court of quarter sessions of the peace shall be holden shall be within the jurisdiction of the justices of any county from which such borough before the passing of this act was exempt, any law, statute, letters patent, charter, grant, or custom to the contrary notwithstanding."

County justices to have jurisdiction in all boroughs which have not a separate court of quarter sessions. But aliter where quarter sessions are holden for a borough which was exempt before the passing of the act.

[See 38 G. 3. c. 52. § 10. p. 832.]

By 5 & 6 W. 4. c. 76. § 109., the exceptions contained in the last above-cited section, as to *Bristol*, *Chester*, and *Exeter*, are repealed.

[See this act at large, tit. *Corporations*, Vol. I.]

INDEX

TO

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END OF THE THIRD VOLUME.

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ERRATA ET CORRIGENDA.

VOL. III.

Page 435. line 11. from bottom, for "*R. v. Macklow*" read "*R. v. Macklow*."

508. line 2. for "7 & 8 G. 4. c. 64. § 12." read "7 G. 4."

1007. line 1. for "In a case of forgery" read "In a case not strictly of forgery, but a crime of an analogous description."

Ibid. line 16. from the bottom, after "were bad" subjoin the following note: "The decision of the judges was, that these counts were bad on account of the imperfection of the translation as above objected. A majority of the judges also thought them bad because *fac similes* of the notes were sewed with thread to the indictment; but they came to no regular decision upon that point."

1008. at the bottom, subjoin "With reference to the point that after verdict an indictment shall be sufficient under 7 G. 4. c. 64. § 21. if it describe the offence in the words of the stat., it having been noticed that in the above cases the objections were taken during the trial, and before any verdict was given, it was held that if an offence created by stat. be described in the indictment in the words of the stat., and the description be such as would not be sufficient according to the general rules applicable to indictments, the prisoner may demur to the indictment, but, unless he demurs, he cannot, after issue is joined on the plea of not guilty, and the trial has begun, take any objection as to the legal description of the offence in the indictment, if it be described in the words of the stat.; and if such an objection be taken, the judge ought not to allow it, for that is in the nature of an objection taken in arrest of judgment, which, if the indictment be for an offence created by stat., and in the words of the stat., cannot be taken under the circumstances stated in the latter part of the 21st section of 7 G. 4. c. 64."

